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CASES

DECIDED IN

THE COURT OF SESSION,

COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM AUGUST 8, 1890, TO AUGUST 5, 1891.

REPORTED BY

MIDDLETON RETTIE, JAMES PATTEN MACDOUGALL,
H. J. E. FRASER, GEORGE R. GILLESPIE, AND
JOHN DAVID SYM, ESQUIRES, ADVOCATES.

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OF THE

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The EARL OF SELBORNE, Lords WATSON, BRAMWELL, HERSCHELL, MACNAGHTEN, MORRIS, and HANNEN.

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ERRATUM.

Court of Session,—

P. 855, rubric, lines two and eight, *for* "cccxi.," *read* "cccl."

CASES

DECIDED IN

THE HOUSE OF LORDS,

1890-91.

W. & T. ADAMS AND OTHERS, Appellants (Pursuers).—*Sol.-Gen. Sir C. Pearson, Q.C.—Law.*
THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Respondents (Defenders).—*D.-F. Balfour, Q.C.—Ferguson.*

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Arbitration—Act of Regulation, 1695, *sec.* 25 (*issued under Act*, 1693, *c.* 34)—*Reduction of decreet-arbitral—Corruption—Constructive corruption.*—Sec. 25 of the Act of Regulation, which excludes reduction of decreets-arbitral "upon any cause or reason whatsoever, unless that of corruption, bribery, or falsehood, to be alleged against the judges-arbitrators who pronounced the same," does not apply where it is alleged that the arbiter has exceeded the *fines compromissi*, or in the course of the arbitration has disregarded any one of the express conditions contained in the contract of submission, or of those conditions which the law implies in every submission.

Opinions (*per* Lord Watson and Lord Bramwell) that the word "corruption" is used in its natural sense, and that to bring a case within the exception it is necessary to allege that there was actual corruption on the part of the judge-arbitrator.

Contractors for making a railway were bound by their contract to complete the works by a day specified, but it was provided that if any delay should arise from any cause not imputable to the contractors, this might be stated to the arbiter "as a reason for not completing the works within the time specified," and the arbiter was authorised "to extend the time for completing the same for such time as he shall consider reasonable." The contractors were bound to pay £20 of liquidate damages for each day's delay beyond the time specified, "or such extended period as the arbiter may determine as aforesaid." All disputes under the contract or as to its construction were referred to the arbiter. No application for extension of time was made to the arbiter during the progress of the works, but in a decree-arbitral, after the completion of the works, the arbiter, in fixing the amount of liquidate damages for delay, extended the period for completion of the works for six months.

In a reduction of the decree-arbitral brought by the contractors, on the ground that the arbiter had exceeded his jurisdiction in extending the time after the completion of the works, *held* (in *aff.* judgment of First Division) that even if the arbiter was not entitled after the completion of the works to extend the time, he was entitled, in determining the amount of liquidate damages, to take into account delays caused by the railway company; and that, in any view, as the construction of the contract had been left to the arbiter, his judgment could not be reduced.

A contract for making part of a railway provided that all disputes between the parties "under or in reference to the contract, or in regard to the true intent, meaning, and construction of the same, or of the specifications," &c., should be referred to A B as arbiter.

The contractor was bound to complete the line of railway on 30th September

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1884, under a liquidate penalty of £20 for every day's delay, but it was stipulated by the railway company that 400 yards of embankment forming part of the line should not be formed until another contractor had completed the east abutment of a bridge and the diversion of a river, or until he had received the written instructions of the engineer to proceed with the embankment. The line was not completed till 1st May 1886.

The arbiter found that the contractor was liable in penalties for each day's delay (exclusive of Sundays) from 30th March 1885 to 1st May 1886.

In an action of reduction of the decree-arbitral brought by the contractor, it was proved that the contractor had not got access to the ground on which the 400 yards of embankment was to be formed until February 1886. The arbiter stated that he was satisfied that the contractor had not been ready to use the ground until he got it, and that his delay was not due to his not having had access to it until February 1886.

Held (*aff.* judgment of First Division) that, as the whole matter, including the construction of the contract, had been referred to the arbiter, the Act of Regulation prevented reduction of the arbiter's award.

Ld. Chancellor (Halsbury). Lord Watson. Ld. Bramwell. Ld. Herschell. Lord Morris.

(IN the Court of Session, June 21, 1889, 16 R. 843.)

In January 1883 the Great North of Scotland Railway Company entered into two contracts with Messrs W. & T. Adams, contractors, Callander, for the construction of a railway from Portsoy to Elgin. The first, the Portsoy contract, embraced two sections of the railway (1) from Portsoy to Tochieneal Station, (2) from Tochieneal Station to Portnockie. The second, the Buckie contract, embraced the line from Portnockie to the river Spey.

By the Portsoy contract the contractors were bound to complete the first section by 30th September 1883, and the second section by 30th September 1884, "or on or before such respective days thereafter as may be respectively fixed by the arbiter after named, under the declaration hereinbefore written."

A previous clause contained this provision,—"And the said second party [*i.e.* the Messrs Adam] bind and oblige themselves and their foresaids to intimate to the said first party in writing when they are ready to commence said works, and any delay which may thereafter occur, if any, in giving the said second party possession of such lands as the engineer shall consider necessary for carrying on said works, shall not confer on the said second party a right to claim damages against the said first party, or to break this contract, but may be stated to the arbiter hereinafter named as a reason for not completing the said works within the time after specified, and if it shall appear to said arbiter that the said second party was prevented from completing the said works by that delay or by any stoppage from any cause not imputable to the said second party, the said arbiter shall be entitled to extend the time for completing the same for such period as he shall consider reasonable, but of the propriety of giving the said extension of time, and the length thereof, the said arbiter shall be sole judge."

The contract further bore,—"And it is hereby further declared that the said second party shall be liable in all damages and extra expenses which may be incurred by, or occasioned to, the said first party by the said second party or their foresaids failing to complete the said works, or to have the same ready for opening by the times respectively hereinbefore stipulated; and as compensation for loss of profits to the company should the foresaid respective portions of the line not be in a state to be opened for public traffic by the times stipulated, it is hereby declared and agreed on that the said second party shall be bound to pay to the said first party the sum of £20 sterling as the liquidate and agreed-on compensation for every day during which each of the foresaid respective portions of the

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line, or any part thereof, shall remain unfinished, or in a state not to admit of its being opened for public traffic, after the said 30th day of September 1883 and 30th day of September 1884 respectively, or such extended periods as the said arbiter may determine as aforesaid."

By the contract the parties submitted to Mr B. Hall Blyth, as sole arbiter, "all disputes and differences which have arisen or shall or may arise between them under or in reference to the contract, or in regard to the true intent, meaning, and construction of the same, or of the said specifications, conditions," &c.

Great delay took place in the execution of the works, but no application was made to the arbiter for an extension of the time allowed for the completion of the works during their progress.

Disputes having arisen between the parties as to the sums payable by the contractors as penalties or liquidate damages, the matter was brought before the arbiter, who issued the following finding on the Portsoy contract:—"Find that the first portion of said works was not completed by said contractors on said 30th September 1883, but was completed by them on 1st April 1884, and the said remainder or second portion of said works was not completed by the said contractors on 30th September 1884, but was completed by them on 1st May 1886: Find that I am entitled to extend, and I hereby do extend, the time for completing the said second portion from said 30th September 1884 to the 30th March 1885: Find that the balance of price," &c.

A similar finding was given by the arbiter on the Buckie contract, which contained the same clauses—the extension of time allowed by the arbiter in his decree being from 30th September 1884 to 30th March 1885.

Messrs Adams thereafter brought a reduction of the two decrees-arbitral on various grounds (enumerated by Lord Fraser, 16 R. 850).

The First Division, on 21st June 1889, reduced the arbiter's decrees to a certain amount, on the ground that the arbiter had awarded a larger sum of penalties than the railway company claimed, and *quoad ultra* assoilzied the defenders.

The pursuers appealed.

The only grounds of reduction insisted on in the appeal were the third and sixth of those mentioned by Lord Fraser.

"Third, that the arbiter was not entitled after the time specified for the completion of the works to extend the time for such completion."

The sixth was founded on the following clause in the specifications and conditions for the construction of the Buckie section:—"The portion of the embankment of the line, between pegs Nos. 892 and 899, shall not be formed until the contractor for the bridge or viaduct over the river Spey has completed the works in connection with the erection of the east abutment of the bridge, the diversion of the river, and the erection of the protection walls embraced in the contract for the Spey Bridge, or until he has received the written instructions of the engineer or assistant-engineer to proceed with the formation of the said portion of the embankment. . . ."

The pursuers averred,—(Cond. 11) "The aforesaid bridge across the river Spey at Garmouth, forming part of the Buckie Railway, was built by the firm of Blaikie Brothers, under a contract with the defenders similar to those of the pursuers, and dated in the same month of January 1883. . . . Part of the pursuers' contract with the defenders was to connect the bridge with the Buckie section of the railway by an embankment, but it was impossible to do this, and so complete the Buckie section of the defenders' contracts, till the bridge was finished. Messrs Blaikie Brothers had contracted to finish the bridge by the 31st July 1884, but they did

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not do so till the month of May 1886. It was not till the month of February 1886 that the pursuers were put in possession by the defenders of the land necessary for the formation of the aforesaid embankment. On 20th January 1886 the defenders' resident engineer addressed a letter to the pursuers, stating that he expected that the river Spey would be diverted in a week, provided the weather kept favourable, and that he trusted they were making all the preparations necessary for filling in the banking required. The material for the embankment had to be brought from Portgordon, a distance of three miles. It was thus impossible for the pursuers to have completed the works under their Buckie contract until two months or thereabouts after the said month of February 1886. . . . The said Benjamin Hall Blyth has, by the decree applicable to the Buckie contract, found the pursuers liable in the sum of £6800 in name of liquidated damages, being at the rate of £20 per day for the period from 30th March 1885 to 1st May 1886, and as if the bridge at Garmouth had been completed by the month of January 1885." In answer the defenders, *inter alia*, denied that the completion of the works under the Buckie contract was in fact retarded or materially affected by the state of the works of the Spey Bridge, and explained that any question of delay so arising was by the contract submitted to the decision of the arbiter.

It was proved that the contractors did not get possession of the ground till February 1886.

The pursuers pleaded that the decrees were *ultra fines compromissi*, and that in the circumstances they were corrupt, unconscionable, and unjust.

At delivering judgment,—

LORD CHANCELLOR.—I confess it appears to me that this is a very plain case. I do not at present assent to the view in the direct form in which it has been alleged[1] that the law of Scotland applicable to this case is different from the law of England.

There is no doubt that at one time the Courts in both countries treated themselves rather as being in the position of Courts of Appeal, and examined whether or not the conclusion at which an arbitrator had arrived was sound, both in point of law and in point of fact. I think the only learned Judge who ever gave distinct expression to that view was Lord Thurlow, and I am the more desirous of alluding to him and doing him justice, because I think that what Lord Thurlow says in *Knox* v. *Symmonds*[2] rather throws some doubt upon the question whether he ever was responsible for the statement put into his mouth in the case which has been quoted at the bar—*Colquhoun* v. *Corbet*.[3] Lord Thurlow says that it is no ground for setting aside an award that the conclusion was wrong, otherwise it would be a ground for setting aside all awards, but his Lordship then goes on to say that, where certain facts are submitted to an arbitrator by the Court, the arbitrator must be considered to be somewhat in the position of a Master, and that the Court when the matter comes back to them have to consider not only whether the Master has acted according to law, but whether he has arrived at a sound conclusion. His Lordship goes on to distinguish arbitrations in the more popular sense of the word, and shews that where there are real arbitrations, and where the parties have selected their judge, in such cases you have to shew a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court

[1] Lord Campbell in Mackenzie v. Girvan, 1843, 2 Bell's App. 55.
[2] 1791, 1 Ves. Jun. 369.
[3] 1784, 2 Paton's App. 626.

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can interfere with his award. And in the Court of Common Pleas forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law, on demurrer nevertheless held that the parties having submitted that question to the arbitrator, it was for the arbitrator to determine it,—in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts—*Stimpson* v. *Emmerson*.[1] In the Court of Queen's Bench, thirty years ago, that decision was adopted as being the law which would guide the Court in the decision of such questions.

Upon the facts now before your Lordships everything appears to have been practically abandoned except the third objection, referred to by the Lord Ordinary, and the sixth. Now, with regard to the third objection, the difficulty seems to me to arise upon the perhaps not very well conceived or selected words of the contract. That the parties by that contract intended that the arbitrator should have the power of determining between the parties whether or not liquidated damages (I assume now that what are called the penalties are liquidated damages) should be ascertained by the arbitrator with reference to the conduct of both parties is manifest, and the language which is used undoubtedly *prima facie* (for my own part, I am prepared to admit as much as that) rather looks like an intention by the parties that that determination by the arbitrator should go on during the currency of the contract, that he should be the consulting engineer, that he should be the person to whom application should be made in the event of alleged default on the one side or the other. But I am by no means prepared to assent to the conclusion that that excludes the consideration of such questions afterwards. Having regard to the documents before us it is almost impossible to suppose that the parties did understand that, when the arbitrator was investigating the question what damages were to be reported, he was not to have regard to the conduct of both parties, and that if one party had withheld the possession of the land, that party was not to insist upon the delay consequential upon his action as being one of the elements of the case in respect of which he could claim damages. It is impossible, I think, to read the words of the contract without seeing that that which was in itself a very sensible provision was the intention of both parties. And in truth, I cannot entertain a doubt that, whether that provision were held to be there or not, when it was left to the arbitrator to decide in respect of the delay which had taken place, apart from any such provision in the contract at all, it would have been perfectly competent for the arbitrator to say: "I shall not allow this or that period of delay to be made the subject of damages against the contractor when it is proved before me, as a matter of fact, that the delay which then existed was caused by the act of the railway company themselves, who were bound to provide either facilities, or material, or land, or what not, and that the delay which had taken place was not the fault of the contractor." That is manifestly the law in this country, and I believe it to be the law also in Scotland. Therefore that part of the award, both upon the construction of the language itself and upon the substance of the matter, apart from the language, seems to me to be free from objection.

[1] June 5, 1847, 9 L. T. 199.

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With reference to that question, which alone appears to have invited comment by the learned Judges, I confess I am a little puzzled. The thing in itself does not speak for itself as though the award shewed that the damages were awarded by reason of the bridge not being completed, and that nevertheless, although the bridge was not completed, the portion, or any particular portion, of the works was not completed by reason of the prohibition contained in the contract to do it until the bridge was completed. In order to make the argument intelligible and sensible, and in order to arrive at the conclusion of repugnancy and unreasonableness insisted upon, I must know what the facts were. I do not know what the facts were; but the arbitrator did. I am not to assume that he was so unreasonable as to award damages in respect of a thing which was caused by the non-completion of the bridge. On the contrary, until I am compelled to come to the opposite conclusion upon the face of the award, or upon some evidence which is legitimately to be brought into the consideration of the matter, so that I can form a judgment upon it, I shall assume that the arbitrator performed his duty; and if he did perform his duty, it would be unreasonable and absurd to give damages for anything in respect of which the company themselves were really responsible. And how does it appear that he has done anything of the sort? I am totally unable to understand that. Some of the learned Judges appear to have adopted the view that the arbitrator must have awarded damages in respect of that which had not been completed by reason of the absence of the bridge. I myself have been looking at these documents carefully, and I am unable to come to any such conclusion. One learned Judge, Lord Shand, says in his judgment—"I should have been clearly of opinion that the meaning of the contract would not justify the award that he has given." If the learned Judge means by that that the contract never intended that damages should be given in respect of the non-completion of that the non-completion of which was due to the conduct of the company, I entirely agree with him; but there, as it appears to me, the fact fails. I can find no such fact as would induce me to come to the conclusion that the arbitrator has ever awarded any damages in respect of any default caused by that. Damages are awarded in respect of the delay in the completion of the whole contract, and it is extremely possible that the mere fact that the bridge was not completed was as irrelevant to the culpability of the party causing that delay as any other fact which can be imagined.

Under these circumstances it appears to me that this award is perfectly good upon the face of it. There is no evidence that I can find leading to the conclusion that the arbitrator has exceeded his jurisdiction, either in the way of leaving out what he was bound to attend to, or of inserting or considering anything which he had no jurisdiction to adjudicate upon. I am, therefore, of opinion that the award cannot be attacked upon those grounds.

With reference to the other ground, namely, corruption, which is alleged to evade the operation of the Act of Regulation, corruption, in the ordinary and popular sense of the word, is entirely repudiated by the learned counsel at the bar. It is said that what it does amount to is constructive corruption. Whether there be such a thing or not, I am not at all prepared to say. I can only say, with reference to the case which was quoted, the *Bridge of Allan Waterworks* case,[1] that that case stands by itself. If it ever comes for review before this House, or any case which raises such a question, I shall be prepared to express my opinion upon

[1] Feb. 5, 1869, 7 Macph. 492, 41 Scot. Jur. 258.

it. At present I can only say that the facts of that case would have entirely justified the decision, upon the ground that the arbitrator had exceeded his jurisdiction, and therefore was not exercising the function which had been given to him by statute. If it is placed upon the other ground (and I am bound to say that the interlocutor pronounced does in fact expressly refer to legal corruption), it is possible that a case raising the point may come for review before this House. All I can say at present is, that I am certainly not prepared to assent to that view when the decision itself is, upon the grounds which I have indicated, perfectly sound.

Under these circumstances, considering that the case rests on familiar principles with which we are well acquainted, and that the points are really simple ones when the matter has been explained, I am only surprised that your Lordships' time should have been occupied at any length in dealing with it; and I move your Lordships that this appeal be dismissed with costs.

LORD WATSON.—I am of the same opinion. The points raised by the appellants in this case have all been decided against them by the unanimous judgment of five learned Judges in the Court below for reasons, some of which at least, appear to me not to admit of serious controversy. The parties committed to the arbiter whom they selected the right to construe the contract between them, the right to determine all questions of fact arising between them in relation to the contract, and the right to determine the application of the law to these matters of fact.

The two points insisted on at the bar of the House were the third and the sixth objections. Now, as regards these matters, they both appear to me to involve the construction of the contract, that being a matter specially committed to the arbiter by the express terms of the submission. I do not think that any good cause has been shewn against the finding of the arbiter under the third head. On the contrary, my present impression is that the arbiter determined according to the true meaning of the contract between the parties.

Then, as regards the sixth objection, I do not concur in the expression of opinion which fell from two learned members of the Court below upon the character of the finding pronounced by the arbiter. It does not appear how the arbiter construed that particular clause of the contract which the sixth objection involves; but assuming that he construed it in favour of the appellants in this case, the question is not, in my opinion, one of construction merely; it is a question arising upon the facts of the case, and these facts have not been fully brought before the House. I do not complain of that, because I doubt the competency of submitting them to the House; but the conclusion to which I have come is, that there are many possible states of fact in regard to the completion of these works, and the want of energy shewn by the contractors in pushing them to completion, which would warrant the finding of the arbiter upon a construction of the contract favourable to the appellants.

These are sufficient grounds for disposing of the argument which we have heard, but I may be permitted to make a single observation upon that clause of the Regulations of 1695 which was referred to in argument. I need scarcely remind the House that these Regulations are of statutory force. They were enacted by Commissioners under the special sanction of an Act of Parliament. They have sometimes been referred to as an Act of Sederunt, because under the King's Royal Warrant they were directed to be engrossed in the Sederunt Book

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of the Court of Session at the time. The object, as I take it, of the Regulation made by the Commissioners was this—to put an end to the practice, which until that date had obtained in the Court of Session, of treating the awards of arbiters as reviewable decisions, and of setting them aside whenever, in the opinion of the Court, upon an examination of the evidence and the proceedings before the arbiter, the conclusion at which the chosen judge of the parties had arrived was either contrary to law or contrary to fact. The rule laid down is in these terms:—"That in time coming the Lords of Session sustain no reduction of any decreet-arbitral that shall be pronounced hereafter upon a prescribed submission at the instance of either of the parties submitters upon any cause or reason whatsoever, unless that of corruption, bribery, or falsehood, to be alleged against the judges-arbitrators who pronounced the same." The three grounds are "corruption," "bribery," and "falsehood"—not "corruption in the decreet-arbitral"—the expression which I find in the closed record, but "corruption," "bribery," or "falsehood" brought home to the individual judge.

It has been recognised by the Court of Session, and also by noble Lords in this House, that the Regulation was never intended to go beyond the point of putting an end to the practice of review upon the merits, and of placing the award of an arbiter selected by the parties for the determination of all questions between them on precisely the same footing as the decree of a Judge Ordinary, to whose decisions finality has been attached by statute. Accordingly, both in this House and in the Court of Session, awards have been set aside upon other grounds which did not necessarily involve an investigation of the merits of the case. Want of jurisdiction is not covered by it—it is not one of the pleas which are forbidden, and an award may still be set aside on that account. Misconduct in the course of the case, whether in the proceedings which led to the award or in the award itself, is another ground with which this Regulation was never intended to deal. I think I state the law correctly when I say that it will be a good ground of reduction at the instance of either party if he is able to shew, independently of the Regulation, either that the arbiter has exceeded what are called in Scotland the *fines compromissi*, or that in the course of the arbitration he has disregarded any one of the express conditions contained in the contract of submission, or any one of those important conditions which the law implies in every submission. The case of *Sharpe* in 1817,[1] to which I alluded in the course of the argument, is a good illustration of that. Lord Eldon there refused to recognise an award as valid where the arbiter was perfectly honest—free from corruption, free from bribery, and free from falsehood—but had proceeded upon an honest error, believing that he had a joint representation from both the parties to the submission, whereas it was a representation from one only. And so in those cases where an act innocently committed by the arbiter amounts to misconduct which, in the opinion of the Court, would naturally imply that justice had not been done between the parties, the award must be set aside, not according to the Regulation, but according to those principles of law which existed before the Regulation, and which were not in the least affected by it.

I feel bound to protest against the view expressed by some of the Scottish Judges in the cases to which we have been referred at the bar with regard to what they call "constructive corruption." I suppose that as well as "construc-

[1] Feb. 24, 1815, 3 Dow, 102.

tive corruption" you may have "constructive bribery" and "constructive falsehood." The meaning of it appears to be this—that in order to satisfy the ends of justice in dealing with the validity of an award, it is necessary to invoke this constructive principle, of which I have under all circumstances the greatest distrust, and that for the purpose of doing justice it is necessary to call a man "corrupt" who is not corrupt but honest, to call a man "bribed" who never listened to an improper suggestion from any quarter, to call a man "false" who never uttered a falsehood. I do not doubt that corruption might be inferred from the terms of an award, and it is clear that if Lord Thurlow used the expression "constructive corruption" in *Colquhoun* v. *Corbet*,[1] he must have used it in that sense. Even in that case the term is inappropriate, because such corruption is actual and not constructive.

But, if you examine those cases to which we have been referred, I think it will be found that in every one of them the ground of reduction which was dignified with the name of "constructive corruption" fell within the category of cases which, as I have already explained, are entirely outside the Regulation. Take the case of *Alexander*,[2] which involved two points, and two points only. The first of these was whether the arbiter had committed an excess of jurisdiction by declining to entertain a claim which was laid before him in a statutory submission under the Lands Clauses Act, and which he had no power to reject. He found that the claimant was not the owner of part of the subject possessed by him and his tenants, and upon that ground alone he, having no competency whatever to deal with questions of property, having only the duty of valuing that which was submitted to him, refused to value it. The second point was that he, mistaking his duty, but in perfect honesty (for nothing else was imputed to him by the learned Judges who decided the case and set aside the award) purposely declined to put into the award a description of the subjects which he had valued, so that the omission which he had made might not appear. He did that because he thought it right; he thought he had valued all he was bound to value, and he said—"I will only put in a general description." The Court held that he had failed to do his duty under the Lands Clauses Act, although there was no imputation upon his honesty. But I see no reason whatever for calling that "constructive corruption."

In many other cases the same thing occurred. In the case of *Mitchell*,[3] which is perhaps the leading case in the Court below upon this branch of the law, the arbiter thought that he was bound to conclude the case without further proof from the parties, the consequence of which was that one of them, who had taken the precaution of obtaining a commission for the purpose of taking evidence abroad, had no evidence to offer, because, from no fault of his, the commission had not been executed. Under these circumstances the arbiter had proceeded upon evidence from one side only. The Court held that it was his clear duty to give an opportunity to the opposite side of bringing evidence before him, and accordingly that he had violated the principles of justice, and that justice could not be done between the parties without setting aside his award.

These are all the observations which appear to me to be necessary for the decision of the case. It humbly appears to me that the case stated at the bar for the appellants fails, inasmuch as neither the Act of Regulation, nor any

[1] July 27, 1784, 2 Pat. Apps. 626.
[2] Alexander v. Bridge of Allan Water Co., Feb. 5, 1869, 7 Macph. 492.
[3] Mitchell v. Cable, June 17, 1848, 10 D. 1297, 20 Scot. Jur. 476.

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one of the decisions without the Act, entitles them to have the award set aside. I therefore concur in the judgment which has been moved.

LORD BRAMWELL.—I am entirely of the same opinion, and I desire to express my hearty concurrence in what has been said by my noble and learned friend opposite (Lord Watson) about "constructive corruption." I think that that and similar expressions are only used by persons who have a desire to bring about a certain result, and do not know how to do so by the use of ordinary and intelligible expressions.

I just wish to make one other remark. I do not believe that this case would have found its way here but for the magnitude of the stake.

LORD HERSCHELL and LORD MORRIS concurred.

THEIR Lordships affirmed the decision appealed from, and dismissed the appeal, with costs.

ANDREW BEVERIDGE—ALEX. CAMPBELL, S.S.C.—DYSON & COMPANY—T. J. GORDON & FALCONER, W.S.

No. 2.
Dec. 1, 1890.
Hogarth v. Miller, Brother, & Co.

HUGH HOGARTH AND OTHERS (Owners of the "Westfalia") Appellants (Pursuers).—*Finlay, Q.C.—D. C. Leck.*
ALEXANDER MILLER, BROTHER, & COMPANY, Respondents (Defenders).—*J. Gorell Barnes, Q.C.—F. W. Hollams.*

Ship—Charter—Freight—Hire to cease when ship inefficient.—In a charter-party the charterer became bound to pay hire for a steam-vessel at a certain rate per month, and the owners to provide the officers and crew and stores.

It was stipulated that "in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service."

On 30th September 1887, on a voyage from the West Coast of Africa to Harburg, the high-pressure engine broke down, and the vessel put in to Las Palmas in the Canary Isles, where she was pronounced to be unfit to proceed on her voyage. As repairs could not be effected in that port, the owners and charterers arranged to send from England a tug to bring the ship to Harburg, it being agreed that the cost should be treated as general average.

The ship arrived at the port of discharge by the use of her low-pressure engine and with the assistance of the tug. The charterer paid £867 as his share of the cost of the tug.

In an action by the shipowner against the charterer for £341, 4s. 8d., as the hire of the ship from the time she left Las Palmas with the assistance of the tug till she was discharged, *held* (1) (*diss.* Lord Bramwell, *aff.* judgment of Second Division) that the ship had not been "in an efficient state" for completing her voyage from the time of the accident, and that in terms of the charter-party the owner had no claim to hire for the subsequent voyage, but (2) (*diss.* Lord Morris, varying judgment of Second Division) that the charterers must pay hire for the full period during which she was engaged in discharging her cargo at the port of arrival, the ship being then in an efficient state for performing that part of the contract.

(IN the Court of Session, March 15, 1889, 16 R. 599.)
The pursuers appealed.

Ld. Chancellor (Halsbury).
Lord Watson.
Ld. Bramwell.
Ld. Herschell.
Lord Morris.

LORD CHANCELLOR.—The whole of this case, as it appears to me, turns upon the true construction of the contract which regulates the relations between the parties, and there are two very diverse views which have been presented to your

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Lordships upon the true construction of the language of that instrument. I think that each part of the contract must be looked at with care, and that it must be remembered that in the construction of the contract we are not bound simply by the exact words. We must remember that it is a mercantile contract, and we must remember the nature of the subject-matter with respect to which each of the parties was contracting.

Now, the contract is for the hire of a ship, and each of the parties must be taken to know what are, in the ordinary course, the duties to be performed by a ship, and it must be taken that each party is contemplating the possibility of the benefit which he is contracting to obtain being interrupted by various causes. That clause of the contract which has to be interpreted is in these terms, and each part of it, I should say, ought to be looked at with care and with reference to the words which are found associated with it in the particular instrument which we have to construe. It is, "That in the event of loss of time." That is the leading and guiding principle by which we are to ascertain what it is with reference to which the succeeding words are used. What the hirer of the ship is guarding against by this contract with the owner of the ship is, that he is not to pay during such period of time as he shall lose (that is, lose time) in the use of the ship by reason of any of the contingencies which this particular clause contemplates,—"That in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours." The language is consonant with what I have indicated to be the general intention of the parties in entering into this part of the contract. In the first place, it is "in the event of loss of time," and then the parties proceed to shew that that contingency which is to give rise to the actual operation of the clause is, that the working powers of the vessel are interfered with, and "the working of the vessel is stopped for more than forty-eight consecutive working hours," and upon that there is to be a cessor.

What the parties to this contract contemplated was this:—The hirer of the vessel wants to use the vessel for the purpose of his adventure, and he is contemplating the possibility that by some of the causes indicated in the clause itself, namely, "the deficiency of men or stores, break-down of machinery, want of repairs or damage," the efficient working of the vessel may be stopped, and so loss of time may be incurred; and he protects himself by saying, that during such period as the working of the vessel is stopped for more than forty-eight consecutive hours, payment shall cease; and now come the words upon which such reliance is placed,—"until she be again in an efficient state to resume her service." If the contention which has been put forward at your Lordships' bar were well founded, one might have expected that the parties, in contemplating what upon that view was said to be the intention of the parties,—if they had intended that the test should be the efficient state of the vessel as it originally was,—might very readily have used the words "until such time as the deficiency of men or stores has been removed, or the break-down of the machinery has been set to rights, or the want of repairs has been supplied, or the damage has been remedied," and so forth; or the terms might have been inserted that the resumption of the payment should be dependent upon the vessel being restored to full efficiency in all respects as to seaworthiness and otherwise as she was at the time when she was originally handed over. But the parties have not used such language. On the contrary, the test by which the payment

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for the hire is to be resumed is the efficient state of the vessel to resume her service, so that each of those words, as it appears to me, has relation to that which both of the parties must be taken to have well understood, namely, the purpose for which the vessel was hired, the nature of the service to be performed by the vessel, and the efficiency of the vessel to perform such service as should be required of her in the course of the voyage.

As to the first part of the claim which has been insisted upon here, I confess that I entertain no doubt whatever that the vessel was not efficient in any sense for the prosecution of her voyage from Las Palmas to Harburg. I decline altogether to enter into the question of the contracts of insurance, with which these parties have nothing to do—I mean, have nothing to do with respect to the performance or the construction of this contract. This contract must receive the same construction whether the vessel was insured or not, and the question what other rights might have been obtained by the shipowner by supplying that which by the hypothesis he did not supply, is a question which is not before your Lordships, and upon which, at all events, I decline to express any opinion. As a matter of fact, this vessel did not and could not pursue her voyage as a vessel from Las Palmas to Harburg. That another vessel took her in tow, that another vessel accomplished the voyage and brought this vessel, not as an efficient steamer, but as a floating barge, whereby the goods were brought to Harburg, seems to me to be nothing to the purpose. I use that phrase, although I am aware that it is suggested that the low-pressure engine was used for the purpose of easing the work of the tug; that appears to me to be entirely irrelevant when one is ascertaining whether this vessel of its own independent power was efficient for the purpose of prosecuting the voyage. All that is suggested is that the tug was assisted by the use of the low-pressure engine. I find as a matter of evidence—as each Court I think has found—that the vessel was not seaworthy for the purpose of accomplishing her voyage without the assistance of a tug; she did not accomplish her voyage without the assistance of a tug; and in truth, as it appears to me, upon these facts it is clear that the voyage which was accomplished, and the service which it was contemplated this hired vessel was to perform, was performed by another vessel, and that the auxiliary assistance which she gave to that other vessel was not making the vessel herself an efficient vessel for the working of which the hirer was to pay.

It appears to me that the various hypotheses which have been put dispose of this part of the case, because the greater or less degree of efficiency of the vessel which these hypotheses have suggested appears to imply in all cases this admission, that without the additional assistance the vessel could not have accomplished that object which both the shipowner and the hirer had contemplated as being that which was to be supplied by the shipowner to the hirer. If so, how can it be said in any business sense, apart from the mere words, that the vessel was "in an efficient state to resume her service"? That being once admitted as a question of fact (and if it were not admitted I certainly should find that upon the evidence), it appears to me that she was not herself seaworthy or efficient to perform the voyage, and did not herself perform the voyage. That is conclusive upon the first part of the case, and therefore no payment for the hire was due during the period that she was passing from Las Palmas to Harburg.

With reference to the second question which has been argued, it appears to me that one has again to refer to each of these clauses of the contract to see what the parties were bargaining for. I should read the contract as meaning

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this, which I think one of the noble and learned Lords suggested in the course of the argument, that she should be efficient to do what she was required to do when she was called upon to do it; and accordingly, at each period, if what was required of her was to lie at anchor, if it was to lie alongside the wharf, upon each of those occasions, if she was efficient to do it at that time, she would then become, in the language of the contract, to my mind, "efficient," reading with it the other words, "for the working of the vessel." How does a vessel work when she is lying alongside a wharf to discharge her cargo? She has machinery there for the purpose. It is not only that she has the goods in the hold, but she has the machinery there for the purpose of discharging the cargo. It is not denied that during the period that she was lying at Harburg there was that machinery at work enabling the hirer to do quickly all that this particular portion of her employment required to be done. It appears to me, therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time.

Under these circumstances it appears to me that the pursuer here was entitled to payment for the hire of the vessel during the period of discharge. That would make the pursuer entitled, I think, to a sum of £136, 4s., and for that I think judgment should be entered.

I wish to say one word as to the other view which has been presented, that the shipowner was not entitled to anything in respect of the period during which she was discharging. It has been put in various forms by the learned counsel. What reason or good sense would there be in construing a mercantile contract so that all right for payment should cease when the other party to the contract was getting everything he could out of the use of the vessel if the vessel was in an efficient state? I can see none. And what was put this morning seems to me conclusive—if some other part of the steam-gearing not used for the purpose of navigation had gone out of working in mid-ocean, and there had been no longer any use for that particular thing, the reason why such a break-down of the machinery in mid-ocean would not have created a cessor of payment under the contract would, I suppose, have been this—it would have been argued, and argued justly, "It is very true that there has been a break-down of machinery, but that break-down of machinery is not the only event contemplated, it does not of itself entitle you to a cessor of payment. There must be to entitle you to a cessor of payment a loss of time arising from a break-down of machinery. Not even then does the cessor of payment arise, but there must be a loss of time by the break-down of the machinery whereby the working of the vessel is stopped for the contracted time." That appears to me to reflect great light upon the other question—What was the break-down of the machinery which was contemplated by both parties? It appears to me that the resumption of the right to payment is correlative with that, and inasmuch as when the vessel got to Harburg the vessel became "efficient" for the purpose for which alone she was wanted at that time, it appears to me that the right to payment arose.

Now, under ordinary circumstances, when a substantial claim has been established, having been successfully prosecuted at your Lordships' bar by the pursuer or plaintiff, the result is that he shall be entitled to costs, but in this case, certainly, there are difficulties in either view of this question. For my

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own part it seems to me that both parties have been insisting on rights which they did not possess. The pursuer has insisted upon a right to payment during the whole period of the voyage from Las Palmas to Harburg, which I submit to your Lordships he is not entitled to. On the other hand, the charterer, the defender, has been insisting from the first that he was not bound to pay anything in respect of the period of discharge, when the pursuer was, according to the view I have presented to your Lordships, entitled to the hire of the vessel. The result of that appears to me to be that both parties have been in the wrong, and both parties have been insisting upon an affirmative case. It does not seem to me to be like the ordinary case in which the plaintiff has merely claimed too much, and has failed in proof as to some of it. It appears to be rather in the nature of two separate claims, each of the parties failing to make out one of those claims. Under those circumstances, while I move your Lordships that the interlocutor be amended by entitling the pursuer to judgment for £136, 4s., on the other hand it appears to me that the course of litigation has been such that neither of the parties is in a position to ask for costs. I therefore move your Lordships that the costs both here and below, from the original rise of this litigation to the present moment, shall not be given to either of the parties, but that each of them shall pay their own costs.

Lord Watson.—If the appellants were suing for freight in respect of cargo which had been safely carried to its destination notwithstanding the unseaworthiness of the ship, that consideration might have gone a long way in their favour. Such is not the nature of the claim which they prefer. They hired their ship and the services of its crew for an all-round voyage from this country to the West Coast of Africa, and thence to a home port or a port on the Continent. Hire is payable according to a monthly rate, subject to a special stipulation, which provides, in the first place, that the shipowner shall maintain the hull and machinery throughout in a thoroughly efficient condition, and in the second place, that under certain circumstances payment of hire shall cease.

The high-pressure engine of the vessel broke down on her way from Africa, and in consequence she put into the port of Las Palmas, which she reached with the aid of her low-pressure engine assisted by her sails. The parties seem to be agreed that the condition of the vessel upon her arrival there brought her within the condition of the contract as to cessor of hire. Loss of time was incurred through the break-down of the machinery, and the vessel was stopped for more than forty-eight hours, having been detained by the cause I have mentioned, before she ultimately sailed, from the 1st to the 18th of October. The appellants do not claim hire for that period. Whilst the vessel lay at Las Palmas it was found not to be expedient to repair her at that port, from want of workmen and want of materials, and accordingly an arrangement was entered into, of the details of which we know nothing beyond this, that the parties, hirers and charterers, agreed to bring her to Harburg, which was her first port of destination, at their joint expense, by means of a tug, and that the cost of bringing her should be defrayed by them on the same footing as if it had been general average loss. Accordingly the vessel sailed under tow of a tug, and reached Harburg on the 1st of November, almost in due course.

The first question which arises is this,—Was the vessel, when she started under tow for Harburg, in an efficient state to resume her service within the meaning of the contract? I have no hesitation in answering that question in

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the negative. The service contemplated was a service to be performed by the vessel without foreign aid, the means of propulsion through the water being her own machinery. But the fact is, that she did not proceed from Las Palmas to Harburg in that condition; she was towed; and I think that is quite sufficient to bring the whole period from her leaving Las Palmas till she reached the pier at Harburg within the terms of the condition I have referred to, and that no hire is due for that period.

It was suggested in the course of the argument that a reasonable allowance was due from the charterers in respect of the amount of use which they undoubtedly had, because their cargo was conveyed to the port of destination, and safely conveyed, in a hull which was the property of the shipowner. They had undoubtedly that use, and they had besides, to some extent, the aid during the voyage of steam-power supplied by the shipowner.

I do not mean to cast any doubt upon the suggestion that there may be circumstances, which, as matter of commercial expediency or as matter of equity, may justify the conclusion, that where a contract payment has ceased, there may, notwithstanding, be a *quantum meruit* due to the shipowner; but in all such cases it must be of the nature of a reasonable payment, warranted by the circumstances, in exchange for a use from which the charterer has benefited. But what are the facts here? If the shipowner had chosen to pay for a tug to tow the steamer to Harburg, and had thereby supplied at his own cost an equivalent for an efficient vessel, which his was not at the time, it may be that that would have been considered (I think it might fairly have been considered) by the Court as so substantial an equivalent for the stipulations of the contract which he had violated that he was entitled to recover hire for that period. But that equivalent was not in this case given by the shipowner—it was paid for to the extent of £860 odd by the charterers, the balance of the hire of the tug, to the amount of some £230, being borne by the shipowner. If the shipowner had at his own cost paid for the tug, he would have expended about £800 more than the hire he would have earned. On the other hand, under the arrangement which was entered into and was acted upon, the charterers have paid considerably more than double the hire which they stipulated to pay for an efficient vessel in terms of the contract. In that state of facts I cannot find any consideration which points to the propriety of making an allowance by way of *quantum meruit* to the appellants; and therefore I have come to the conclusion that upon this first branch of the case the judgment of the Court below is well-founded.

In regard to the second branch of the case, the claim for hire whilst the vessel was under discharge at Harburg, I have come to a different conclusion, because it appears to me, for the reasons which have been already indicated by the Lord Chancellor, that from the moment when she reached the pier at Harburg the vessel was in an efficient state to perform that part of the contract work for which she was hired, and for which she was in the possession of the respondents. Her steam-winches were in perfect order, and it humbly appears to me, that if charterers keep possession of a vessel which is in a thoroughly efficient state for all the purposes contemplated at the time by the contract, and required by them, they must, in terms of the contract, pay the stipulated hire. No doubt, on the record there is a statement made by the respondents to the effect that the discharge of the cargo proceeded leisurely, and that it was known to the defenders and their agents that the repairs would last for a considerable time. I venture to doubt whether that statement, if admitted, would afford a good answer to the

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claim for hire. But the evidence shews that the statement is not justified by the facts. The agent for the charterers at Harburg did everything in his power to expedite the unloading of the cargo, and it is apparent that he was not able to effect his purpose in a shorter time than was really occupied by that proceeding. Therefore, the only inference which I can draw from the evidence in this case, if it were necessary to draw it, would be this, that no more than an ordinary time, according to the circumstances of the port, was occupied at Harburg by the discharge.

I therefore come, upon the second point, to a conclusion adverse to the decision of the Court below. I concur, upon both points, in the judgment which has been moved by the Lord Chancellor, and also in the proposal which he has made with respect to costs.

LORD BRAMWELL.—My opinion differs from those which have been expressed by my noble and learned friends who have already addressed your Lordships, and from those opinions which are entertained by my two noble and learned friends who have not yet spoken. I said that I did not wish to hear Mr Barnes for the purpose of convincing me, because really it would be of very little use—it would make no difference in the judgment which your Lordships would pronounce, and the case is of no great consequence in point of amount, nor I should think in point of precedent—there is not very likely to be another case like this, I should think; therefore Mr Barnes was stopped on one point very much at my instance. But I must say (Mr Finlay and his junior must forgive me) that I do not know that I have heard a stronger argument in support of what they contended for than that which Mr Barnes used in support of his opposition to the other part of their case; so that practically I did hear Mr Barnes, I may say, very much in support of the opinion which I entertain, and not against it.

I cannot help thinking that most undue importance has been attached to the word "efficient." Now, I look at the meaning of this contract as being this—when there is a break-down which occasions a loss of time of a substantial character,—that is to say, for forty-eight hours at the least, during that lost time no hire shall be paid; but when there is no loss of time in consequence of that break-down, that is, no total loss through a delay, then the hire shall be paid. That is the meaning I attribute to this contract. It seems to me to be the ordinary mercantile and reasonable meaning, when you get the benefit of the ship you shall pay for its hire. Well, but it will be said they did not get the benefit of the ship on the voyage from Las Palmas to Harburg. I say they did—I say the charterer got the benefit of the ship on that voyage. It is true he paid or largely paid for a tug; I think it does not matter at all that he was insured, because the question is precisely the same as it ought to be if he had not been insured. I am of that opinion. If he thought fit to pay for the services of a tug for the purpose of accelerating the arrival of the vessel at Harburg, he thought fit to do it for his own purposes. He did not stipulate that if he did so he should not pay for the hire of the vessel; it seems to me that he ought to have done so. He might have refused to do it if he had liked—he might have said, "I have nothing to do with getting your vessel to Harburg; that is your affair"; but he thought fit to do it, and did not think fit to stipulate that in consideration of his doing it he should not pay for the hire.

It cannot be said that the vessel did not reach Harburg, for she did. It is true she was helped; and then the sort of argument used is, "she was not

'efficient'—she was not efficient for the purpose of her service." I say she was efficient *sub modo*, even if the word "efficient" is to be regarded, because she could do it with help. I accept what has been assumed to be true, that she was not fit to go from Las Palmas to Harburg without help; but she was fit to do it with help, and did it with help. It seems to me, as I have said before, I am afraid more than once, that an undue importance is attached to the word "efficient." I think it is an example of *qui hæret in litera hæret in cortice*. The substantial matter to my mind is that the charterer has got the benefit of the carriage of his goods in that ship from Las Palmas to Harburg, and ought to pay for it.

I think that is all I need say about the first point. With respect to the second point, of course, with the opinion which I entertain, I must concur in the judgment which has been moved and the opinions that have been expressed.

LORD HERSCHELL.—I concur with the view which has been put before your Lordships by the Lord Chancellor and by my noble and learned friend beside me (Lord Watson).

I do not lay any special stress upon the word "efficient" in the phrase "efficient working of the vessel." If the word "efficient" had been left out and the word "working" had been the only word there, I think I should have come to the same conclusion as that at which I have arrived. The subject-matter of this contract of hire is a steamer as a steamer, not either as a hulk to serve as a warehouse for goods, or as a vessel to be propelled without steam by means of her sails. The hire is estimated with a view to the fact that she is a steamer and that the goods are to be brought on her intended voyage or voyages during the time of the hire by the ordinary means of propulsion by which a steamer passes through the water. When therefore the vessel at Las Palmas ceased to be able to prosecute her voyage as a steamer, it appears to me that there was a breakdown of the machinery, the result of which was a stoppage of the working of the vessel; and I should come to that conclusion even though it were shewn that the vessel could have proceeded under sail. That condition of things therefore having come about, that the working of the vessel was stopped for more than forty-eight consecutive working hours, the payment of hire was to cease until she was again in an efficient state. I should have said the same if the wording had been "in a state to resume her service," her service being the carriage of goods as a steamer upon the stipulated voyages.

Now, it is said on behalf of the appellants that she did become in an efficient state as soon as she was taken in tow. I am unable to accede to that argument, if it is intended to assert by it that no matter who provides the tug, or under what circumstances she takes the vessel in tow, the vessel is to be regarded as in a condition to resume her service and so earn hire. I put, during the course of the argument, the case of this vessel being in a desperate condition, only to be saved from total loss by a salving vessel, which takes her in tow, and brings her into port, making of course for her services a large claim. Is it to be said that as soon as she was in tow of a steamer she became efficient, or became in a condition to resume her service, without looking at all at where that steamer came from or who was to pay for it? I cannot think so. I do not intend to assert that if the owner himself provided a steamer to tow the vessel into her port of destination, if he did not recover, strictly speaking, the hire under this contract, he would not be entitled to recover as for a substituted service in the

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same way in which, under other contracts, a shipowner who has contracted to carry goods in a particular ship on a particular voyage may recover although he does not bring them on that voyage in that ship, but tranships them and brings them in some other ship. It has never been doubted that he may, in such a case, recover in respect of the carriage of those goods. So there might have been a right (it is quite unnecessary to consider whether there would have been) of the same sort if the owner had substituted steam-power outside the vessel instead of putting the machinery into a fit state within the vessel. But that is not the case here. In the present case, the vessel having broken down, and not being in a condition to prosecute her voyage as a steamer, it is agreed between the owner of the cargo or the charterer and the shipowner that it shall be treated as a joint loss, and that the vessel shall be brought home at joint expense, treating that joint expense as a general average loss arising from a disaster in the course of the voyage. That was the arrangement come to.

Now, it seems to me that, when the vessel is brought home under an arrangement of that description, she is not really prosecuting her voyage under this contract at all, and cannot be so regarded, inasmuch as she is being brought home at joint cost by an arrangement of that description, in order to save the shipowner from inconveniences and to save the cargo owner from inconveniences; and therefore it being the interest of both parties that the vessel shall be in that way brought on, the vessel for the benefit of the shipowner, and the cargo for the benefit of the cargo owner, at their joint expense, proportioned to the value of the vessel and of the cargo respectively, I cannot regard that as in any way affording a right to a resumption of this hire, which was to be paid for the use of a steamer which could carry the goods as a steamer from the port where she took them on board to the port of her destination.

On the other point I agree with the view which has been already stated. It seems to me that it would be somewhat extravagant to hold that when a vessel has been thus by arrangement brought home, or rather brought to the port of discharge, at the joint expense, as soon as she arrives at the port of discharge you are to look back to see how she arrived there, and not rather to see what was the service then required of her, and whether she was in a condition to perform that service. It seems to me that during those ten days, whether you lay any stress on the word "efficient" or not, she was in a condition to perform the service that was required of her.

Lord Morris.—I entirely concur with the judgment which has been moved by the Lord Chancellor, and with the opinions which have been expressed by him and by my two noble and learned friends opposite (Lords Watson and Herschell), as regards that portion of the voyage for which hire is claimed, namely, the part of it between Las Palmas and Harburg. But I am further of opinion that the pursuer is not entitled to recover anything.

In order to arrive at a conclusion upon this case, I think it necessary to refer to the charter-party. It appears to me that in the argument of this case in the Court in Scotland and before this House there has been some confusion between what would be the rights of the parties in the earning of freight, and under the contract contained in this charter-party for the hire of this steam vessel out-and-out. The first portion that I would refer to is at the conclusion of the appellants' case: "That the owners agree to let, and the charterers agree to hire the said steamship for a voyage" afterwards mentioned—that is, a voyage from

certain ports mentioned to the West Coast of Africa and back again—"she being ready to receive cargo, with a clear hold, and being tight, staunch, strong, and every way fitted for the service."

Now, the first question which I would ask is, What is the service contemplated there? The service contemplated there is her being a steamship fitted in all respects to go from the ports mentioned to the West Coast of Africa and back again. She was to be a vessel fit for that service. The clause proceeds on the assumption that she was fitted for the service at the starting; it provides that "the owners shall maintain her in a thoroughly efficient state in hull and machinery for the service." What service? The service of being a steamship fit to go from the ports which are defined in the concluding paragraph.

I now come to the clause in question, and I agree with my noble and learned friend who has preceded me (Lord Herschell), that we should not give any peculiar importance to the word "efficient." I shall use it as if the word "fit" were used. The clause in question is, "That in the event of loss of time from deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service." I read, as I have said, "fit" for "efficient," "until she shall be in a fit state to resume her service." What service? The service contemplated of being a steamship which was originally fit to go from certain ports to the West Coast of Africa and back again. The owner contracted, under the second clause to which I have referred, to keep her in that efficient, or, if you will, fit, state to perform that service, namely, to go to the West Coast of Africa and back again. But as the owner would only be liable under the clause in an action for damages, the parties very wisely chose to measure their damages, and accordingly the measure is that the hire is to cease on the contingency of there being "a loss of time from a deficiency of men or stores, break-down of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, until she be again in a" fit "state to resume her service." I say that I read for "efficient" "fit" only. What service? She was to be a vessel which was fit to go on certain voyages described in the concluding portion of the clause. Now, was she that? On the portion of the voyage from Las Palmas to Harburg she was clearly unable to do it. When was the moment that she again became fit? Nothing was done to her to make her fit on the first day of the discharge. When did the period begin at which she was again fit for the performance of "that service," namely, the service between these ports? I say, only upon the day when she was put by repairs into a state in which she was fit to perform the voyages which she was originally required to perform, and in which state the owner undertook that she should be during the whole period.

For these reasons, I, of course, concur with the judgment of the Lord Chancellor and of my two noble and learned friends opposite with regard to the portion of the voyage from Las Palmas to Harburg. But I have also come to the conclusion that the pursuer is not entitled to any portion of the sum which he has claimed. The Court in Scotland appear to have given the sum of £60 in a vague sort of way. I am of opinion that if the pursuer is entitled to anything he is entitled to payment for the entire ten days occupied in the discharging, and that we cannot go into the question of dawdling in the discharge. But I

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Dec. 1, 1890. Hogarth v. Miller, Brother, & Co.

am of opinion that he is entitled to nothing; and therefore I do not agree with the view which has been expressed by the majority of your Lordships that the interlocutor of the Court of Session in Scotland should be amended as proposed.

INTERLOCUTOR of 15th March 1889 varied by inserting therein £136, 4s. instead of £60, and by deleting the words "Find the pursuers liable to them in expenses, remit to the Auditor to tax the same, and to report," and by inserting therein the words "Find neither party entitled to expenses," &c.: Cause remitted to Court of Session: No costs allowed to either party in respect of the appeal.

LOWLESS & Co.—WEBSTER, WILL, & RITCHIE, S.S.C.—HOLLAMS, SONS, COWARD, & HAWKSLEY—DAVID TURNBULL, W.S.

No. 3.

Mar. 19, 1891. Ritchie & Co. v. Sexton.

JOHN RITCHIE & COMPANY (Defenders), Appellants.—*Sir H. James, Q.C. —F. T. Cooper.*

THOMAS SEXTON (Pursuer), Respondent.—*Sir C. Russell, Q.C.—Shaw.*

Reparation—Slander—Innuendo—Ironical meaning attachable to words.—A person who conceived that his reputation had been unfairly attacked through questions put by a Member of Parliament in the House of Commons, wrote to him, and sent to a newspaper a letter in which he denied the charges alleged against himself. He went on to put the case that he should induce one of the political opponents of the member addressed to put questions in the House of Commons implying that that member had had *delirium tremens*, and had been intoxicated in public. Such a course, the writer stated, would be as justifiable as the conduct of the Member of Parliament had been to him. In his letter he also spoke of his illustrations of *delirium tremens* and drunkenness as "imaginary stories," adding "it is doubtless painful for you to hear of these stories as it is painful for me to imagine them true for the sake of bringing home to your mind the impropriety of your unfair questions." In an action of damages at the instance of the Member of Parliament against the proprietor of the newspaper in which the letter was published, *held* (*aff.* judgment of the First Division) that the pursuer was entitled to an issue whether the letter represented him as a drunkard; that meaning being capable of being put upon the letter, and it being for a jury to say whether there was or was not a libel.

(IN the Court of Session, March 18, 1890, 17 R. p. 680.)

Ld. Herschell. Lord Watson. Lord Macnaghten. Ld. Bramwell. Lord Morris. Lord Hannen.

The defenders appealed, and argued that the primary meaning of the letter was not libellous, and that it was necessary for the pursuer to have averred facts and circumstances which gave it a different meaning to entitle him to an issue.

LORD HERSCHELL.—This is an appeal from an interlocutor in which it was held that in an action for libel brought by the respondent against the appellants there was an issue fit and proper to be submitted to a jury. The only question which your Lordships have to consider is whether that determination of the Court of Session was correct. All that has been decided is that there is such an issue which the jury will have to consider and determine, and there is no controversy about the law which governs a case of this description. If the statements or letter which is charged to be libellous be of such a nature that it is capable of a construction which would be libellous in point of law, if it contains matter which is capable of such a construction that it might be read by reasonable men as libellous in point of law, then it is for the jury to determine whether a case has been made out, and the Court cannot stop the case at its inception, and prevent a verdict of a jury. The question therefore resolves itself into one of simple construction,—what interpretation might reasonably be put upon the document in question. I believe all your Lordships are agreed that the Court

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below was right in coming to the conclusion that the case could not be withdrawn from the jury, and that it was right to direct an issue. That being so, it would be obvious that there are reasons for not giving a detailed statement of the views which have led your Lordships to that conclusion, inasmuch as if the case is to be tried before a jury, the reasons which would be given by your Lordships would be arguments which might be regarded in the light of prejudging the very question which would have to be determined by a jury. Therefore I do not propose to give any reasons for the conclusion at which I have arrived, which is, that the letter is capable of being understood in a libellous sense, and that, therefore, it is for the jury to determine whether there is a libel or not. For these reasons I move that the judgment be affirmed, and the appeal dismissed with costs.

LORD WATSON.—I entirely concur. I desire to express no opinion as to whether these letters are libellous. All that my judgment implies is that there is a question which a jury and not the Court ought to try.

LORD BRAMWELL, LORD MACNAGHTEN, LORD MORRIS, and LORD HANNEN concurred, and the appeal was dismissed with costs.

NEISH & HOWELL—HENDERSON & CLARK, W.S.—WADDY & WADDY—R. AINSLIE BROWN, S.S.C.

No. 4.

June 9, 1891.
Bank of Scotland v. Dominion Bank.

BANK OF SCOTLAND, Appellants (Defenders).—*Finlay, Q.C.—Murray.*
DOMINION BANK, Respondents (Pursuers).—*Att.-Gen. Sir R. Webster—D.-F. Balfour, Q.C.*

Bill—Payment and discharge—Cancellation without authority—Liability of agent employed to collect bill.—The agent of a bank offered to try to obtain payment of a bill which had been protested for non-payment, and the holders accepted the offer. The acceptors offered to pay the bill and the protest charges on the condition that they should not be called upon to pay interest and expenses. The bank's agent communicated this condition to the holders, and without waiting for authority took payment of the bill and protest charges, marked the bill paid, and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the condition on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, and received back the bill cancelled, the money being repaid to the acceptors. The holders then raised an action against the acceptors for the amount of the bill, with interest, and for the expenses of the action, and obtained decree, but the estates of the acceptors became bankrupt before diligence could be used against them.

The holders thereupon raised an action against the bank, concluding for the amount of the bill, with interest, and for the expenses of their action against the acceptors. *Held* (*aff.* judgment of First Division) that the evidence shewed that if the bill had not been cancelled through the error of the agent of the bank, the holders might have recovered payment by summary diligence before the acceptors had become bankrupt, and that the bank was liable.

(In the Court of Session, July 19, 1889, 16 R. 1081.)
The Bank of Scotland appealed.

Earl of Selborne.
Lord Watson.
Ld. Bramwell.
Ld. Herschell.

EARL OF SELBORNE.—I confess it is with some regret—because I think the case is rather a hard one upon the Bank of Scotland—that I feel myself compelled to come to the conclusion that the judgment in this case is right, though I think it should be amended, without prejudice to the costs of the appeal, by introducing words which will require effect to be given to the offer which was

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made in the Inner-House to subrogate the appellants to any right and remedy which may remain upon the bill against the drawers.

In the view which I take of the case it may be put thus—First of all, has there been a loss sustained? It appears to me clear that there has been a loss, arising no doubt immediately out of the bankruptcy of the judgment debtor; and for this purpose I cannot but think myself that this case should be dealt with upon the footing of the right of the holder of the bill against the acceptor, and without drawing in any question as to whether an action against the drawers in Canada might have been successful or not, or to what extent; but that there has been an actual loss arising immediately from the bankruptcy of the judgment debtor, and that the measure of that loss *prima facie* is that which the Court below have assumed, namely, the whole debt minus the interest, appears to me to be unquestionably clear.

Then what was the cause of that loss? I think myself, upon the evidence (differing here from Lord Mure, but agreeing with the rest of the Court), that the cause of the loss was the delay of the remedy—I mean the summary remedy which would have existed if the bill had not been on the face of it cancelled. I cannot think that more evidence as to the possibility of having made that summary remedy effectual, if it existed, than that which was given, can be required. The debtor was a man engaged in business, carrying on business, paying his way, and paying considerably larger sums, according to the evidence, than that in question until some considerable time after the action was brought, and it appears that on the 12th of July 1887 (a matter which is not noticed by Lord Mure in his judgment) a positive offer was made to pay down immediately—that is, the next day—the whole principal sum due upon the bill on the condition of the waiver of the right to the interest.

I will consider hereafter whether the refusal of that offer has any effect upon the pursuers' right; but I think that in that state of circumstances your Lordships must come to the conclusion that, so far as appears, there would be every reason to assume that payment would have been made but for the question which was raised as to the interest; and if the summary remedy had been available at that time it cannot be doubted, from the correspondence which then took place, that it would have been immediately resorted to; and, as I understand it, the law of Scotland is, that if a party is let in to defend in such a case, it must be upon the terms of consigning the amount claimed, or at least giving good security for it. Therefore, I cannot but think that *prima facie* the loss is proved, and is due to the delay of the remedy, because it is not suggested that the action was not proceeded with as rapidly as it could have been, or that there was any default of any sort or kind in prosecuting it on the part of the pursuers.

That brings us to the question, what was the cause of the loss of that summary remedy? If we find that it was due to a wrongful act on the part of the defenders, I cannot but think that the loss was the direct consequence of that wrongful act. The cause was beyond all doubt the cancellation of the bill—that is to say, the perforation of it as paid, which was the act of the defenders by their agent Mr. Mackenzie, and also the simultaneous erasure of the signature by the acceptor. Then the sole question, as it strikes my mind, is, whether that was a wrongful act or not? If it was a wrongful act when it was done, I am afraid the consequence is that the defenders must be liable for the loss occasioned.

Now, in determining whether it was a wrongful act or not, I think that we

must look to what took place upon the 13th of June 1887, and not at what might or might not possibly have taken place if action had been taken upon letters which passed at an earlier date. And what did take place on the 13th of June? This, that the principal money and the amount of certain small charges were paid to Mr Mackenzie, the agent of the Bank of Scotland, on a certain condition. That condition was that there should be an express renunciation or waiver of any further claim for that which was not paid—in other words, that payment of part of the debt should be accepted and the rest discharged, and that positively, by an express engagement. Both Mr Mackenzie, representing the Bank of Scotland, and Mr Anderson, who made the payment, knew perfectly well that there was no authority to accept payment upon those terms, because the letters written contemporaneously, which, in my opinion, must be taken to represent the true effect of the actual transaction (and I should think so even independently of a circumstance not altogether immaterial, namely, that the Bank of Scotland were also the bankers of Anderson the debtor), shew that the true effect is that it was a conditional payment, made upon those conditions, and whatever other condition the preceding correspondence might possibly have authorised such a payment to be received upon, it did not authorise the acceptance of the payment upon those conditions. The letters prove it distinctly, the whole sequel of the correspondence proves it, and Anderson's letters previous to that date shew that the thing was deliberate, and that he never would have paid upon any other terms; and the letter of Mr Mackenzie proves that he knew perfectly well that there was no previous authority to accept payment upon those terms, and that if those terms were not accepted the payment could not in good faith, or in point of law either I should say, be retained. Consequently, the terms not being accepted, the payment was returned, and re-delivery of the bill asked for.

Now, the question to my mind is, could it possibly be justifiable under those circumstances, and upon such conditional payment being made, *instanter* to cancel the bill, to perforate it as paid, and to stand by while the signature of the acceptor is erased by him and leave it so in his hands? To me it is perfectly plain that until the terms were accepted and the condition assented to, it could not be consistent with the duty of the bank to part with the bill or to permit it to be tampered with. It might have been put *in medio* under some reasonable arrangement, leaving it in a condition in which it might be returned as it was before when the money was returned if the condition was not accepted. That, however, was not done, and I cannot think it is any answer to the case so made to say that a somewhat ambiguous letter (but which for the purpose I will assume to be clear), as it seems to me to be, had been written upon the 7th of June, the effect of which, especially when taken in connection with Mr Gordon's evidence, seems to shew that the National Bank, the agents of the creditor, would have been willing to accept payment of the same amount upon other terms,—upon the terms either of something being done expressly to save the right to claim and recover the interest due and not paid, with any other charges which might lawfully be made, or at least to leave that question untouched by any express waiver or agreement or renunciation. I do not think it necessary to go into the question what the true construction and effect of that letter would have been if it had been treated at the time as an authority to deliver up the bill upon payment of that sum, because the transaction did not follow upon it. There may have been perhaps some difference of view between the National

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Bank of Scotland and Mr Mackenzie as to the effect of that letter. Whichever was right or whichever was wrong, one thing is to my mind quite clear from all that followed, namely, that the National Bank of Scotland did not mean to renounce that upon the renunciation of which Mr Anderson distinctly insisted; and on the other hand, that Mr Anderson would not and did not make any payment except upon the terms of that renunciation, which was never agreed to, and was never intended to be agreed to.

Then that being, as it appears to me, the whole substance of the case, I cannot but say that I am unable to follow the argument founded on the fact that on the 13th of June, and at a later date, on the 12th of July, payment of part was offered on condition that the rest was remitted or renounced. I cannot see how if at the time that those proposals were made there was no obligation to accept them, the fact of the ultimate loss can be affected, or that loss reduced, by reason of those proposals. If they ought to have been accepted, it would be quite a different thing, but can anyone seriously say that either in a question with the agent to collect, or in a question with the principal debtor, the principal debtor has a right to reduce the amount of the debt, or that the agent to collect has a right to keep the amount of the debt as reduced by an offer to pay less than the whole? Though the amount of the difference may not be very large, yet if the tender was not such a tender as should have been accepted, and such as there was an obligation to accept, I am at a loss to see how it can affect the ultimate result.

On these grounds—and I think it unnecessary to say more—I have come to the conclusion that the Court of Session was right, and that your Lordships should affirm their judgment, and that with costs, altering the interlocutor only by adding the words which will be necessary to make it part of the judgment that there is to be an assignation to the appellants of any remedy competent to the respondents against the drawers of the bill of exchange, and I move your Lordships accordingly.

Lord Watson.—I am of the same opinion upon all of the points which have been dealt with by the noble and learned Lord on the woolsack.

The letters containing the authority or instructions sent by the National Bank in London to the agent of the Bank of Scotland at Grangemouth are certainly expressed in terms somewhat loose, and if, following out the authority given by these letters, Mr Mackenzie had *bona fide*, as the authorised agent of the National Bank, entered into a final and binding arrangement with Mr Anderson which could by some reasonable construction of these letters have been justified, I should not have been prepared to construe the letters very strictly against Mr Mackenzie or the bank which he represented. I think that they would have admitted of very considerable latitude. But what Mr Mackenzie actually did do on the 13th of June 1887 was not anything of that kind. He then made an arrangement which he knew he had not power to make finally; he made that which was known to him to be a provisional arrangement, because a condition insisted upon as essential by Mr Anderson, and without the concession of which Mr Anderson would make no arrangement at all, was known to Mr Mackenzie to be one to which the National Bank had given him no authority to consent, and accordingly, in reporting the arrangement, he called the attention of the bank to that fact, and points out that it is made a *sine qua non* by Mr Anderson.

Now, the subsequent letters shew that it was quite within Mr Mackenzie's view that the arrangement was provisional, and that it was within the com-

petency of the Dominion Bank or their agents in London to assent to it or not, and that its completion entirely depended upon their giving their assent. That was all very right and proper, and I think to that extent no fault can be found with Mr Mackenzie's action. But the matter in which he did exceed his powers and commit a legal wrong was in relation to the mutilation of the bill. He had no right to alter that document, to perforate the signature, or to permit any other person to interfere with the document—a document which was the property of the Dominion Bank, and remained so. I say he had no right to allow anybody to do that so long as the bank had not intimated their assent to the arrangement under which alone either Mr Mackenzie or any other person had the right to mark it as discharged.

I do not see any reason whatever to doubt that in that view of the case the result which followed was the direct and necessary result of that wrongful act. I think the judgment of the Court below is right and ought to be affirmed, with the variation suggested by the noble and learned Lord on the woolsack.

Lord Bramwell.—I am of the same opinion. I am very much inclined to think that the construction put by the appellants upon the letter of June the 7th is the right one, and if nothing else had happened except that, and Mackenzie had been content to take the principal without interest, I am very much inclined to think that he would have been justified in giving up the bill to be cancelled, and in point of fact I believe that was the agreement which he originally made with Anderson. But whether from a feeling of goodwill to Anderson, who was a customer of the bank, or from any other consideration, he told the National Bank that that was not all that took place between them, because he in effect told them that Anderson's letter was a truthful one, and that he had taken the money upon the footing that the Dominion Bank was to have no further claim in respect of the bill. It is very ingeniously argued that that really did not add to what would have been the case if nothing had been said expressly about the Dominion Bank having no further claim in respect of the bill. I am sure I do not know about that, but it took away from the Dominion Bank the power of trying whether they had such further right, and it therefore, if it really had been agreed to, was an excess of authority on the part of Mackenzie, and I think that he is precluded from saying that that was not really agreed to, although in fact I doubt extremely whether it was, for I doubt whether Mr Galloway's evidence is not right.

If that is so, Mr Mackenzie added a term to the agreement with Anderson which he had no authority to add, and therefore he acted without authority in giving up the bill in pursuance of an agreement which he had no authority to make. That is the first position.

I have had a misgiving, I own, whether the damage arising from the inability of the Dominion Bank to have recourse to the summary procedure, and the intervening bankruptcy of Anderson, was damage naturally arising out of the wrong thing which Mackenzie did. But I cannot but think that some damages arose from it, and although it can hardly be said to be a natural consequence of the wrong that Mackenzie did, and of the mistake which he made, yet the insolvency of Anderson and the necessary delay in the procedure together undoubtedly caused a loss of money—at least I think upon the evidence (with all submission to Lord Mure) that it would have been recovered if there had been the possibility of summary procedure. I had a strong opinion that the

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pursuers had not made out their damages, because they had left it in uncertainty what they would recover, if anything, from the drawers of the bill, but that difficulty is got over by what I understand can be done in the decree which can be pronounced now. But I should just like to make this suggestion. The bill may be handed over to the appellants, but ought there not to be some provision by which they should be enabled to prove notice of dishonour to the drawers of this bill, which no doubt was given by the Dominion Bank in Canada? I should think there ought to be some provision or arrangement by which the Dominion Bank should undertake to enable the present appellants to prove all that the Dominion Bank could have proved to enable themselves to recover. Whether that can in any way be done or not, I am sure I do not know. I merely make the suggestion that in some way or other it ought to be done or agreed to.

Lord Herschell.—I am of the same opinion. I do not propose to trouble your Lordships with any observations as to the effect of the letter of the 7th of June. I think it quite possible that under the terms of that letter the Bank of Scotland would have been entitled to receive from Anderson the principal and the small charges without commission or interest, and to take them from him possibly (I do not wish to determine that point at all) without making any reservation whatever, nothing being said on either side, if Anderson had been content to make the payment on these terms. But it is clear to my mind that Anderson never was content to make the payment on these terms. Whether he shared a common mistake with the National Bank or not, it seems to me manifest that he always insisted that he would only make payment of the principal if there were a distinct and express renunciation by the holders of the bill of their remedy in respect of anything further. I do not see any ground for thinking that he ever receded from that position. He had taken it from the outset, he took it on the 9th of June, and I cannot myself see any ground for supposing that he did not take it on the 13th, inasmuch as it was embodied in the letter which he wrote on that day.

Now, as I have said, I will assume that if Mr Mackenzie had handed over the bill after he got the letter of the 7th June, and had received the principal and the 12s. 6d., the other small charges, no complaint could have been made. But that did not take place. Anderson was not willing that it should take place, because Anderson said—"I am not content with that; I want an express renunciation." Then on the 13th I think it must be taken as against Mackenzie (and I have no doubt myself that it was the fact, but even if it was not the fact it must be so taken as against Mackenzie) that that was the transaction, because it is upon those terms alone that he sends up the draft to London.

Now, the ground upon which I base my judgment in the case is this, that where a banker is employed to receive payment of a bill from the acceptor, and receives payment from him clogged with a condition, without assent to which the holder is not entitled to retain the money paid, I think the banker cannot be entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid before he has received the assent to the condition. It seems to me that where he has transmitted the money to his principal upon the distinct terms that that principal cannot be justified in keeping it absolutely and in all events, but can only keep it properly if he assents to a condition imposed by the letter remitting it, then he was bound to hold in his own hands,

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untouched and untampered with, the acceptance sent him for collection until he had ascertained whether his principal was willing to assent to the condition or not. Not having done so in this case, it seems to me that he has committed a breach of duty, from which the damage sued for has resulted.

THE interlocutor of the Inner-House was varied by adding thereto, after the words "refuse the reclaiming note," the following words, —"and the pursuers having undertaken to assign to the defenders any remedy which they may have against the drawers of the bill of exchange of the 28th of September 1886, order such assignation to be duly made, and the said bill of exchange to be delivered up to the defenders for the purposes thereof, upon payment by the defenders to the pursuers of the amount decerned in this action": Subject to such variation, interlocutors appealed from affirmed, with costs.

LOCH & GOODHART—TODS, MURRAY, & JAMIESON, W.S.—MURRAY, HUTCHINS, & STIRLING —MACKENZIE, INNES, & LOGAN, W.S.

No. 5.

July 2, 1891.
North British Railway Co. v. Wood.

NORTH BRITISH RAILWAY COMPANY, Appellants (Defenders).—*Finlay, Q.C.—Haldane, Q.C.*
JOHN WOOD, Respondent (Pursuer).—*Rhind—Baxter.*

Discharge—Reparation—Damages for personal injury.—A commercial traveller, who had been injured in a railway accident, accepted a sum of £27 from the railway company, and granted them a receipt bearing that that sum was accepted by him "in full of all claim competent" to him in respect of injury and loss sustained by him in the accident in question. About eighteen months after granting this receipt he raised an action of damages against the company concluding for £5000. The company pleaded that in respect of the terms of the receipt they were entitled to be assoilzied.

In a proof evidence was led—as to the pursuer's state of mind and body at the time of granting the receipt, and at the time of the proof—as to the intention of parties in giving and taking the receipt, and—as to the capacity of the pursuer to understand it. The pursuer at the time of granting the receipt had been visited by the railway company's surgeon, but not by any surgeon employed by himself. He had no external injuries, but had sustained a nervous shock. He had no legal advice, and the receipt was granted nine days after the accident. The Lord Ordinary awarded him £500, and to this judgment the Second Division adhered.

The House of Lords, being of opinion that the writing signed by the pursuer was a discharge, that there had been no attempt on the part of the railway company to mislead the pursuer, that he was capable of understanding the meaning of the writing, and that there had been no understanding between him and the person who acted for the company that there was any reservation of claims made by the pursuer at the time the discharge was granted, *reversed* these judgments and assoilzied the defenders.

Earl of Selborne.
Lord Watson.
Ld. Bramwell.
Lord Macnaghten.
Lord Morris.

AN action was raised in January 1890 by John Wood, who had been a commercial traveller, against the North British Railway Company, concluding for £5000 of damages in respect of injuries which he alleged he had suffered by an accident which occurred on the defenders' line of railway on 21st June 1888.

The accident was peculiar. The train in which the pursuer was travelling met a goods train coming in the opposite direction loaded with pit-props. These props projected over the side of the goods train, broke through the side of the carriage in which the pursuer was travelling, and finally stopped the passenger train with some violence. The pursuer averred that he had received "a great and permanent injury to his nervous system."

On 30th June the pursuer had given to a clerk in the employment of the defenders, who had visited him with the view of settling his clai-

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a receipt in the following terms, viz.:—"Received by me, *John Wood, commission-agent, Doune*, from the North British Railway Company, the sum of *£27* sterling, which sum I hereby accept in full of all claim competent to me in respect of injury and loss sustained by me in an accident on the said railway, at *or near Bonnybridge Station*, on or about *the 21st June 1888*, and also in full of all expenses of every kind incurred by me in connection therewith. *Paid 30th June 1888.*" The receipt was printed except the parts in italics, which were in writing.

The railway company, besides disputing the severity of the pursuer's injuries, founded on this receipt as a discharge which excluded the action.

The pursuer in answer (1, 2, and 3) . . . "admitted that the pursuer took the £27, and gave the receipt. It does not discharge, and was not understood by the pursuer to discharge, his right to make any further claim against the defenders. The defenders' representative assured the pursuer that he was suffering only from a slight nervous shock, and that he would be all right in a week or two. The pursuer had no one to consult, either agent or doctor. As the event has turned out, he is helpless for life. Admitted that the first time the pursuer threatened an action was November 1889. Explained that, shortly after the accident, and in consequence of it, the pursuer's mind became seriously affected."

The pursuer proposed the ordinary issue of fault, and also this issue, viz.:—"Whether, when the pursuer signed the receipt mentioned in the record, he understood that he thereby discharged his claims against the defenders in full?"

Lord Kinnear (Ordinary) reported the case to the Second Division,* who of consent of parties remitted to the Lord Ordinary to allow a proof before determining the effect of the discharge, and proof was accordingly led before the Lord Ordinary.

From this proof it appeared that the pursuer was visited twice by the surgeon of the railway company, Dr Heron Watson, who reported to them on each occasion in the terms quoted below by Lord Selborne. These visits took place on 21st and 22d June. On 23d June Mr William Wood, acting for the railway company, called on the pursuer and invited him to call on his uncle, Mr Peter Wood, the official of the railway company whose duty it was to attend to such claims. Mr William Wood on 23d June also wrote this letter to the pursuer, viz.:—"On my return I explained to Mr Wood the purport of what passed between us to-day, and mentioned that you might be along to see him on Monday. He informs me that he will be at his office between 10 A.M. and 5 P.M., and if you come and make a reasonable demand, in keeping with Professor Watson's report, there ought to be no difficulty in coming

* "NOTE.—The Lord Ordinary reports this case, because, while he thinks that a relevant case has been stated, and that the action ought not to be dismissed, he is unable to approve of one of the issues proposed by the pursuer.

"The first issue is in ordinary terms, and is admittedly a proper issue, if the pursuer has not discharged his claims. But he has granted a discharge, whereby he accepts of the sum of £27 'in full of all claims competent to him in respect of injury and loss sustained' by him in consequence of the accident on the North British Railway, of which he now complains. The defenders, founding upon his discharge, plead that the action cannot be maintained, because the pursuer's claim has been settled and paid.

"The pursuer may be entitled to set aside the discharge if it was impetrated by the defenders, or if it was granted under error induced by the representations of their agent. But under the issue he proposes, he would be entitled to a verdict on the ground of a mere mistake on his own part, for which the defenders were in no way responsible."

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to an amicable settlement. . . ." The pursuer did not call, but subsequently on 30th June Mr William Wood called again on him with the receipt and the money. The pursuer took the money, and filled up and signed the receipt. Mrs Black, the pursuer's sister, and her husband, with whom he was then living, were both present at this interview.

It was matter of dispute whether at this last meeting anything was said by the pursuer which was intended by him to reserve any claims against the company, if his injuries should turn out more serious than was then anticipated, and which must have been understood by William Wood to import such a reservation. The state of the pursuer's intelligence on the occasion was also matter of dispute. For the import of the evidence on the matter reference is made to Lord Selborne's opinion, the substance of that opinion being that there was no evidence of any such reservation having been expressed, or of any lack of intelligence on the part of the pursuer. The pursuer had not at this time consulted either a doctor or a law-agent.

Evidence was also led as to the pursuer's mental and bodily state, both as at the date of the proof, and as shortly after the accident. There were no external injuries, and the suggestion of the pursuer was that he had suffered a mental or nervous shock, which had permanently injured his health.

On 22d July 1890 the Lord Ordinary decerned against the defenders for £500. His Lordship issued no note or opinion.

The defenders reclaimed, and argued, in the first place, founding on the case of the *Victorian Railway Commissioners* v. *Coultas* (1888, L. R., 13 App. Ca. p. 222), that no damages could be recovered, in respect that there was no physical injury, but merely fright and nervous shock. On proceeding to argue the question of the effect of the discharge, the junior counsel for the defenders admitted that, assuming the state of mind and body of the pursuer to have been such as to warrant the award of £500 of damages, the company would not be justified in standing on the discharge. Senior counsel, however, subsequently in his argument contended that the discharge ended the matter.

The Second Division, on 25th November 1890, adhered to the Lord Ordinary's judgment.*

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* The following opinions were delivered :—

"Lord Justice-Clerk.—I do not think it necessary to consider in this case the questions raised in the case of *Victorian Railways Commissioners* v. *Coultas*. In that case the question was whether a person suffering from fright alone could claim damages. If any opinion required to be expressed upon that case I should like time for further consideration, but there is nothing similar to that case in the present.

"The accident here was a very deplorable one indeed. Some pit-props were being carried on a railway waggon, and while the waggon was passing the carriage of a passenger train going in the opposite direction, one of these props suddenly crashed through the door of the carriage. In fact it got so fixed that it could not be removed without considerable force. There were eight persons in the carriage. One of them says that he received a severe shock, from the effects of which he is still suffering. The defenders say he cannot have received anything more than a mental shock, because the other people in the carriage did not receive any injury. I do not understand that. Whether a person in a carriage, through the door of which a pit-prop has forced its way, received a physical shock or not is not determined by the fact that others received no shock. It may depend upon the position at the time of the person said to be injured. I see no ground for differing from the opinion of the Lord Ordinary that this man received a physical shock, and if so, he is entitled to compensation.

"The question in this case is, whether he is barred from recovering further

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The defenders appealed.

In their appeal case the defenders submitted, in the first place, that the damages from the railway company by having accepted £27 in lieu of all claims a few days after the accident? Now, it was not maintained by Mr Dickson that if it turned out after such a discharge had been taken that the injuries actually received were of such a nature as not to have been in the contemplation of the parties when the settlement was made, and that the amount paid was quite inadequate, the pursuer would be barred by such settlement from suing for the actual damage sustained. All he maintained was, that if the pursuer took £27 his injuries could not have been so serious as he now seeks to make them out to have been. But that cuts both ways, for if he was relieved from anxiety by being paid at once, he should have recovered rapidly if he was not really seriously injured. There is nothing more common in these cases of shock than to hear doctors declare that it is the anxiety of the litigation which prevents recovery.

"The next question is, has he recovered? Some of the doctors say he has completely recovered. He is still to some extent suffering from the injuries. His own doctor finds certain symptoms which the other doctors do not find, but these are just the circumstances which the Lord Ordinary was entitled to form his own opinion upon. He has considered these matters, and has given the pursuer £500. It is a large sum, but the only question is, whether if it was in his province to grant it we should cut it down. I regard the question as if this sum had been awarded by a jury. I do not think we should have ordered a new trial, on the ground of excessive damage, had the award been given by a jury.

"Lord Young.—I have all along regarded this case as one of considerable interest and importance, because it is certain that railway companies are not seldom victimised. Here the pursuer was in the train to which the accident occurred, and he says he sustained a severe shock. He had little or nothing to shew in support of that statement at the time, and he accepted £27, and granted a receipt as for all he could demand from the company. A year or more afterwards he brought an action for £5000 for injuries sustained, and it is not surprising that the action should be defended, and every plea competent to the defenders urged against it. The case came before us first upon the question of the discharge, and considering the state of the pursuer, and the alleged circumstances in which the receipt was granted, we thought that the case should be sent for trial before determining the effect of the discharge. The parties very wisely agreed that the case should be determined by the Lord Ordinary without a jury. We now have before us the evidence taken before the Lord Ordinary, and the judgment pronounced upon it. As he has thought £500 a proper sum to award, I am not prepared to hold that the pursuer is barred by accepting £27. The question we have to determine is, whether we should interfere with that judgment? It has come to be a question of damages, and of damages only. The accident is admitted. It is admitted that the pursuer received some injuries through the fault of the defenders. Now, the amount of damages turns upon whether the pursuer was pretending injury or not. If he was not, a sum of £27 is absurd. The Lord Ordinary thought he was not pretending injury, and awarded him £500. I think there is evidence which reasonably supports that view, and I am not for altering the judgment. Whether another view might not have been taken, and reasonably supported by the evidence, I do not say.

"Lord Rutherfurd Clark.—I have had some difficulty about this case, but I agree that we should adhere to the Lord Ordinary's interlocutor. I do not think, however, that we are in precisely the same position as if we were considering the question of granting a new trial. We have more power here in dealing with the judgment. The case turns entirely upon the question of whether or not the witnesses for the pursuer are to be believed. The Lord Ordinary has believed them, and I see no reason for saying that I disbelieve them, and no ground for altering the judgment."

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respondent's demand was excluded by the document signed by the pursuer. The proof allowed was, as Lord Young explained, allowed on the footing that the facts should be brought out "before determining the effect of the discharge." Now, however, that the proof had been led, the appellants maintained as to the said document (1) that its terms were such as to exclude the respondent's claim; (2) that the respondent's statements challenging the effect of the document were not relevant. They were only pertinent to an action of reduction, but the appellants did not desire to found on the form of action, and were willing to deal with the case as if they had been stated in an action of reduction; and (3) that on the proof the respondent had not established his averments as to the document, even if these averments were relevant.

The pursuer maintained;—Both in England and Scotland the granting of a receipt for money contained in an informal discharge had been held not to be a bar to an action of damages. Inquiry had been allowed into the circumstances under which the document was signed in order to see whether effect should be given to it as a final and binding settlement.[1] In the present case there was no *consensus in idem placitum*, and, in the words of Mr Justice Mellish in *Lee* v. *Lancashire and Yorkshire Railway Company*,[2] "the receipt does not state an agreement or purport to bind either of the parties to any terms whatever." In that case the receipt was in similar terms to the present. Reference was also made to *Roberts* v. *The Eastern Counties Railway Company*.[3]

EARL OF SELBORNE.—I think all your Lordships are likely in this case to agree that the judgment appealed from cannot be maintained. One always feels a certain degree of compassion for persons who have suffered injuries of this description, if it turns out that the compensation which they have been content to receive is apparently inadequate to the amount of the injury, but I cannot think, my Lords, that this is a proper ground on which to proceed if the parties have really and *bona fide* come to an accord and satisfaction with each other. I cannot help thinking that the consideration of the apparent inadequacy subsequently ascertained of the remuneration had very considerable weight with the Court of Session. In one of the judgments (Lord Young's I think) it is very prominently put forward, but with the greatest respect to that learned Judge and to the others who may have concurred in that view, I cannot bring myself to adopt it. I think we must look at the circumstances as they stood at the time.

Now, the first question is a question of principle. Was there anything in the relation of these parties and in the nature of the question which they had to settle, which precluded them or precluded the company from making a settlement at the time when it was made without assuring themselves that the pursuer had advice and assistance of a character which is not shewn to have been had by him? There was no relation of influence or of confidence between the parties, they were certainly at arm's length. It was simply the case of a man having a cause of action for damages in respect of personal injury against those with whom he had entered into the contract which always subsists between persons travelling by railway and the railway company as carriers, and so long as there was nothing in the circumstances known to the company, or in their

[1] M'Donagh v. P. & W. Maclellan, June 18, 1886, 13 R. 1000.

[2] Lee v. Lancashire and Yorkshire Railway Co., April 1871, L. R., 6 Ch. App. 527.

[3] Roberts v. Eastern Counties Railway Co., 1859, 1 F. and F. 460.

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conduct, to give them an undue advantage of which they improperly availed themselves, I cannot think that parties so at arm's length are disabled by law from settling without litigation, and without going through any preliminaries for the purpose of ascertaining that each party is sufficiently informed as to the injuries. I cannot think that there is anything in the law to prevent them from making such a settlement; and it is fair to remember that while on the one hand the railway company offers compensation, and may offer what may turn out to be too little, on the other hand the party injured not infrequently over-estimates his injury and asks a great deal more than he is fairly entitled to.

Well, then, we must look at the circumstances as they stood. There had been an accident of a peculiar kind, which in point of fact had inflicted no external injury. Whatever injury there might be latent in the case was either upon the nerves arising from the shock of the accident, or consisted in some internal effect upon the bodily system not at the time known to or discoverable by either party. In that respect it seems to me that the reports of Dr Watson are of importance. They shew that he had more than once visited the patient, and had discovered nothing more than that.

If he had told the company this was a case of a certain kind involving a permanent disability it may be that the company, having received that information, would have been acting in a manner not becoming them in keeping it back and taking advantage of that knowledge to obtain a settlement which under those circumstances might reasonably have been said to be too favourable to themselves. But there was nothing of that kind. It was a case as to which it was doubtful whether there was anything more than a temporary shock which would pass away—there was no external injury. As far as I can see there was no improper suppression of anything which Dr Watson had said. He had said that he had been unable to discover any external injury, although I do not think that that appears in the written report. That was told, and as far as I can see was quite truly told, to the sufferer. The sufferer was a man of business, for I must consider that a commercial traveller may be so described, and there is no suggestion that he was not a man of intelligence. He was living with his sister and her husband, the husband himself being in the employment of the railway company, and no motive is even suggested for his not giving such fair assistance as he could to his brother-in-law in the circumstances as they stood. He was informed by the railway company beforehand, in order that he might inform his brother-in-law (the sufferer) beforehand, of what it was that they proposed to offer. And more than that, at the very outset, the railway company had invited from the pursuer any demand which he might think fit to make, and he had preferred apparently to wait for what they might be pleased to offer.

Well, the parties met, and with that previous notice, and when he was in a state of mind which, according to his brother-in-law's evidence, appears to me totally to exclude the notion of inability to understand what he was about,—the pursuer deliberately took this money which was offered, £27, and signed the document which your Lordships have seen, which is short, and partly printed, leaving the necessary particulars to be filled up, which he did himself in, as appears to me, a very good handwriting, not at all indicative of any species of bodily disability at the time. For my part, I should say that whether he did or did not carefully read the document, it was impossible for him to

have filled it up, and signed it as he did without seeing enough of it to understand it, and if he is to be trusted when he says that he did not read it, I can only say that I should conclude from that that he did not read it because he knew perfectly well what was in it without reading it.

Well, what is the document? It is a full discharge of all claims of this sort, and it is obvious that it is the object of such a payment, offered in such a manner, to get rid of the uncertainty and the expense, and the risks of litigation on the one side and on the other. The pursuer signs this document, and then brings this action a year, or more than a year, afterwards.

Now, of the points which have been insisted upon, the most important, as it seems to me, is the suggestion that the acceptance of the payment and the signature of the document were at the time qualified by an express reservation, which either ought to be taken as accepted by the company's agent, or, at all events, as shewing that the pursuer's mind did not go with the words of the document which he was signing. That being the most important matter now insisted upon, it seems to me, in the first place, to be very remarkable that there is no reference to this in the judgments of the Court below, and in the absence of that reference I hardly think that your Lordships ought to assume that the mind of the Court below did turn upon that point. Well, if not, what is there to maintain this judgment? But even taking that point without any prejudice from the absence of reference to it in the Court below, still it seems to me to be a point, which taken as it is, and having regard to such evidence as has been given upon it, makes it extremely important to see what the case was which was put upon the record, and of which case the parties were allowed to proceed to proof, because when the case came by the earlier interlocutor before the Inner-House, their Lordships remitted that part of the case "of consent" to the Lord Ordinary, "with instructions to allow parties a proof of their averments made on record."

Now, what are these averments? The first was that the receipt did "not discharge, and was not understood by the pursuer to discharge, his right to make any further claim against the defenders." Now, if there had been a reservation expressly and unequivocally made, so that it must have been understood on the other side, and one which was intended to make out that which seemed to be an absolute discharge in fact a qualified one, as if for payment on certain contingencies, or merely on account,—if it had taken place with that indication,—it must have been from first to last so understood by the pursuer, and it is to me perfectly inconceivable that if it had been so he could have pleaded his defence in the way he does, because no man in such a pleading, with his mind addressed to the point, is in the habit of stating his case greatly below that which he means to rely upon. But, as the pursuer states it, it seems to turn on only two propositions, one, that the effect of the instrument upon the face of it is not a discharge (as to which I need say nothing, because it is clearly an untenable point), and secondly, that the pursuer did not understand that it was a discharge. But if it was the pursuer only who did not understand that, and if nothing took place to make the document otherwise than that which it was upon its face towards the party paying the money, the point comes to nothing, and so the Lord Ordinary expressly held when he dealt with the issues which were in the first instance proposed.

What were the issues which the pursuer proposed? The first of them was "whether he was injured or not." I put that aside, as there is no question about

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it. Secondly, "whether when the pursuer signed the receipt he understood that he thereby discharged his claims against the defenders in full." But the Lord Ordinary said that that would not do, that it would be no defence, and if nothing more had been pleaded but that, the defence would have failed in point of relevancy. It is after the pursuer knows that this defence which he has pleaded is good for nothing that these statements are made in the evidence. Well, since three witnesses speak of having heard something to the effect that in a possible case the pursuer would come back upon the railway company, I should be very sorry to suppose that nothing of the kind was said, but the question is whether it was so said, either in point of intention on the part of the pursuer or in point of the meaning, which is conveyed to the mind of the other party, that it amounted to a reservation qualifying the written document. I cannot think that it was. I cannot think that he ever supposed that it was, because otherwise he would have pleaded in a different way from what he did; and that leads me to attribute a much greater weight upon that point to the statement made by Mr William Wood, who both in his statement and in his examination in chief, and still more emphatically in his cross-examination, says very positively that that did not happen in the sense now relied upon, because, though I agree with those who observe that three witnesses who remember a matter are generally more to be trusted than another who does not remember it, yet if it had taken place in the way necessary for the pursuer's argument, so as to convey unequivocally to Mr William Wood the idea that the written document did not express the true sense of the parties, then I think he would have been likely to remember it, and perhaps, as he himself thinks it very probable, he would not have paid the money. The conclusion which I draw from the evidence as a whole upon that point is that whatever was said it was not so said as to be on both sides intended and understood to be a qualification of the *res gesta* of the written and signed document. That it was not so understood by Mr William Wood, I am bound to believe from what he has himself said. That it was not so understood on the other side, I cannot but conclude from the manner in which the pleadings stand upon the point.

Then upon the other points which are pleaded the next two pleas are doubtless those alone which caused the Court to send the case to proof at all. The defenders' representative assured the pursuer "that he was suffering only from a slight nervous shock and that he would be all right in a week or two." Well, with reference to that there is nothing upon the evidence whatever. The words in a part of the evidence which were referred to by the learned counsel for the respondent were only these,—he asked whether he had ever had a slight nervous shock before. That is not telling him that he was suffering only from a slight nervous shock, and still less that "he would be all right in a week or two." If that had been said it would no doubt have been very material indeed, because Dr Watson's opinion, such as it was, was known to the railway company; but there has been no attempt to prove it. Asking a man whether he has ever had a slight nervous shock is as remote from telling him that in point of fact he is suffering from a slight nervous shock and nothing more as anything can be, in the sense of a representation tending to influence action.

Then the third statement in the pleadings is "That shortly after the accident, and in consequence of it, the pursuer's mind became seriously affected." When we get that upon the evidence it appears thus, that he was in a state of excitement and alarm on the day of the accident when Dr Watson first saw him, and that that

alarm was greatly mitigated on the next day; and so far from the state of his mind at the time when the receipt was signed and the money was paid appearing to have been such as to affect his competency to enter into the transaction, his own brother-in-law distinctly proves the reverse. For my part I can see nothing in the evidence of the sister or any other part of the evidence to suggest to me the least doubt that he did really understand what he was doing. If, therefore, we are to look to the averments on the record, it appears to me impossible to hold that any of them which are material have been proved; and what the evidence adds to the averments, I think looked at in the light of those averments, does not amount to that kind of qualification of an act done which ought to be regarded as defining it of the character which it would otherwise have had.

Therefore I humbly move your Lordships to reverse these interlocutors, and to assoilzie the defenders from the conclusions of the action.

LORD WATSON.—I am of the same opinion, and I have only to say that I concur in everything which has been said by the noble and learned Earl.

LORD BRAMWELL.—I am entirely of the same opinion, and I doubt very much whether I ought to say anything more when my noble and learned friend, who is better acquainted with this procedure than I can possibly pretend to be, has not said anything more, but as we are differing from the learned Judges of the Court of Session I should just like to say why I have come to the conclusion which I have. It is very true—I believe it is what plaintiffs trust to when they bring actions of this description—that people are sorry that they should have suffered and not been adequately compensated. That, of course, as the noble and learned Earl has said, is no reason why, if they have entered into a bargain which deprives them of the right to further compensation they should not be held to that bargain, and I feel disposed to hold them to it strictly, because if on the one hand one is sorry for them, on the other hand it is to my mind a most objectionable thing that they should be encouraged to wriggle (to quote an expression of an Irish Lord Justice) out of an agreement which they have entered into, and to be tempted to make untrue statements, or if not absolutely untrue, at all events exaggerated and coloured statements, as I have not the slightest doubt has been done here.

Now, I should just like to say one or two words upon the reasons for which I have come to this conclusion. In the first place, as to the facts, I really do think that if ever there was an unreasonable complaint of the conduct of railway people it is in this case. Instead of going to this man privily, as it were, due notice is given to him by his own brother-in-law that a person will come with a named sum of money on the next day. He has time to consider, therefore, whether he will take it or not. When on the next day that person comes, the money is given to him in the presence of his sister and of his brother-in-law, and he signs this receipt. Well, now, can anyone pretend for a moment that this man (I forget what his age is, but he is not very young)—he is a middle-aged man, I think, and a business man, a commercial traveller—did not perfectly know what it was that he was signing, and the effect of it? If he did not read it he ought to take the consequences, but I think the answer has already been given. If he did not read it, it was because he did not want to read it, for he knew what was in it. Under these circumstances, to charge

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the railway company with anything like unfairness seems to be really preposterous.

I made a remark in the course of the argument which I should like to repeat. Three people say that something was said about the pursuer's possibly coming upon the railway company again. A witness on the other side, young Mr Wood, says that he does not believe that was said. I think there is some hesitation or ambiguity in his evidence about it. I believe that at one time he says he does not recollect, and at another time he says it was not said. But he gives a very good reason for not believing that it was said, and that is that he would not have paid the money unless it had been conveyed to his mind that it was taken in full satisfaction.

I am reluctant to think that the three people who say that something of that sort was said are telling a wilful untruth about the matter, and I think it is likely, as has been suggested by the noble and learned Earl, that something to this effect might have been said,—"Well, I shall make another application to you if I turn out to be very bad." I think it is perfectly possible that that was said, but so said as not to convey to the mind of the man who was paying the money that it was not taken as it was paid in full satisfaction. Like the noble and learned Earl on the woolsack, I cannot help relying in support of that very much upon the statement which the pursuer makes in his answer to the case of the defenders. He does not put it forward that he qualified his acceptance of this money by saying,—"Mind I do not take it in satisfaction, for if things turn out to be worse I shall make a further claim upon you." I do not want to go over this—it has been commented upon by the noble and learned Earl. It is clear to my mind that he did not suggest such a thing as that, and I should say, dealing with this as an English lawyer, these answers 1, 2, and 3 would be bad on general demurrer. There was no question raised, unless indeed it was perhaps you may say something like this, that "the defenders' representative assured the pursuer that he was suffering from a slight nervous shock." Whether, if he had so assured the pursuer, it would have made any difference I do not know; I should think it ought not to have done so.

It appears to me therefore upon the substance of the matter that there really never was a plainer case than this present one; that the pursuer has no good cause of action. But the oddity of the thing to my mind is, that the judgment was pronounced upon a question which was not properly before the learned Judges, as well as I can understand, and not upon the real question. I look at Lord Young's judgment. He says,—"The parties very wisely agreed that the case should be determined by the Lord Ordinary without a jury. We now have before us the evidence taken before the Lord Ordinary, and the judgment pronounced upon it. As he has thought £500 a proper sum to award, I am not prepared to hold that the pursuer is barred by accepting £27. The question we have to determine is, whether we should interfere with that judgment." There does not seem, in the judgments of the learned Judges, to have been any dealing with the question which is really the question,—a question raised explicitly by the defenders on the pleadings, that all future actions were barred by that which had taken place between the parties. That is a very singular thing.

I should just like to say one word more, although I suppose it will be *obiter*. If, when the document was signed, the pursuer had made it intelligible to young Mr Wood that he was not taking the money, as the paper said, "in full satisfaction and discharge of all claims," I am inclined to think that if he could

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have proved that in point of fact he would have been at liberty to maintain this action, and I do not see anything in the cases which were cited and relied on which goes further than that. I cannot suppose that a man might not sign a document, and at the same time give to the person to whom he had handed that document, and with whom he was dealing, to understand, "Mind, I do not mean what I say." I do not mean to say that such things ought to be encouraged, and I do not mean to say that I should believe a statement of that kind very readily, if such a case came before me. But, as I have said already, I do not think that anything of that sort took place here. I think that if anything was said, the principle of *Croft* v. *Lumley* (1857, 6 Clark's H. of L. Cases, 672) would apply, that it must be taken that the man paying was paying according to the terms upon which he said he was paying, and that he was not informed that he must not understand that.

I really do think, my Lords, that this is about as plain a case as ever was, and as to any complaint against the conduct of the railway company, and of the Woods who acted for the company, it not only seems to be utterly unfounded, but it does seem to me that they behaved in the very fairest way.

LORD MACNAGHTEN and LORD MORRIS concurred.

THE HOUSE ordered and adjudged that the interlocutor appealed from be reversed, and the defenders (appellants) be assoilzied.

WM. WHITE-MILLAR, S.S.C.—LOCH & GOODHART—WILLIAM OFFICER, S.S.C.—A. BEVERIDGE.

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June 16, 1891.
Whyte v. Northern Heritable Securities Investment Co.

GEORGE WHYTE, Appellant (Respondent).—*Haldane, Q.C.—Kemp—A. S. D. Thomson.*

NORTHERN HERITABLE SECURITIES INVESTMENT COMPANY AND OTHERS, Respondents (Petitioners).—*Murray—Le Breton.*

Bankruptcy—Nobile officium—Discharge of both trustee and bankrupt—Appointment of new trustee—Abandonment of claim.—Certain creditors upon a sequestrated estate on which both the trustee and the bankrupt had been discharged, the latter without composition, presented a petition for a remit to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a new trustee, averring that there were funds belonging to the sequestrated estate which had not been recovered, and that the petitioners had not been paid their debts in full. It was objected by the bankrupt that all claim to these funds had been abandoned by the trustee. *Held* (*aff.* judgment of First Division), that the petition fell to be granted.

(IN the Court of Session, Nov. 21, 1888, 16 R. 100.)

George Whyte appealed.

Counsel for the respondents were not called upon.

Earl of Selborne.
Lord Watson.
Ld. Bramwell.
Lord Morris.

EARL OF SELBORNE.—This appears to be an extremely clear case, so far as the question of the competency of the Court of Session was concerned, to make an order in a sequestration for the appointment of a new trustee. For the last thirty years there has been such a practice in the case of funds which have not been got in or distributed at the time of the discharge of the trustee in bankruptcy. No doubt a practice which has continued so long may be wrong, but it is needless to say the presumption is the other way. The case rests upon this proposition, that when a trustee has been discharged, all funds not at that time distributed vest by law in the bankrupt for his own benefit, although the creditors have not been paid 20s. in the pound, or interest on their debts; and that at all events, if that is not the necessary construction of the clause itself, the

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fact of there being no provision made in the statute as to the machinery by which a new trustee is to be brought into existence in that case is enough to prevent anyone but the bankrupt from claiming and getting the benefit of those funds. I confess I had great difficulty in following that argument, having regard to the express provisions of the Act, as well as for the general purpose for which it was passed. The general purpose is to enable a debtor who cannot pay his way to get his discharge upon the footing of giving up the whole of his property for the benefit of the creditors. For the present purpose (subject, of course, to any contest which may be raised elsewhere), it must be assumed upon the facts which we know that the fund in question was, at and before the time of the bankrupt's discharge, a part of his distributable estate under this sequestration. Supposing it was so, what is there to take away from the creditors the right to have it applied for their benefit? The 102d section, the vesting clause, in the fullest and strongest terms vests, for the purpose of distribution, in the trustee, "for behoof of the creditors, absolutely and irredeemably," "all right, title, and interest" in every part of the property of the debtor. Another clause, one of the dividend clauses, the 132d, after express provision for the first and the second dividends, goes on to say that similar divisions are to be made from time to time "until the whole funds of the bankrupt shall be divided." And the very clause which is relied upon, the 152d, provides for steps to be taken by the trustee in order to obtain his discharge "after a final division of the funds." From the beginning to the end of the Act there is nothing to cut down the right given to the creditors, in accordance with the general purposes of the Act, to have all the funds which vested in the trustee divided among them.

But it is argued that, because in point of fact, in such a case as this, where there has not been a final division of the funds, a trustee, upon the erroneous supposition that there were no more funds to be divided, has taken the steps provided for by the 152d section, and has got a discharge, therefore it is impossible to distribute the funds which ought to be distributed for the benefit of the creditors, and that they revert to the bankrupt. I should have said that that was a very difficult proposition seriously to maintain, even if there had been nothing in the Act providing for the circumstances under which something is to revert to the bankrupt. But the 155th section expressly says that "any surplus of the bankrupt's estate and effects that may remain after payment of his debts, with interest, and the charges of recovering and distributing the estate, shall be paid to the bankrupt." And there is another section mentioned by one of your Lordships, dealing with a case which has not happened here, which also provides for something which is to go to the bankrupt.

Well, then, what is the question? It is contended that, when, upon the face of all the clauses in the Act which determine and provide for the rights of the parties, it is clear that this fund is not to go to the bankrupt, but is to go to his creditors; yet, because a trustee has been discharged and the case does not fall under the clause which provides for death, resignation, or removal, and the necessity for appointing a new trustee had not been discovered till the existence of this distributable fund was discovered, therefore you cannot now by any means whatever appoint a new trustee, because there is no express provision for it in the statute. I must say for my own part I look upon the appointment of a new trustee for this purpose as nothing more than machinery for giving effect to the rights given by the Act. It seems to me that the Court has under

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the Act the power of providing that machinery for giving effect to those rights; and the practice of the Court of Session has been in accordance with that view of the case.

I think it would be very difficult to imagine a clearer case than this is; and, with regard to the special circumstances, the facts which were stated, as operating by way of an equitable estoppel in some way or another to prevent the assertion of the right of the creditors, seem to me not to raise any intelligible shadow of any equity whatever. Therefore, I have to move your Lordships that this appeal be dismissed, and, the appellant being a pauper, that it be dismissed in the way usual in pauper cases, without costs.

LORD WATSON.—I am of the same opinion. The provisions of the Bankruptcy Act of 1856 strip the bankrupt of the whole property of every description which is vested in him at the date of the sequestration, and also of all property that may come to him during the subsistence of the sequestration prior to his own discharge. According to my view of the statute, he can only get back the property which has been taken from him absolutely and irredeemably by the force of the statute in one of three ways—either, first, by his discharge upon payment of a composition to his creditors; secondly, by receiving a part of it as surplus after satisfying their claims to the extent of twenty shillings in the pound; or, in the third place, by a transaction with the trustee and creditors of the bankrupt's estate. The creditors may deal with him as to the footing upon which they give back part of the property; they may abandon it. It is not necessary, in my view, that in every case there should be a retrocession. The acts of the trustee and creditors in relation to it may be such as to indicate that the bankrupt is, according to their desire, to be deemed to be in future the master or the owner of the property, and that they have abandoned and rejected it.

Now, as to the period when a sequestration comes to an end, the able argument of Mr Haldane rested mainly upon this: that the sequestration in this case had absolutely come to a close in terms of the statute, and accordingly that the exercise of their prætorial power by the First Division of the Court of Session was in reality legislation; that they had revived a process which by the statute was at an end. I am quite unable to take that view of the provisions of the Act. I think the final close of the sequestration contemplated by the statute was the discharge of the trustee after the final distribution—after the whole of the funds vested in him by force of the statute had been applied to their proper purpose, namely, payment of the debts ranked in the sequestration. When I speak of final distribution, I mean distribution of what were in fact the last funds available for the purpose.

Now, in this case there was no doubt a discharge of the trustee upon the footing that the available funds had been distributed. That was the footing upon which the discharge of the trustee proceeded, so far as I can see. But it proves to have been in face of the fact that there were funds extant at that date which were available, and might have been made available by the trustee for division among the creditors. Now, it appears to me that the discharge of a trustee upon that footing before final distribution, either in ignorance or by inadvertence, cannot possibly alter the provisions of the Act, and that by force of the Act the sequestration notwithstanding subsists for behoof of the creditors. When a trustee has been discharged upon that footing erroneously, I do not doubt (indeed, I think it is implied in the statute, as my noble and learned

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friend on the woolsack has said) that the Court has power to furnish the machinery necessary for working the sequestration to its close—necessary for getting in the whole assets available for payment of the creditors and distributing those assets among them, and I have only to add, that in my opinion the parties who made this application to the Court below were quite right in appealing to the *nobile officium* of the Inner-House, because I do not find in the statute any precise delegation of the authority required for such a purpose either to the Lord Ordinary on the Bills or to the Sheriff.

Upon the second part of the case I have nothing to add.

LORD BRAMWELL and LORD MORRIS concurred.

THEIR Lordships dismissed the appeal.

SAVIDGE & SOUTHERN—ANDREW URQUHART, S.S.C.—ANDREW BEVERIDGE—ALEX. MORISON, S.S.C.

No. 7.

June 25, 1891.
C B v. A B.

C B, Appellant (Respondent).—*Rigby, Q.C.—Haldane, Q.C.—Guthrie Smith—Birrell.*

A B, Respondent (Petitioner).—*Sir H. Davey, Q.C.—Murray.*

Curator Bonis—Insanity—Insane delusion—Opposition of alleged incapax—Necessity for cognition or judicial inquiry.—When a petition for the appointment of a curator bonis to a person alleged to be incapable of managing his own affairs is opposed by him, he is not entitled to demand cognition or a formal judicial inquiry at which witnesses shall be examined on oath, with an opportunity for cross-examination, before the appointment is made, but the Court is entitled to adopt what course it considers best to obtain the information necessary, and, if it sees fit, to proceed on the reports of medical men.

The wife of a man who was detained in a lunatic asylum presented a petition for the appointment of a curator bonis to her husband. He opposed the petition, maintaining that he could not be superseded in the management of his affairs except under cognition upon a brieve from Chancery. He did not dispute the propriety of his being in the asylum, but stated that such delusions as he might labour under in no way interfered with his business capacity. The First Division, on a consideration of medical reports obtained by the petitioner, by the respondent, and by the Court, *granted* the petition.

On appeal judgment *affirmed.*

Ld. Herschell.
Lord Watson.
Lord Morris.

(IN the Court of Session, Nov. 8, 1890, 18 R. 90.)

The respondent appealed.

LORD HERSCHELL.—This is an appeal from a judgment of the First Division of the Court of Session affirming an appointment made by the Lord Ordinary of a curator bonis in the case of the appellant, who at that time was under detention in an asylum as a person of unsound mind. He was so detained in conformity with the law, by reason of the certificates which were given by two medical men with reference to his mental condition. He being thus under confinement as a person of unsound mind, an application was made by his wife for the appointment by the Court of a curator bonis. The appellant opposed any such appointment being made, and those who were acting for him, after putting before the Court the certificates which had been given by various medical gentlemen, to whom I will refer in a moment, "submitted his case to the consideration of the Court" and prayed that "after making such further inquiry as shall appear to the Court to be necessary or desirable in the circumstances, the Court, in the event of considering it necessary that a curator bonis should be appointed to the respondent, may be pleased to appoint such person as the Court in its wisdom may select." And then objection is taken to the appointment of the person whose name had been suggested by the petitioner.

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Now, it appears that on the 20th of May of last year, the appellant, having been confined in the lunatic asylum in the month of April, was examined by two medical men, Dr Stewart and Dr Watson, and that they gave this certificate—"While we should not recommend it as safe that" the appellant "should be relieved from a restraint which has acted most beneficially in favouring recovery, and is, we believe, fitted to secure the best prospect of ultimate restoration to health, we feel it impossible at the present moment, from facts observed by ourselves, to grant a certificate for the appointment of a curator bonis. What we do recommend is delay; and we beg to advise that after the lapse of a month or six weeks a further examination of the appellant should be held for the purpose of deciding upon the necessity of appointing a curator."

A few days after that, a little more than a week, the appellant was examined by two other medical men, Dr Balfour and Dr Littlejohn—the one on the 28th of May, and the other on the 31st. On the 28th of May Dr Balfour certified that he had "seen and examined" the appellant, and was "of opinion that he is of unsound mind and incapable of managing his own affairs or of directing their management." And on the 31st of May a similar certificate was given by Dr Littlejohn.

If the matter had rested only on those certificates it might have been open to some possible question, regarded from a medical point of view, whether the appellant was incapable of managing his own affairs, by reason of the terms of the certificates given in the first instance by Dr Stewart and Dr Watson. But naturally enough those who were acting for the appellant as his law-agents secured the services of two medical gentlemen in whom the appellant had confidence (I rather think one of them was named by himself), namely, Dr Clouston and Dr Byrom Bramwell. They, on behalf of the appellant, made an examination of his condition with a view to expressing their opinion as to whether he was or was not capable of managing his affairs, and they came to the conclusion which is thus expressed—"We found him coherent and acute in regard to business matters. His memory seemed to be good with regard to everything except the events of the morning of the 3d of April last; but taking into account the whole of the facts elicited at our prolonged examination of his mental condition, we feel unable to give a certificate that he is yet fit to manage his affairs or to give directions for their management."

Now, it appears to me that anything more calculated to produce in the mind of anyone the conviction that this gentleman was incapable of managing his affairs it is impossible to conceive. That two medical men visiting him at the instance of his law-agents, and at his own instance, with the view of, if possible (for, of course, they would understand that to be the object of their visit), certifying that he was capable of managing his own affairs, should feel themselves unable to give such a certificate, shews that the conclusion arrived at by those who had examined him on behalf of the petitioner was not a conclusion which resulted merely from bias or prejudice in their minds, or from any want of skill, but was a conclusion which those selected by himself or his advisers felt themselves unable to controvert.

The matter does not rest there, because the appellant was also examined by three other medical men at his own instance or the instance of his advisers. Dr Howden and Dr Ferguson saw him in the month of November 1890. I need not trouble your Lordships with the detail of the statement which they

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make, which is of considerable length, but in that statement they detail a conversation which they had had with him, which indicated that he was under the belief that for many years those about him had been attempting to poison him with arsenic. "He stated that he had frequently seen a suspicious white powder in the doses of Epsom salts he was in the habit of taking, that he tasted arsenic in his tea, that he had overheard some remarks about the drug in his house, and that he believed someone was procuring it from a firm who advertised neuralgic pills. As proof of the last supposition he had found the cover of a journal in which the pills in question were advertised. Inside the cover there were two pieces of red silk. When asked to explain what connection the silk had with the arsenic" (a very natural question, of course, for one medical man to put to another medical man) "he said he believed that the pieces of silk had contained arsenic, and that he regarded them as important links in the chain of suspicion. When asked to name the person whom he suspected of obtaining the poison he declined to do so." The conclusion which these gentlemen state is, that he was "of unsound mind, that if at large he might be dangerous to the persons who are the object of his suspicions, and that the nature of his delusions unfits him to treat with fairness the members of his own family and household, and renders him liable to be biased in a similar manner against others; (third) that, nevertheless, he is capable of clearly appreciating his worldly interests in many ways; (fourth) that if management of his affairs includes a just and natural regard to the interests of his family, we do not consider he is worthy of being entrusted with their management; but (fifth) that we are not prepared to say that his mental condition, as ascertained by us, incapacitates him from administering his affairs in other respects"—which obviously means, that he is, in their opinion, suffering from insane delusions which might affect the disposal by him of his property, and might lead him to employ it in a manner in which he would not employ it if he were sane; that is to say, he might dissipate it upon objects on which if he were sane he would not desire to spend it.

On the 7th of November 1890 he was examined by Dr Yellowlees, who had an interview with him lasting over two and a-half hours, and he says,—"I believe that" the appellant "is conversant with his business affairs and investments, and that he could give directions concerning them, but such directions would be influenced or swayed or determined by the presence of delusions as to relatives or others conspiring against him and desiring to injure him, and might be influenced by insane ideas as to spiritualism and its devotees, supposing" the appellant "to entertain such delusions and ideas."

Now, those were the opinions which were before the Court. It appears to me that if the Lord Ordinary was justified in being guided by the expression of medical opinion, it is difficult to conceive a stronger case justifying the conclusion that it was proper not to leave the appellant in the management of his own affairs, but to appoint, during the period for which his insanity should continue, a curator bonis. When the matter came before the Lord Ordinary, notwithstanding these medical opinions he determined not to act upon them alone. The later opinions which I have read were, I think, given after the date of the Lord Ordinary's judgment; they were before the Inner-House but not before the Lord Ordinary. But the Lord Ordinary, not being satisfied to act upon the medical opinions which were before him, remitted the case to Sir Arthur Mitchell, who, I believe (it is so stated by Lord M'Laren) fills the office of Chief Commissioner in Lunacy, to report to him upon the subject. About the competency

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and the high character of Sir Arthur Mitchell there cannot be a question. Sir Arthur Mitchell accordingly reported to the Lord Ordinary that, in his opinion, the present appellant was "of unsound mind," and that in consequence of this "he was incapable of managing or of giving directions for the management of his affairs." Sir Arthur Mitchell states that he "arrived at this opinion without hesitation or difficulty." I understand that to mean that in his opinion his unsoundness of mind was of such a character that he was incapable of managing or giving directions for the management of his affairs. The Lord Ordinary was not left merely to a consideration of the terms of that written opinion, because he had a personal interview with Sir Arthur Mitchell, and learned from Sir Arthur Mitchell that in his opinion the appellant was "subject to delusions related to what is known as spiritualism, of such a nature as to render him quite an unsafe guardian of his own property, and which might render him liable to be very readily imposed on by designing people who were aware of his weakness." The Lord Ordinary adds,—"He entertains besides, Sir Arthur informs me, feelings of mistrust towards his family which cannot be altogether disregarded."

Now, that was the information which the Court possessed. If it was open to the Lord Ordinary and the Inner-House to exercise their discretion, relying upon the information afforded by these medical opinions and the report of Sir Arthur Mitchell on the remit to him, I do not think it can be doubted for a moment that the conclusion at which they arrived in their discretion cannot possibly be questioned—no ground for questioning it has been made out. There was really no conflict of opinion in this case between the medical men who were consulted. Those consulted on behalf of the appellant were manifestly as fully persuaded as those consulted by the petitioner that it was a case in which it was not expedient that he should be left to manage his affairs.

But then it was argued on behalf of the appellant, first of all, that there was an absolute right in such a case as this, where the appointment of a curator was opposed, to have a cognition and an investigation by a jury, and that only after a finding by a jury could he be deprived of the management of his affairs. I think it is impossible so to maintain after the judgment of this House in the case of *Bryce* v. *Graham*, 1828, 3 W. & S. 323. That was a case where a curator of an admittedly insane person had been appointed, and it was alleged that he was at that time convalescent, and sought on that ground to get rid of the curator. The Court there remitted to the Sheriff-depute to make certain inquiries. I shall have occasion to deal with the terms of that remit presently—it is unnecessary to go into them for the moment; but notwithstanding that inquiry by the Sheriff, it had been contended before your Lordship's House that there was an absolute right to a cognition and to the verdict of a jury upon the question then at issue. Lord Eldon, influenced by the English practice, appears at first to have been disposed to entertain that view, but after learning what had been the practice of the Court of Session, he thus expressed himself,—"When this cause was heard, it was thought necessary by this House to desire the Court of Session to consider whether they could take this course according to their law, or whether there was not a necessity for a cognition to issue in order to have the finding of a jury on the case. We have since received the answer to that question so propounded by your Lordships, and that is, that the Court have been in the habit of proceeding in this course for a very long period of years, for so long a period that I do not think it is proper to advise your Lordships to hold that this is *not a legal* proceeding on their part." Now, that I take to be an abso-

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lutely unequivocal decision of this House that there is no such right to a cognition as has been contended for here, and that the Court can without any such cognition deal with the question of the appointment of a curator bonis in the case of a lunatic.

But then it was contended on behalf of the appellant that even if there be not the absolute right to a cognition contended for, yet the Court can only appoint a curator after a judicial inquiry, that is to say, after evidence has been taken in the ordinary way upon oath with the opportunity of cross-examination by the opposing party—I do not mean to say that it was contended that this must be done in every case. It was admitted that in many cases a curator was appointed without such an inquiry, but the argument was, that in every opposed case, where the alleged lunatic was objecting to the appointment of a curator, the appointment of a curator could only be made after a judicial inquiry. Some reliance was placed by the learned counsel, for the purpose of supporting that argument, upon the course taken in the case of *Bryce* v. *Graham*, to which I have just alluded. It is quite true that in that case the Court remitted to the Sheriff-depute "to inquire concerning the condition of intellect and state of faculties of the petitioner James Bryce, and his abilities to manage and conduct his own affairs," and they authorised and directed the Sheriff "to proceed to the inquiry by personal visitation of and intercourse with the said James Bryce at various times, and without previous warning or concert, as also by examination upon oath of such witnesses suggested by either party who had sufficient cause of knowledge respecting the premises, and likewise by the opinion of medical persons named by the Sheriff to visit him"; and they then ordained the Sheriff "to report his opinion on the said matters to the said Lords." But, as I understand, such a remit to the Sheriff was a course taken by the Court only for the purpose of informing their own minds and enabling them to decide, after receiving that report, what was in their judgment the proper course to be pursued. It was not a remit to the Sheriff to try the case. Whatever conclusion had been arrived at by the Sheriff, as I understand, it would have been open to the Court to disregard it, and notwithstanding the opinion of the Sheriff that a curator ought or ought not to be appointed, the Court might have come to the very opposite conclusion. It was only for the purpose of assisting them to form a judgment that the remit was made. Now, I do not understand that remit to have been made in a form which can be regarded as a precedent universally to be followed and applicable to every kind of case. In that particular case it was considered by the Court, having regard to circumstances, to be a proper form of remit, but I do not consider it either to have decided that in every case a remit to the Sheriff was necessary, or that if there were such a remit that was the proper form.

I think the contrary is proved by the authorities. In the case of *Gordon* v. *Gunn*, 11 S. 235, which was also a question as to the appointment of a curator bonis, and where there was a remit to the Sheriff, the remit was in these terms —"To inquire concerning the condition of intellect and state of the faculties of Mr John Gordon, of Swiney, and his abilities to manage and conduct his own affairs, and with power to examine medical men and witnesses on the subject, and to report." Now, the power is no doubt given to examine witnesses as well as to examine the alleged lunatic himself, and to examine medical men, but no obligation is imposed on the Sheriff, nor is any direction given, as I understand, to the Sheriff to do so, as was given in the case of *Bryce* v. *Graham*,

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where he was not only empowered but was in terms directed to do so. Here all I can find is that power was given to him to examine medical men and other witnesses on the subject.

The case does not stop there, because in *Dewar* v. *Dewar*, 12 S. 315, which is a later case, the Court made a remit to the Sheriff-substitute "to inquire as to the facts and circumstances alleged by the parties, and report whether in his opinion it is necessary or expedient for the protection of the respondent to appoint a judicial factor or factors or curator or curators bonis." The Sheriff-substitute, in returning his report, stated that he had "personally visited the respondent, and made due inquiry otherwise." I need not trouble your Lordships with the terms of that report. It is manifest that in that case the appointment neither directed him to examine witnesses, nor did he take proof as upon a judicial inquiry, but he made his report to the Court, and then the Court were in a position to act after receiving the information which he supplied to them. Now, that case seems to me to be a distinct authority against the proposition contended for by the learned counsel for the appellant, because it is obvious that if in every case where there is opposition there is the right to a judicial inquiry either by the Court itself or by a remit to the Sheriff, the Court neglected its duty in that case by not making the judicial inquiry which it is contended must in all cases be made.

Therefore I confess it appears to me that so far as authority goes, there is no authority for the proposition that in every case the Court is bound to make a judicial inquiry, or to remit the case to the Sheriff in order that he may do so. And it seems to me that there is authority for the course being taken which was taken in the present case, for in *Forsyth* v. *Forsyth*, 24 D. 1435, the Court made a remit to two men of skill in order to have the advantage of their opinion upon the subject. In the present case a remit was made by the Lord Ordinary to Sir Arthur Mitchell, a man, as I have said, highly competent to fulfil such a function, and the Court had the advantage of his report before arriving at any conclusion. Therefore there appears to me to be no authority justifying the assertion that the Court can only act by taking proof itself or having proof taken before the Sheriff. There is authority for the proposition that the Court may act, and has been in the habit of acting, upon a remit to a medical man or medical men of skill to assist it in forming its conclusion. But all these authorities together leave without any doubt the impression upon my mind that in every one of these cases it is for the Court to form its own conclusion, and it is for the Court to determine in its discretion what assistance it will obtain towards forming that conclusion. That assistance has been of a different character in different cases, but whatever its character has been, whether in the way of proof before the Sheriff or not, it appears to me only to have been such assistance as the Court thought right to acquire in order to enable it to come to a conclusion as to how the discretion reposed in it ought to be exercised.

If that be so, I think it disposes of the whole of the contentions which have been put before your Lordships on behalf of the appellant, and it shews the course taken in this case to have been correct. I therefore move your Lordships to affirm this judgment, and to dismiss the appeal.

LORD WATSON.—I cannot say that I have anything to add to the statement of this case which has been made by my noble and learned friend. To anyone conversant with the law and practice of Scotland, this must, in my opinion, appear

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to be a most groundless appeal. I think there can be no doubt whatever, in the first place, that the Court of Session had jurisdiction to entertain the application made to it; in the second place, that notwithstanding the appearance of the present appellant to oppose its prayer being granted, it was a matter entirely within the discretion of the Court to determine what inquiry was necessary for the purpose of enlightening them as to the capacity or incapacity of the appellant to manage his own affairs at the time; and in the third place, I think it equally clear that the certificates of the medical men which were produced were quite sufficient to justify the Court in taking the course which they did take, and making the appointment without further inquiry.

LORD MORRIS concurred.

THEIR Lordships affirmed the judgment appealed from and dismissed the appeal.

KEEPING & GLOAG—MITCHELL & BAXTER, W.S.—GRAHAMES, CURREY, & SPENS—TODS, MURRAY, & JAMIESON, W.S.

No. 8.

July 2, 1891.
M'Inroy v. Duke of Athole.

WILLIAM M'INROY AND OTHERS (M'Inroy's Trustees), Appellants (Respondents).—*Asher, Q.C.—Ure.*

DUKE OF ATHOLE, Respondent (Complainer).—*D.-F. Balfour, Q.C.—Murray.*

Servitude—Road—Constitution—Occasional use as access to shooting ground only.—A mountain path formed a convenient short cut from one part of an estate to another through a projecting tongue of an adjoining property, and from 1821 it was used by the proprietors of the estate as the means of going from the one part of the estate to the other when deerstalking in autumn, but it was used by them for no other purpose and at no other time, and between 1846 and 1878 they hardly used it at all. It was not proved that this use of the path had come to the knowledge of the proprietor of the adjoining estate except on two occasions, in 1857 and 1882, and on both occasions it was challenged by him. In 1888 he brought a note of suspension and interdict against the future use of the path by the respondent. *Held* (*aff.* judgment of Second Division) that the use of the path proved was not sufficient to shew that it was in the assertion of a right, and therefore that the respondent had failed to instruct the existence of a servitude right of way over the path in question.

Earl of Selborne.
Ld. Watson.
Ld. Bramwell.

(IN the Court of Session, Jan. 24, 1890, 17 R. 456.)

M'Inroy's trustees appealed.

LORD WATSON.—The Cromalton Pass is a natural hollow about 1000 yards in length between two mountains forming part of Ben-y-Glo range. It runs nearly due east and west, and the Cromalton Burn, which has its source to the north, flows along the bottom of the pass for more than half its length on the western side, and then enters the estate of Lude belonging to the appellants. The pass and the land on either side of it are the property of the respondent. Carnlia, one of the mountains enclosing it, rises on the south to the height of 3193 feet above sea-level, but only the upper part, which apparently comprises about one-third of its altitude, belongs to the respondent. The lower two-thirds are included in the estate of Lude, which surrounds Carnlia on the east, south, and west, and comes up to both ends of the pass. The mountain range to the north of the pass is the property of the respondent.

On the north side of the pass there is a track or path continuing all the way through it, which forms the subject of the present controversy. Starting from the west the track runs along the hill face a considerable distance above the Cromalton

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Burn, which it eventually crosses, and is then continued along the hillside until it reaches the lands of Lude on the east. In this action the appellants asserted their right to use the track, on the ground that it formed part of an old public road leading from Glen Tilt in the north-west to Glenferrate and Kirkmichael in the south-east, and alternatively that they had acquired by prescriptive use a predial servitude of way for themselves, their tenants, servants, and others occupying the lands of Lude.

The appellants were allowed a proof of both alternatives, but they appear to have abandoned at a very early stage their claim for a public right of way. The user upon which they relied in the Court below as sufficient to constitute a servitude was by the family of Lude, their game-tenants, and gamekeepers, for sporting purposes, and by shepherds on their farms of Monzie and Glenloch, which are on opposite sides of Carnlia.

The Lord Ordinary (Kinnear) and all the learned Judges of the Second Division were of opinion that the appellants have failed to shew that there was any user by shepherds as in the assertion of a right. The Lord Ordinary being of opinion that the track had been used as of right during the prescriptive period for sporting purposes, sustained the alternative claim of the appellants as made by them on record. In the Inner-House his interlocutor was reversed, and the respondent obtained interdict as craved. In the argument addressed to this House on behalf of the appellants their claim was limited to a servitude of way for purposes connected with sport.

I think it right to say that I entirely concur in the observations which were made by the late Lord Lee upon the interlocutor of the Lord Ordinary. Assuming that the appellants had in the open assertion of a right persistently used the track for the purpose of shooting or watching game, I do not think they could thereby acquire the right to free passage for every man, woman, and child on the estate of Lude, for any purpose whatever. I cannot conceive how a general servitude of way could arise in a case like the present, where it is clear that the use had by Lude shepherds during the prescriptive period was by permission and not as of right.

As for the track in dispute, the evidence satisfies me that it is not part of a continuous way made by or for human use, but that it owes its formation to deer and sheep, although it has been occasionally used by men when it suited their convenience. The only witness who suggests the contrary is Mr Young, who is under the impression that deer "rather avoid paths," but he admits that he "cannot speak about deer." There are no fences of any kind in the locality, which is on the outskirts of the great deer forest of Athole, and it appears that at certain seasons the deer which are bred in the forest descend below the pass in search of food. The season for shooting stags commences in the beginning of August, and ends before the middle of October, and during that period some deer are to be found in the vicinity of the pass. But the chief exodus from the forest is during the late autumn or winter months, when stags are out of season, and only the hinds are fit objects for a sportsman's rifle. The respondent has a few sheep upon that part of the forest upon which the sheep from Lude ground are constantly straying and being driven back. These facts sufficiently account for the numerous short tracks at the west end of the pass, which were erroneously supposed by Mr Young to be human footpaths.

The evidence of the appellants with reference to the use of the track for shooting purposes connected with the estate of Lude covers the whole period from the

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year 1821 until 1887, when the challenge was given which led to the institution of the present action. But from 1821 the proprietor of Lude asserted right to the ownership of the whole of the upper part of Carnlia down to the centre of the pass, and he shot over that part of the pass which he claimed until the respondent's right to these subjects was established by a decree of the Court of Session in 1841. During the period preceding 1841 Lude sportsmen were in the occasional habit of using the pass for the purpose of getting from their ground on the east side of Carnlia to their ground on the west, and *vice versa;* but whilst the evidence shews that on some of these occasions they shot over that part of the pass which they then claimed, there is neither probability nor proof that they either used or claimed the right to use the track now in dispute.

The case of the appellants must therefore depend upon their evidence of continuous and uninterrupted possession of the right which they now claim during the period of forty-six years following 1841. It is unnecessary to enter into the details of that evidence. It comes to this, that at certain seasons in each year the proprietors of Lude and their friends or game-tenants, in the course of their sport on the upper moors of Lude, used to go to their ground on the other side of Carnlia, which they did by means of the track, and also that their keepers sometimes used the track in going their rounds. It appears to have been rarely used by sportsmen in pursuit of game, but when there were no deer on the west face of Carnlia, stalkers found the track to be a convenient means of getting to the east face instead of going round the south end of the hill. The Lude ground is not in the strictest sense of the term a forest, and deerstalking upon it was chiefly confined to the hinds, which descend from the higher grounds and frequent the sides of Carnlia during the winter months. Even at that season the use of the track was not regular but occasional.

I do not find it necessary to consider, for the purposes of this appeal, the point discussed by some of the learned Judges of the Inner-House touching the amount of tolerance which ought to be implied on the part of a proprietor who sees a party of sportsmen taking a short cut across his land in order to reach another part of their ground. That must depend upon the circumstances of each case. If the respondent and his predecessor had been aware of the use made of the track by the Lude sportsmen at certain seasons in each of forty-six consecutive years, I should have had great difficulty in coming to the conclusion that such user was merely tolerated. But it appears to me that the facts of this case absolutely exclude the idea of tolerance. The only inference which I can draw from the proof is, that had the respondent or his predecessor known of that use they would immediately have done their best to put a stop to it.

I do not doubt that, in order to found a prescriptive right of servitude according to Scots law, acts of possession must be overt, in the sense that they must in themselves be of such a character or be done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted, and the nature of the right. The proprietor who seeks to establish the right cannot, in my opinion, avail himself of any acts of possession *in alieno solo*, unless he is able to shew that they either were known, or ought to have been known, to its owner or to the persons to whom he intrusted the charge of his property.

In many—indeed in most—cases where a servitude of way is claimed, the natural and necessary inference arising from its local situation is that the user must have been known to the owner of the *solum* or to those whose duty it was

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to give him information. But that is an inference which it would be very unsafe *to derive* from the mere fact of the occasional user of an isolated deer tract, in a region remote from public observation, which is only visited at rare intervals by a few sportsmen, foresters, or shepherds.

With three exceptions, upon which great stress was laid in the argument addressed to us by the junior counsel for the appellants, not one of the numerous witnesses examined for them was able to say that a Lude sportsman or a Lude keeper was ever in the course of these forty-six years seen upon the track either by the respondent's servants, by the shepherds on the adjoining lands, or by any other person. The exceptions were these:—Angus Cameron, who has been head keeper at Lude since 1871, says that in 1872 or 1873, when he was going through the pass with Mr James M'Inroy, a son of the late proprietor, they met one of the Duke's foresters, who did not find fault with them. He does not say at what season, or that they were either grouse-shooting or deerstalking, so that taken by itself the incident is immaterial. The witness Gordon, who was examined on interrogatories in Canada, says that he never met the Duke's foresters in the pass itself, but that they were in the neighbourhood when he went through it with his father, then head keeper at Lude. But it is obvious that his statement refers to the period antecedent to 1841, because he states his understanding to have been "that the property on both sides of it (that is, the pass) belonged to Mr M'Inroy." The third exception is the witness William Carrick, who was an under keeper at Lude for three years between 1868 and 1871. He certainly does state in his examination-in-chief that when going through the pass he met the respondent's foresters on several occasions. But on cross-examination he explains that "the only time that I met any of the keepers right in the pass was when I was with them shooting foxes."

The appellants' own evidence points strongly to the inference that their use of the track was made in such circumstances that it was not likely to come, and in point of fact never came, to the knowledge of the respondent or his predecessors. But the matter does not rest there. A large and concurrent amount of testimony has been adduced by the respondent which shews that the appellants' user was unseen by and unknown to the proprietors of the Athole forest and their shepherds and foresters, and that testimony is not confined to servants upon the Athole estate. Amongst others, David Guild, who was the appellants' tenant in Monzie from 1867—that is, for twenty years before this dispute arose—never heard of his landlord or anybody else using the Cromalton Pass in order to get from his farm to the east side of Carnlia.

There are two incidents established by the proof which appear to me to have a significant bearing upon this part of the case.

The first of these occurred between 1852 and 1857, and is spoken of by John Stewart, at that time a forester in the employment of the late Duke of Athole. The Duke was in the pass with his retainers when he saw the late Mr M'Inroy of Lude and his keeper, who were also going through the pass westwards, having entered it from the east. The Duke, in the hearing of the witness, who was close beside him, gave orders to his head keeper to go and turn back the intruders. The order was obeyed, and the witness said Mr M'Inroy and his keeper returned in the direction from which they came. I see no reason to question the accuracy of this statement. The Lord Ordinary, before whom the witness was examined, suggests no doubt as to his credibility, although he makes light of the circumstance, mainly because Mr M'Inroy continued notwith-

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standing to assert and use his right. I should agree with the Lord Ordinary's estimate if I were, as he appears to have been, satisfied that the previous and subsequent user were open to observation and known to the person who challenged it on that occasion. Persistent use in the face of challenge is a clear assertion of right; but I can find no grounds for supposing that Mr M'Inroy, either previously or subsequently, used the track or the pass in such a way as to indicate that he was asserting a right. If that be so—and in my opinion it was so—the conduct of Mr M'Inroy was well calculated to assure his Grace of Athole that he was making no pretension to a right of way through the Cromalton Pass. The next occasion was in September 1882, at a time when the mansion and shootings of Lude were let to Sir A. B. Walker. The present respondent was shooting in the pass when he observed traces of a party having passed along the track with a horse. He immediately wrote to Cameron, the appellants' head keeper, stating his belief that the party must have come from Lude, and intimating that the keepers and others from Lude must understand that they were trespassing when they went up the Cromalton. His Grace treated the trespass as one arising from the inadvertence of the keepers, and informed Cameron that if it were repeated he would be obliged to complain to Mr M'Inroy, who is the leading appellant.

Cameron forwarded the respondent's communication to the appellant under cover of a letter, asking for directions, in which he says with respect to the track,—"I was told some time ago that it was an old drove road; if such is the case, the Duke cannot prevent us taking it." Mr M'Inroy's reply has not been preserved, but the tenour of it may be implied from Cameron's answer, which is in these terms,—"I am glad we have done nothing wrong. I am perfectly sure the late Mr M'Inroy would never have allowed me to cross the Cromalton unless he had right to do it. We have not crossed it since, but will do so some day this week."

Whatever may have been the instructions given by Mr M'Inroy to his keeper, it is certain that he neither answered the respondent's letter himself nor directed his keeper to do so, and that no answer was sent.

I cannot understand why no answer was sent to the respondent's communication, and the appellants' counsel made no attempt to explain it. Going through the pass next week was no answer, unless there was someone there to see on the respondent's behalf. The terms of the communication implied that the writer was unaware of there having been any previous use of the pass, and unless he came to know of its being used subsequently by the Lude people, the silence of Cameron and his master would naturally be construed as an admission of trespass. I entertain no doubt that it was so construed, and that the respondent was unaware of the continuance of the use for five years afterwards.

In these circumstances I have no difficulty in coming to the conclusion that there has not been an open and unequivocal assertion of the rights which the appellants claim, such as the law requires in order to the constitution of a servitude of way; and I therefore move that the interlocutor of the Inner-House be affirmed and the appeal dismissed with costs.

Lord Bramwell.—I agree entirely with the opinion of my noble and learned friend Lord Watson. But as I believe this to be an honest case, I wish to shew the appellants that I have not come to a conclusion they probably will think wrong without forming an opinion of my own on it.

That there would be a path or track in the pass or depression between the two mountains called Cromalton Pass is certain. Whoever and whatever had to go from the east of those mountains to the west, or the west to the east—man, deer, or sheep—would naturally take that route which would be the easiest. Accordingly, we find the marked track, the use of which has been discussed, and we find it has been used in a variety of ways.

The appellants have claimed a right of public way, a right for sheep from the part of Lude on one side of the pass to the other, and a right to pass to and fro for sporting purposes. All these claims are given up except the claim of a right for sporting purposes. Of course there having been claims that could not be maintained would not preclude the appellants from the right to one which they could maintain. But I cannot help thinking that it furnishes an argument against them that there should have been uses of the way which were trespasses or permissive. According to English law, the owner of strayed sheep though liable for their trespass would have a right to get them back, at all events after request to the owner of the land where they were to restore them. But the user in support of the right now alone claimed must be examined.

Now, there is, no doubt, evidence of a user of this path by the occupiers of Lude for the purpose of getting from one side of the pass to the other for sporting purposes on the Lude property; and if that user had been frequent enough to the knowledge of the respondent and the predecessors, and had been persisted in after objection by them, the right might have been established. But in my opinion the user proved is insufficient. In the first place, up to 1841 the Lude proprietors claimed a right to the property in Carnlia, and could go over it, or the lower part of it, from one side to the other without using the path. It is true they did not claim the soil of the path or track, and it may have been easier to go along it than over a place where there was no track. But it certainly is unlikely that they had a right of way over the Duke's ground close alongside what they thought their own property. Admiral M'Inroy speaks doubtfully as to what route he took. There is then the user since 1841, which, I repeat, if sufficient and shewn to be known to the respondent and his predecessors, might establish the right. But there are only two cases where that knowledge is shewn. That in 1857, when the then Duke turned back the then Mr M'Inroy, who submitted, and thereby recognised that he had no right to be on the track. The other is the Duke's letter to the keeper in 1882, communicated to the appellants, and the statements in it not contested. I think these two matters decisive. As to the Athole foresters not informing the Duke, and not objecting to the use of the path, there are not many occasions on which they are shewn to have been aware of its use. I think it quite possible that they may not have known the rights of the case, and if they did, may not have wished to be tale-bearers against persons with whom they had probably some friendship or acquaintanceship, and who perhaps were trespassing when it was not an objectionable time of year. Lastly, there is this, that the place in question was remote, little used, and difficult to protect. Believing though I do in the good faith of the appellant and his witnesses, I am satisfied he has not made out his case.

EARL OF SELBORNE.—I had partly prepared my opinion in this case when I saw in print that which has just been delivered by my noble and learned friend Lord Watson. I found the view which he had taken to agree so entirely with

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that which I had myself formed, and the manner in which the reasons for that view were stated so satisfactory to my mind, that I thought I should be unnecessarily occupying the time of your Lordships if I did more than express my entire agreement.

THEIR Lordships affirmed the interlocutors appealed from and dismissed the appeal, with costs.

FAITHFUL & OWEN—DAVIDSON & SYME, W.S.—GRAHAMES, CURREY, & SPENS—TODS, MURRAY, & JAMIESON, W.S.

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July 17, 1891. Holmes Oil Co., Limited, v. Pumpherston Oil Co., Limited.

HOLMES OIL COMPANY, LIMITED, Appellants (Pursuers).—*Finlay, Q.C.—Dundas.*

PUMPHERSTON OIL COMPANY, LIMITED, Respondents (Defenders).—*D.-F. Balfour, Q.C.—Ure.*

Arbiter—Corruption—Act of Regulations, 1695.—The A company, who were engaged in shale mining and distilling oil from the shale, but had no works for refining the oil after distillation, entered into an agreement with the B company to sell to them the crude oil they distilled. The A company were to be paid a certain price per gallon on the refined products, which were estimated at 72 per cent of the crude oil. The price was to be taken at one-half of the average price obtained by the B company for the refined products sold by them, as ascertained from their books by an accountant named in the contract. "In the event of any questions, disputes, or differences arising as to the true intent and meaning" of the agreement "or the due implement thereof," the same were referred to an arbiter therein named.

After the agreement had been acted upon for two years, and a decree-arbitral had been pronounced by the arbiter relative to certain disputes arising as to the sum payable to the A company by the B company, the A company raised an action of reduction of the accountant's reports fixing the price for these two years and of the decree-arbitral, and for an accounting for the products obtained from the crude oil delivered to the defenders. The action was based on the following averments, viz., the pursuers averred that one of the products obtained from the crude oil was paraffin scale, which was of two kinds—"hard" scale and "soft" scale, the former being worth 1s. 8d. per gallon, and the latter 1s. per gallon only; that it had been understood that the whole of the crude paraffin scale would be sold by the defenders, and that the price was to be fixed on the basis of the average price, but that the defenders had retained the "hard" scale for their own purposes, and had sold the "soft" scale only; that the price brought out in the accountant's reports was only that of the soft scale; that the arbiter had pronounced the award brought under reduction, finding that it was not admissible to take into consideration the different qualities of scale, but only the amount actually received from the various products during the year for which the estimate was made, notwithstanding that the pursuers had maintained that hard scale ought to be taken into account in fixing the price, and had offered proof that the scale sold consisted only of soft scale, and did not therefore represent the total scale produced. They averred that the defenders, the B company, had fraudulently concealed from the accountant that they were only selling soft scale, and had represented to him that the scale they sold consisted in fair proportions of both soft and hard scale, and that the arbiter had refused to go behind the figures brought out by the accountant, and had thus acted illegally and corruptly, in the sense of the Act of Regulations, 1695.

The Second Division, with three consulted Judges, by a majority *held* that the action was not relevant.

In an appeal the pursuers contended that the decree-arbitral should be reduced on the ground that the arbiter had misconducted the case by refusing to allow evidence tendered by the pursuers. *Held* that as the arbiter had construed the contract in a way which made the evidence tendered irrelevant, there was no ground for reduction, and appeal dismissed.

(*In* the Court of Session, March 13, 1890, 17 R. 624.)

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Ld. Herschell.
Lord Morris.

The pursuers appealed.

The pursuers contended, *inter alia*, that the arbiter had misconducted the case in refusing to allow evidence tendered by them to shew that the defenders had not sold the whole scale, but had retained the hard scale, which was more valuable than the soft scale which they had sold, and had thereby brought out a low average price for the scale sold.

Lord Chancellor.—I agree with a remark which was made by the learned counsel as to doing justice in this case, and I have approached the case with the strongest possible desire, if I could, to do justice between the parties, which I think ought to be done, assuming that the facts suggested are true. But the matter is not here for review; apart from the particular form in which the question arises, this is in substance an attempt to set aside an award. Now, one of the advantages which people are supposed to get by a reference to arbitration is the finality of the proceeding when the arbitrator has once stated his determination. They sacrifice something for that advantage—they sacrifice the power to appeal. If, in their judgment, the particular judge whom they have selected has gone wrong in point of law or in point of fact, they have no longer the same wide power to appeal which an ordinary citizen prosecuting his remedy in the Courts of law possesses, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law, therefore, that when they have agreed to refer their differences to arbitration, as they have here, you cannot set aside the award simply because you think it wrong. The parties have agreed that it shall not be subject to the ordinary modes of appeal, and that it shall be final; and that is, in nine cases out of ten, the very object which they mean to attain by submitting their differences to arbitration.

In this case the arbiter has, to my mind, clearly decided the question in dispute between the parties; and in truth what he has decided—at all events the substance of his decision—is, that there being a dispute as to how much one of the parties shall pay to the other party, he has given the amount in terms and in figures which the one party shall pay to the other. Thereupon one of the parties, the party against whom he has decided, says—"Oh! but you have proceeded upon a wrong principle; you have not allowed the price of the article to be ascertained in the way contemplated by the contract." The arbiter to whom that matter is remitted says—"I have looked at the contract, and I find that the only mode in which the price is to be ascertained is by taking the average during the year of the price received for all these articles. Well, I look at the average of the price received for all these articles, and I arrive at such and such a conclusion upon the figures stated, and for the amount so arrived at I give my award." Upon which the other party says—"But the average was to be an average ascertained by considering all the things which were not only in fact sold, but which ought to have been sold, or considered as sold, or treated as sold, and taking the price of them as received during the period of the year." To that it is replied—"Well, but that is not the contract between the parties; the parties have selected a particular mode of ascertaining the amount, and the arbiter finds that that is the mode."

For myself, as I have said during the argument, I am unable to concur with the learned arbiter in the view which he has taken of this matter, but still that is a matter which he has decided, and that is the view which he has taken. He has, as I think, left us in no doubt whatever of the ground on

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which he had decided before when a dispute took place between the parties in which the question was—Can you consider, for the purpose of ascertaining what is to be paid by the one to the other, the amount of stock which remains over after the year has elapsed and which has not been sold? Upon which the party objecting to this mode of ascertaining the average says—"No, no, we must treat that as unsold, and for this purpose it does not enter into the question of what is to be paid." That may have been right or it may have been wrong, but that was their contention, and the arbiter acquiesced in that contention. He said, "That is the view I take of the contract." Time passes on, and then comes the question which has been debated before your Lordships, as to whether, although not remaining in stock, account ought to be taken of the quantity of material consumed by the manufacturing company (because since the beginning of the year they had turned themselves into a manufacturing company) neither sold in the ordinary course of the market, nor, in the language of the contract, any price received for it in that character. The arbiter says (I do not concur in this view) —"I adhere to my former decision; you yourselves say, 'You must strictly abide by the language of the contract'; and I cannot find any average here to be derived from goods sold and the price received, and therefore I must proceed on the former assumption—I must proceed only on the language of the contract."

That being the state of facts, it is said now that the arbiter has misconducted himself. I confess I think that the language of the English law is more applicable to the grounds upon which you can set aside an award than the Regulations of 1695, where it is said that misconduct in an arbiter shall include not only the three heads there recited, but all conduct on the part of an arbiter which is inconsistent with natural justice in deciding between man and man. If he declines to hear material evidence, his conduct is such that he is obviously not complying with the ordinary principles of judicial proceedings. In our English law we call that misconduct, and an award may be set aside by reason thereof. I doubt very much whether those words of the Regulation of 1695 are applicable to mere misconduct of that kind.

Now, the alleged misconduct here is, that the arbiter has refused not to hear the parties but to hear certain evidence. I cannot help thinking that both Mr Finlay and his learned junior have a little fallaciously used the words "refused to hear." The arbiter has not refused to hear the parties at all; he has heard them, and has considered their arguments. What he has refused to do is to admit a class of evidence which upon his view of the contract would undoubtedly be irrelevant, and Mr Finlay and his learned junior do not contend that if the arbiter's view of the contract was right that evidence would be relevant at all. To my mind the language of the arbiter unmistakeably points to the fact that he refused to admit that evidence because in his view of the contract he considered that that evidence would be irrelevant, and in his view of the contract that evidence was irrelevant. The result is, that there is no ground or pretence for saying that the arbiter has misconducted himself in that respect. He may have been wrong. I have already indicated my view of what the true interpretation of the contract and the mode in which the price ought to be ascertained is —but that is not the question before your Lordships. The question here is, whether the arbiter has misconducted himself in respect of having refused to hear relevant and proper evidence which was essential to the determination of the question between the parties? In the view which he took of the contract, the construction of which was a question for him, and him alone, that evidence

was irrelevant; he rightly rejected the evidence upon that view, and we have no power to review what he has done in that matter. He has determined what the contract rights of the parties were, and we have not to consider his decision as to those rights.

For these reasons, my Lords, it appears to me to be abundantly clear that this appeal must be dismissed and the interlocutors appealed from affirmed, and I move your Lordships accordingly.

LORD WATSON.—In this case I find myself very much in the same position as the Lord Chancellor, because the facts as alleged, taking them so far as admitted, appear to me to shew that the arbiter has put a very singular construction upon the contract between these parties, a construction which involves considerable hardship to the appellants, but at the same time I am bound to remember that the merits of this case are not and cannot be competently drawn under review in this House. The parties have chosen their own judge, and so far as his decision has been honestly given, they must submit to it, whether it be according to law or not.

The learned arbiter in this case has determined, under the powers given to him by the contract, the amount or price which was payable during certain years for the crude oil furnished by the appellants to the respondents. In so far as that decision is on the merits, it is protected by the provisions of the Regulation of 1695, and although in the course of the argument some observations were addressed to the House which seemed to point to the decree being in violation of the terms of that Regulation, I think the only serious argument latterly insisted in by the appellants was founded upon the allegation, not that the arbiter had corruptly given a judgment upon the materials before him, but that there had been misconduct on his part in declining to receive evidence which was tendered to him before he proceeded to dispose of the question submitted.

Now, I am of opinion that that ground of exception, which may be a good ground of exception to the validity of the award, does not rest at all upon the Regulations of 1695. I think that in so far as regards the conduct of the case, and in so far as regards the jurisdiction of the arbiter to dispose of the case, the Regulations of 1695 make no provision whatever. These rest upon the common law. The arbiter must confine himself to the jurisdiction which the parties have conferred upon him, and in the conduct of the arbitration before it comes to final judgment he is bound to observe any condition which the parties may have chosen to impose upon him by the deed of submission, and he must also conform to all those rules for securing the proper administration of justice which the law implies in the case of every proceeding before an arbiter as well as in the case of every proceeding before a Court of justice.

Now, the refusal to admit evidence complained of in this case would have been quite sufficient and conclusive to vitiate the award if it had been clear upon the averments of the parties that the point to be determined by the arbiter involved nothing more than a pure question of fact. When that is the nature of the issue raised for his determination the principles of natural justice require that before proceeding to decide it the arbiter shall receive from the parties all the evidence of fact which can enable him to arrive at a proper and just conclusion as between them. But that is not the nature of the question which was then submitted. Whether the evidence ought or ought not to have been received, whether this question of fact ever would arise or not, depended upon the construction which

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the arbiter might put upon the contract; and I need not say that the construction of the contract, either as necessitating or as excluding the necessity for evidence, is a matter entirely committed by the terms of this submission to the arbiter, and, accordingly, his decision upon that point is protected by the very same sanction which protects his judgment upon the merits of any other question which may be raised before him.

Now, the arbiter's final award has taken the shape of a judgment determining the price payable, and ordaining the appellants to repay a certain amount which had been overpaid to them in the view which the arbiter took of the proper amount. We have, however, set forth in the fourteenth article of the condescendence the findings upon which that decree-arbitral proceeded, and also the note which the learned arbiter appended to those findings, which were issued for the consideration of the parties about three weeks before the formal decree-arbitral was extended.

It has been held by this House that in considering the effect of a decree-arbitral a Court of law is bound to take into account and to read along with that decree the findings of the arbiter upon which it proceeds as explanatory of the views to which by his formal judgment he intended to give effect. Those materials your Lordships have here; and the note appended to these findings is, in my opinion, conclusive upon this point, that the arbiter rejected the evidence not because he was unwilling to hear proof from the parties upon a relevant question of fact, but because, upon the construction of the contract which seemed to him to be the right one, he was of opinion that the facts proposed to be made the subject of inquiry were not relevant. I cannot otherwise construe two sentences in that note. I take the last of these sentences first. He says,—"In the absence of an allegation of fraudulent dealing, I think the principle must be followed of estimating the price according to the amount received from the various products during each year." That is a plain affirmance of the correctness of the accountant's report, who had taken from the books of the respondents the amounts received for the various products during each year, and had made these the materials from which he had extracted the average price which under certain deductions was payable to the appellants. Now, if that was the correct principle, to inquire into the amount of hard scale and the amount of soft scale which went to make the particular item of scale in the accountant's report would have been a very idle proceeding, for it would simply have led to this, to extracting and making a second item containing all the materials of the first, and neither the summation nor the average arrived at would have been effective to any extent whatever.

The first part of the note, which in logical sequence ought to be the last, is this,—"The admissibility of taking into consideration the different qualities of scale was decided by me in the negative in a previous stage of the reference between the parties." It is said that these words do not indicate that the learned arbiter meant to proceed upon any construction of the contract, or to determine that proof upon the subject was inadmissible. I am quite unable to take that view of the language of the arbiter. When it is read in connection with the passage to which I have already referred, its meaning becomes perfectly clear. But even if it were taken by itself the language seems to me to be altogether free from ambiguity. If it were inadmissible, as the arbiter in plain terms says it was, to take into consideration the different qualities of scale, of what relevancy could a proof directed to the different qualities of scale have

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been? The learned arbiter seems to have thought that he had decided it before. With the ground upon which he came to that conclusion we have no concern. He may have been in error; he may have been mistaken in supposing that his judgment on the former occasion constituted a proceeding directly bearing upon the point which he was deciding. That appears to me not to be of the smallest consequence. His conduct is not said in any way to have been corrupt, or to have been in any other way a violation of the Regulations of 1695.

Therefore it seems to me that this portion of the award being entirely within the competency of the arbiter, unless it is successfully assailed upon the ground which I have indicated, the case of the appellants must necessarily fail.

LORD HERSCHELL.—I entirely agree with what has been said by my noble and learned friends who have preceded me. The view which I take of this case, and the reasons which have led me to the conclusion that it is impossible in any way to interfere with this decree-arbitral, are to my mind completely and satisfactorily set forth in the judgment of Lord Rutherfurd Clark in the Court below.

LORD MORRIS concurred.

THEIR Lordships dismissed the appeal, with costs.

LOCH & GOODHART—WADDELL & M'INTOSH, W.S.—WM. ROBERTSON & COMPANY—CAIRNS, M'INTOSH, & MORTON, W.S.

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July 27, 1891.
M'Cowan v. Baine & Johnston.
The "Niobe."

DAVID M'COWAN, Appellant (Defender).—*Finlay, Q.C.—Joseph Walton.* BAINE & JOHNSTON, Respondents (Pursuers).—*Att.-Gen. Sir R. E. Webster—J. Gorell Barnes, Q.C.—D. C. Leck.*

Insurance—Marine insurance—Collision clause—Vessel under tow—Damage caused by tug to stranger ship.—In a policy of marine insurance the underwriters insured the ship "Niobe" "from the Clyde (in tow) to Cardiff . . . while there and thence to Singapore," and agreed "that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel . . . any sum or sums of money, . . . " to pay the insured a certain proportion of the sum so paid. Through the fault of the "Niobe" and of her tug the latter came into collision with and sunk another vessel, whose owners recovered damages both from the "Niobe" and the tug.

In an action by the owners of the "Niobe" upon the policy against one of the underwriters for payment of his proportion of the sum paid by the pursuers on account of the collision, the defender pleaded that under the policy he was only liable for damage arising from collision with the "Niobe."

Held (*aff.* judgment of Second Division), *diss.* Lord Bramwell, that in maritime usage the word "ship" was frequently understood to cover a ship and the tug by which it was towed, and that it fell to be construed in this sense in the collision clause of the policy, and that the defender was liable.

(IN the Court of Session, June 20, 1890, 17 R. 1016.)

The defender appealed.

At delivering judgment after consideration,—

Earl of Selborne.
Lord Watson.
Lord Bramwell.
Lord Morris.

EARL OF SELBORNE.—I cannot help thinking that in construing such a mercantile contract as this there is as much danger of error in extreme literalism as in too much latitude; and though I do not adopt the argument that a contract of indemnity against the consequences of collision can be extended to a

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case in which there has been no collision, but only damages caused by measures properly taken to avoid a collision, I think a construction which makes it cover all damages consequent upon an actual collision, for which the assured is liable, is more reasonable and more in accordance with the probable intention of the parties (if the words will bear it) than one which does not.

In the present case the "Valetta" was sunk by an actual collision, for which the owners of the "Niobe" have been held liable. But the impact which caused the loss of the "Valetta" was not of the hull of the "Niobe," but of the steam-tug "Flying Serpent," which was towing the "Niobe" on a part of her insured voyage, described in the policy of insurance as "in tow from the Clyde to Cardiff $\frac{\text{and}}{\text{or}}$ Penarth."

The words of this contract are: "If the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money, not exceeding the value of the ship hereby assured." If a ship cannot be said to "come into collision with any other ship" except by direct contact, causing damage, between the two hulls (including under the term hull all parts of a ship's structure) there was in this case no such contact, and the appellants ought to succeed.

But I cannot adopt so narrow a construction of those words. I should hold them to extend to cases in which the injury was caused by the impact, not only of the hull of the ship insured, but of her boats or steam launch, even if those accessories were not (as in this case) insured as being, in effect, parts of the ship. I should also hold them to cover an indirect collision, through the impact of the ship insured upon another vessel or thing capable of doing damage, which might by such impact be driven against the ship suffering damage. I should take the same view, as against insurers in similar terms, of a tug towing one or more barges (in which case the barge owners would not be liable for a collision) if damage to any vessel were caused by the barge or barges being driven against it through the improper navigation of the tug, although there might have been no impact of the tug itself upon the injured vessel. And, after full consideration, it seems to me to be no more than a reasonable extension of the same principle to include within them such a case as the present.

Where a ship in tow has control over, and is answerable for, the navigation of the tug, the two vessels—each physically attached to the other for a common operation, that of the voyage of the ship in tow, for which the tug supplies the motive power—have been said, by high authority, to be for many purposes properly regarded as one vessel. Lord Kingsdown's words, in the case of *The "Independence"*[1] were, that the tug, "may, for many purposes, be considered as a part of the ship to which she is attached"; and he went on to repeat the reason given in the earlier judgment reported in the same volume, *The "Cleadon,"*[2] to which he was also a party, where it was said: The "Cleadon" being in tow of the tug, it is admitted she and the tug must be considered to be one ship; the motive power being in the tug and the governing power in the ship that was being towed." I think the "Flying Serpent" and the "Niobe" may be so regarded for the purpose now in question. The principle on which the "Niobe" has been held liable for the collision seems to

[1] 14 Moo. P. C. at p. 115.

[2] 14 Moo. P. C. at p. 97.

me to go far towards that conclusion. That the "Niobe" should be in tow from the Clyde to Cardiff or Penarth was, in the present case, part of the contract. I think the construction ought to be the same, so far as relates to that voyage, as if the words in the margin had been: "If the ship insured, while in tow between the Clyde and Cardiff or Penarth, shall come into collision with any other vessel," &c. If the contract had been so expressed, I should have thought it arbitrary and not reasonable to exclude a collision by the impact of the tug during that voyage upon another vessel, for the consequences of which the owners of the "Niobe" were liable.

I am, for these reasons, of opinion that the interlocutors appealed from are right, and ought to be affirmed.

LORD WATSON.—The "Niobe," a sailing ship belonging to the respondents, was covered by a policy of insurance at and from "the Clyde (in tow) to Cardiff and Penarth, while there, and thence to Singapore, and while in port for thirty days after arrival." Provision was made for indemnity against liabilities arising from collision by a marginal clause, upon the construction of which the result of this appeal must depend.

Whilst the "Niobe" was on her way to Cardiff in tow of the "Flying Serpent," her tug came into collision with the "Valetta," causing her serious damage. The "Valetta," after colliding with the tug, also came into contact with the "Niobe," but without receiving any injury. In a suit before the Admiralty Court of England it was decided by Lord Hannen that the collision was due to the fault of the tug in not porting her helm in terms of the regulations, and that the "Niobe" was likewise to blame in respect of her failure to keep a look-out and to control the steerage of her tug. The respondents have in consequence paid £12,909 to the owners of the "Valetta," and they now sue one of the underwriters of the policy for his proportion of the sum which they claim by way of indemnity.

The legal liability of the "Niobe," and the facts upon which it rests, as these were found by the President of the Admiralty Court, are matter of mutual admission in this case. Whether the collision between the "Flying Serpent" and the "Valetta" was a collision within the meaning of the marginal clause of the policy, is the only subject of controversy.

The material part of the clause is in these terms: "And it is further agreed, that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion," &c. Then follows a stipulation that, in the same events, in cases where the liability of the ship has been contested with their consent in writing, the insurers will also pay a proportion of the expenses incurred or paid by the insured. Lastly, there is a proviso to the effect that the clause shall not extend to any sum which the assured may become liable to pay or shall pay "in respect of loss of life or personal injury to individuals for any cause whatsoever."

The clause is certainly not conceived in the terms which one would have expected the parties to employ, if, as the Attorney-General argued, it was their intention to include in the indemnity all liabilities arising from collision which the "Niobe" could possibly incur.

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The condition which must be purified before any obligation can attach to the underwriters is "that the ship hereby insured shall come into collision with another ship or vessel." These words in their literal sense import that there must be contact between the "Niobe" and such other ship or vessel, causing damage to the latter. There are many ways in which a ship under sail may, without being herself in collision, become liable to bear the whole damages resulting from a collision. Her unjustifiable manœuvres may occasion the colliding of two or more vessels other than herself without any blame on their part, and in that case the offending ship, and she alone, is responsible for the consequences of her fault. In such a case I should not be prepared to hold that the "Niobe" had in the sense of the policy "come into collision with" the vessels whom she caused to collide, because there would be no ground in fact or law for the suggestion that the "Niobe" ought to be identified with any one of them.

So far as I can discover, none of the learned Judges of the Court of Session indicated an opinion that the clause was so expressed as to cover every kind of liability for collision. They based their decision upon a special rule of law, which has admittedly no application except as between a ship and her tug. They held that the identity which that rule established between tow and tug is so complete that the "Niobe" herself must be considered to have come into collision with the "Valetta" within the meaning of the policy. A sailing-vessel and the steam-tug which has her in tow have frequently been described by eminent Judges as for certain purposes constituting "one ship"—an expression which has been borrowed by text writers, and is familiar to persons conversant with maritime law. The expression is figurative, and must not be strained beyond the meaning which the learned Judges who have employed it intended it should bear. As I understand their use of the expression, it signifies that the ship and her tug must be regarded as identical in so far as the two vessels, with their connecting tackle, must be navigated as if they were one ship, and, the motive power being with the tug, the two vessels must, in order to comply with the regulations for preventing collision at sea, be steered and manœuvred as if they formed a single steamship; and also, in so far as the ship towed, when she has, as in this case, the control of the tug and the duty of directing the course of the tug in accordance with these regulations, is responsible for the natural consequences of the tug being wrongly steered, through the neglect of her officers or crew to perform that duty.

There was therefore a legal connection betwixt the "Niobe" and the "Flying Serpent" which could not subsist between her and any other vessel which her fault might drive into collision with a stranger ship. The "Niobe" was, in the contemplation of the law, one and the same ship with the "Flying Serpent" for all purposes of their joint navigation with a view to avoid the risk of collision, and the fault which led to a collision between that legal composite and the "Valetta" was admittedly the fault not only of the "Flying Serpent" but of the "Niobe."

I admit the force of the appellant's argument that contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words, and another in the case where their conventional meaning is not the same with their legal sense. In the latter case the meaning to be

attributed to the words of the contract must depend upon the consideration whether in making it the parties had or had not the law in their contemplation. The point thus raised appears to me to be a very narrow one, but in this case the contracting parties are shipowners and underwriters, and the clause in question relates to possible legal liabilities of the ship insured which are entirely dependent upon the rules of maritime law. In these circumstances I have, not without some hesitation, come to the conclusion that they must be presumed to have known the law, and to have contracted on the faith of it.

LORD BRAMWELL.—In this case the facts are that the "Niobe" was insured by the respondents with the appellants and others by a policy in the ordinary form, from the Clyde (in *tow*) to Cardiff, or Penarth, and thence to Singapore. In the margin of this policy is this, I believe, usual clause: "And it is further agreed that, if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay, and shall pay," "any sum or sums of money not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, or if the value hereby declared amounts to a larger sum, then to such declared value."

What happened was this: The "Niobe," in tow of a tug, proceeded on her voyage, and, by the negligence of the tug, and of those navigating the "Niobe" the tug came into collision with the "Valetta," and sank her. There was a collision between the "Niobe" and the "Valetta," which may be disregarded, as it did no damage. In very fact, therefore, the ship has not come into collision with any other ship, and the insured has not paid something in consequence thereof. The insured, the respondents, have paid to the owners of the "Valetta" a large sum of money in consequence of the damage to her, owing to the conjoint bad seamanship of the tug and the "Niobe," and this is sought to be recovered in this suit.

I say then, in very fact the "Niobe" did not come into collision with the "Valetta," causing a liability in the appellant, and, according to the ordinary primary meaning of the words used the case is not within them. This is agreed. But it is said that for some reason the primary and natural meaning of the words is to be extended, and that we should hold that there was a collision where there was none. I am at a loss to see why. I think an Act of Parliament, an agreement, or other authoritative document, ought never to be dealt with in this way, unless for a cause amounting to a necessity, or approaching to it. It is to be remembered that the authors of the document could always have put in the necessary words if they had thought fit. If they did not, it was either because they thought of the matter and would not, or because they did not think of the matter. In neither case ought the Court to do it. In the first case, it would be to make a provision opposed to the intention of the framers of the document; in the other case, to make a provision not in the contemplation of those framers. Take this very case. Can anyone say that, if the assured had required the insurers to agree to be liable for a collision by the tug (and be it remembered that it is mentioned the "Niobe" was to be towed to Cardiff), I say if such a requirement had been made, can anyone say that the insurers would have agreed to it without an increase of premium: a liability for any towing till the voyage to Singapore was over? Suppose a suit to reform the docu-

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ment by making the insurers liable for collisions by the tug, could it have succeeded?

Let me examine the reasons given for adding to or altering the meaning of the words used. The Lord Ordinary says if the collision clause is read in the strictest manner he would be of opinion that the defender was not liable, but he thinks it admits of being read in a broader and more comprehensive sense. The superlative "strictest" is a difficult word to deal with. Is it to be read in a way not strict; if so, how far short of it? His Lordship gives his reasons; he says: "The risk they wished and had an interest to cover was liability arising from collision for which, as owners of that particular ship, they might be liable." "That the defender knew they wished to cover it, and it may fairly be presumed that the clause was intended to cover that particular risk." I respectfully ask where is the evidence that they wished to cover any risk of collision beyond what they have expressed, or that the defender knew the pursuers so wished? I firmly believe that if the truth were known, neither party had it in mind; and I repeat, I am by no means sure it would have been included for the same premium. The Lord Justice-Clerk says: "In certain circumstances the vessel in tow is looked upon as being one with the towing vessel, and the real question is whether that view applies to such a case as this. I think it would have been far better if the policy had been more clearly expressed." With submission, that should be not "more clearly" but *differently* expressed. Nothing can be clearer than it is. It is said that to hold as I do is a "narrow construction." I respectfully deny it. I do not *construe* the words. I simply read them as I should "twice two are four." Well, if too narrow construction is wrong so is too wide, which, to my mind, the construction (for it is a construction) I object to is. His Lordship came to the conclusion in favour of the pursuer not without hesitation. Lord Young says the collision was just the sort of collision the possibility of which was contemplated by both sides. I suppose, then, he does not agree with the Lord Justice-Clerk, that it would have been far better if more clearly expressed. Lord Rutherfurd Clark doubts if the pursuer is right. Lord Lee agrees with the Lord Ordinary.

It is said that the "Niobe" was, in the contemplation of the law, one and the same ship with the "Flying Serpent" for all purposes of their joint navigation with a view to avoid the risk of collision. I respectfully deny it. The law does not contemplate anything like it. A most distinguished lawyer, Lord Kingsdown, did once use the unfortunate metaphor that "the tug may for many purposes be considered as a part of the ship to which she is attached." He says "for many purposes"—not all. He does not say that it is to be so considered that the plain words of a contract are to be misinterpreted. Had he foreseen what use would be made of his words, he would not have used them. These two shall be one. It is said the parties to this suit knew all about this, and contracted on the footing of it.

Now, this seems to me to be a case (too common) in which there is a tendency to depart from the natural primary meaning of the words and to add to or take from them—to hold that, constructively, words mean something different from what they say. It introduces uncertainty. No case is desperate when plain words may be disregarded. I deprecate this in all cases. In this particular one I believe it will be attended with at least this injustice, that the parties did not contemplate the case that has occurred, and perhaps would have raised the premium if they had. That they did not contemplate it I infer from

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the words that they used. Ingenious cases were put forward in which there might be damage by collision with the "Niobe" without her touching the vessel damaged, as where she pushed an intermediate vessel against that damaged. I have no doubt that ingenuity might suggest many difficult cases. I content myself with dealing with the present, where the ship did not in any sense come into collision with any other ship and cause damage. I think the judgments should be reversed.

LORD MORRIS.—In my opinion the contract must be construed as an insurance against risk or liability for payment by collision to be incurred by the "Niobe" while in tow. What the owners were bargaining for was indemnity against loss or payment which the "Niobe" might *incur* while being towed. I consider the tug part of the apparatus for moving the ship "Niobe," and that a collision by the tug while so towing the "Niobe" was a collision of the "Niobe" within the meaning of the marginal clause of the policy; consequently that the judgment of the Court of Session should be affirmed.

THEIR Lordships dismissed the appeal, with costs.

WALTONS, JOHNSON, & BUBB,—J. & J. ROSS, W.S.—LOWLESS & COMPANY,—WEBSTER, WILL, & RITCHIE, S.S.C.

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Clarke v. Carfin Coal Co.

MRS SUSAN CLARKE, Appellant (Pursuer).—*Rhind—Baxter—F. R. M'Ilraith.*

THE CARFIN COAL COMPANY, Respondents (Defenders).—*J. J. Cook.*

Parent and Child—Illegitimate children.—The parents of illegitimate children derive no patrimonial rights from their relationship to them.

The case of *Samson* v. *Davie*, Nov. 26, 1886, 14 R. 113, where it was held that an illegitimate son was liable to support his mother, *overruled.*

Parent and Child—Reparation—Solatium and damages—Death of illegitimate child.—Held (*aff.* judgment of Second Division) that the rule of law which gives to certain relatives of a person killed by the fault of another a right to *solatium* and damages does not extend to the case of the mother of an illegitimate son.

Weir v. *Coltness Iron Co.*, March 16, 1889, 16 R. 614, *approved.*

Earl of Selborne.
Lord Watson.
Lord Macnaghten.
Lord Morris.

MRS SUSAN CLARKE raised an action in the Sheriff Court of Lanarkshire at Hamilton against the Carfin Coal Company to recover damages for the death of Laurence Hoolahan, her illegitimate son. The pursuer alleged that the deceased had been in the employment of the defenders, and that through their fault he had met with an accident which resulted in his death; that her son was earning 12s. per week, and that by his death she had been deprived of his assistance in supporting her and her family, and of the future support she could reasonably have expected; and that she had suffered great sorrow through his death.

The defenders pleaded, "No title to sue."

The Sheriff-substitute (Birnie), holding the case to be ruled by *Weir* v. *The Coltness Iron Co.*, March 16, 1889, 16 R. 614, assoilzied the defenders.

The pursuer appealed to the Second Division of the Court of Session.

The Second Division, in affirming the Sheriff-substitute's judgment, delivered no opinions, as the point had been decided by them in *Weir's* case.

The pursuer appealed.

LORD WATSON.—This action was brought by the appellant before the Sheriff Court of Lanarkshire, for recovery of damages from the respondent company,

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upon the allegation that the death of her illegitimate son, a boy between fourteen and fifteen years of age, had been occasioned by their fault, and that she had, in consequence, suffered great sorrow and anguish, and had also been deprived of the assistance of her son (who at the time of his death was earning 12s. weekly), in supporting herself and her family.

The Sheriff-substitute assoilzied the respondents, upon the ground that, by the law of Scotland, an action of *solatium* and damages will not lie at the instance of a natural mother for the death of her bastard child; and his interlocutor was, on appeal, affirmed by the Second Divison of the Court of Session. No opinions were delivered at the advising of the case, which their lordships held to be directly ruled by the previous judgment of the same Division in *Weir* v. *Coltness Iron Co., Limited*, March 16, 1889 (16 R. 614), which is practically the judgment submitted to review in this appeal.

In the Court below, as well as at the bar of the House, the appellant relied upon the existence of a continuing and reciprocal obligation between a natural mother and her illegitimate child to aliment each other when necessary, which was recently affirmed and given effect to by the Second Division in *Samson* v. *Davie*, Nov. 26, 1886 (14 R. 113). In that case a bastard, forty-five years of age, who had not seen his mother since he was of tender years, except on two occasions, when he did not know that she was his parent, was, at the instance of an inspector of poor, ordained to relieve the parochial board of the burden of her maintenance. Lord Young strongly dissented from the decision, the majority in favour of it being the Lord Justice-Clerk (Lord Moncreiff), the late Lord Craighill, and Lord Rutherfurd Clark.

Starting from that decision the appellant maintained that the law allows an action of *solatium* and damages to the parent of a legitimate child against the person whose negligence has caused its death, by reason of there having existed, between the pursuer and the deceased, in the first place, near relationship in blood, and, in the second place, a mutual obligation of support arising out of that relationship. It was conceded that there is no legal relationship between a bastard and its parent, but it was argued that, inasmuch as the law considers the natural tie which connects them to be so intimate as to give rise to a reciprocal duty of maintenance which it will enforce, they are within the principle which gives a right of action to persons legitimately connected in the same degree.

On this point reference was made to *Eisten* v. *The North British Railway Company*, July 13, 1870 (8 Macph. 980, 42 Scot. Jur. 575), where the Court dismissed an action by two sisters for reparation in respect of the death of a brother upon whom they were dependent, the main ground of the decision being that the law imposed no obligation of support upon their brother. The Lord President (Inglis) in that case (p. 984) said,—"It cannot be disputed that hitherto in our law no such derivative claim has been sustained, except when arising from the relation of husband and wife, or of parent and child; and, on the other hand, it is true that, in the law of Scotland, differing in that respect from some other systems of jurisprudence, a claim of this kind is sustained at the instance of a wife for the death of her husband, a husband for the death of his wife, a parent for the death of his child, and a child for the death of his parent, when the death has been caused by delict or *culpa*. And it is equally true that this claim may be maintained, although the party raising the action cannot qualify any direct pecuniary loss by the death of the relative.

It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life as between the deceased and the claimant of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that persons standing in one of these relations to the deceased may sue an action like this for *solatium* where he can qualify no real damage, and for pecuniary loss in addition where such loss can be proved."

In *Weir* v. *The Coltness Iron Co., Limited*, all the learned Judges were of opinion that if the decision in *Samson* v. *Davie*, in which two of their number, (Lords Young and Rutherfurd Clark) had taken part were regarded as conclusive of the case before them, it would be necessary to hear further argument, and probably to consult the other Judges. They did not find it necessary to adopt that course, and proceeded to dispose of the case upon the assumption that *Samson* v. *Davie* was well decided. Shortly stated, their ground of decision was, that such an action, at the instance of a natural parent, was unknown to the law, and that it was for the Legislature, and not for the Court, to determine whether a remedy ought to be given to a person in the position of the pursuer.

I concur in the reasons assigned by the learned Judges for their decision. As a matter of fact it cannot be disputed that, although for a century past actions for *solatium* and damages have been sustained at the instance of husband, wife, or legitimate child in respect of the death of a spouse, a child, or a parent, a similar action at the instance of a natural parent or child had never (with one exception, which appears to me to be of no moment) been heard of in the law of Scotland. In my opinion the rule, which admits the former class of suits, does not rest upon any definite principle, capable of extension to other cases which may seem to be analogous, but constitutes an arbitrary exception from the general law which excludes all such actions, founded in inveterate custom, and having no other *ratio* to support it. I venture to think that the Lord President, in *Eisten* v. *The North British Railway Company*, did not mean to suggest that the rule (or rather the exception) was capable of being extended to cases other than those in which it had already been received. To my mind it is evident that by "nearness of relationship," his Lordship meant legal relationship, because he treats as an essential element of the pursuer's claim the right to demand *solatium*, which is a right to reparation for disruption of the family tie, and therefore impossible in the case of natural parent and child, and also because his Lordship subsequently describes the connection between a bastard and his putative father as "one which the law cannot recognise."

The solitary exception to which I have referred is the judgment of a Lord Ordinary (Jerviswoode) in 1867 (3 S. L. R. 192), sustaining the competency of an action of this kind by a bastard's mother. The case has not been traced further, and it does not, in my opinion, constitute a precedent of any value. In his note, as reported, the learned Judge is represented as having said that, on the merits of the case, he did not entertain any serious doubt. The rest of the note does not suggest that any of the real difficulties which beset the question had been brought before his Lordship, who presumably gave judgment on the footing that there was a mutual obligation of support between the pursuer and the deceased. That such mutuality exists was admittedly not decided by the Court of Session until 1887 in *Samson* v. *Davie*, which appears to have led to *Weir* v. *The Coltness Iron Company, Limited*, and the present case.

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Although I have, for the reasons already stated, come to the conclusion that the decision of the Court below is right in law, I understand some of your Lordships to be of opinion that these reasons afford a narrow if not an insufficient ground for affirming the interlocutors under appeal. I have, in these circumstances, thought it right, with the aid of the arguments and of the authorities which were submitted to us, to examine the judgment of the Court of Session in *Samson* v. *Davie*, which has not been brought under appeal. If that decision be not accepted as a correct exposition of the law, the case of the appellant, upon her own argument, must necessarily fail.

By the law of Scotland there are certain disabilities attached to the condition of bastardy as to which there can be room for dispute. To borrow language used by the Scottish bench in the year 1692, bastards are regarded as "unlawful productions" which "are not to be encouraged"—(*Vide Ker* v. *Tutors of Moriston*, M. Dict. 1363). Unless legitimated by the subsequent marriage of his parents, the bastard has no place in the family of either. In intestacy, he has no right of succession to them in heritage or in moveables, and he cannot inherit from anyone through them. Should his parents bequeath property to him, he must pay the highest rate of succession or legacy-duty, as the case may be, not because the Legislature has so prescribed, but because he is, in the eye of the common law, a stranger to them in blood.

It humbly appears to me that to impose upon illegitimate children, to whom the law denies the status of blood-relationship and all rights of succession, a liability to maintain parents, who, in the most charitable view, have done them a great wrong, would be harsh and inequitable, and I am of opinion that no such rule ought to be enforced, unless it is shewn to have been firmly established in the law of Scotland. It was no doubt held to be established in *Samson* v. *Davie*, but it is not without significance that Lord Moncreiff, one of the majority, said, in giving judgment,—"It is true there is a paucity of authority. But there are some cases and dicta." An examination of the books has satisfied me that the dearth of authorities tending to support the rule is even greater than the language of the noble and learned Lord would seem to indicate.

Before adverting to the authorities, there are two expressions, upon which I desire to remark, which have been frequently used by Scotch Judges in bastardy cases and by text writers, one of which appears to me to have been sometimes employed in a way calculated to mislead. It has often been laid down that a bastard is *filius nullius*. Of that expression it is sufficient to say that it is as true in a legal as it is untrue in a natural sense. Again, it has been said that a bastard has a mother but no father. The phrase is unobjectionable, so long as it is only meant to express the obvious fact that the maternity of a bastard is, comparatively speaking, a matter of certainty, whereas its paternity may be matter of doubt, and in some cases the father may never be identified. It becomes, in my opinion, mischievous when it is used to convey the suggestion that, after the father has been ascertained, by admission or by judicial proof, the natural tie which connects him with the child is more slender and less enduring than that which binds the child to its mother. There is no principle of natural law which can justify such a distinction, and, beyond a few loose dicta, I can find no authority for it in the law of Scotland.

Lord Stair, in his Institutions published in 1693, treats (i. 5, 8, and 9) of the duty of legitimate children to relieve the wants of their necessitous parents according to their ability, a duty which he traces to the law of nature,

and to a remuneratory obligation on the child, corresponding to the parental duty of educating and maintaining it, not only during its continuance in the family, but after emancipation. In a subsequent part of his work the learned author (iii. 3, 43, *et seq.*) explains the incapacity of bastards to succeed to the estate of their progenitors, but he nowhere deals with the alimentary rights or liabilities depending upon their natural relation to their parents. He does suggest (iv. 12, 1), and the same view is expressed by Lord Bankton (i. 2, 4), that bastards ought not to be excluded from the moveable succession of their mother and her relations; but as Mr. Erskine points out (iii. 10, 9), that rule would be a novelty in the law of Scotland.

Bankton, who wrote about the middle of the eighteenth century, after stating the law with respect to legitimates, proceeds to say (i. 6, 18),—"Natural children or bastards, even those which are the issue of adulterous or incestuous embraces, are entitled to aliment from their parents; according to the canon law and the dictates of nature it is equally incumbent on both, if they are able; and if the one is not, the other must undergo the whole, till they are capable to do for themselves, or to labour for their bread." In a subsequent paragraph (i. 6, 20) he lays down the doctrine that, in case of necessity, the parents must depend upon the children, and that the children are naturally bound to maintain them. It was argued for the appellant that the learned author meant to include in that rule illegitimate as well as legitimate children, an interpretation which I am unable to accept, for two reasons. In the first place, the rule evidently relates back to the obligation previously stated by him to be incumbent upon married parents, to support their issue, not only during the minority, but during "other incapacity of the persons to support themselves" (i. 6, 16, *ad fin.*), and merely introduces a reciprocal obligation on the part of the children. In the second place, I can hardly suppose that the writer meant to lay a reciprocal obligation upon children, who, according to his previous statement, were only entitled to parental support until they were able to "do for themselves."

Erskine, whose Institute is about thirty years later than Bankton's Treatise, lays down the law in terms which appear to me to assume that the obligation of natural parents does not endure beyond the period during which the child is, from its youth, unable to support itself. He says (i. 6, 56),—"It does not seem fixed in general how long parents are bound to maintain their natural children. In the case of a gentleman, the obligation was found to continue till the child was fourteen years of age—*Paterson* v. *Cochran* (M. Dict. 11,080)." These words obviously refer to the length of time for which the parents are bound to educate and aliment their child, in pupillarity or minority, and have no reference to the case of a bastard, who, having attained majority and become self-supporting, is reduced to indigence.

The next authority is a passage from the MSS. Lectures of Baron Hume, Professor of Scots Law in the University of Edinburgh during the present century. I think it right to refer to that passage because it was relied on by one at least of the majority in *Samson* v. *Davie*. It has been preserved by the late Lord Fraser in his treatise upon Parent and Child (edit. 1866, p. 127), and is in these terms:—"There is no obligation on a natural child to aliment his reputed father; at least it is an extremely doubtful question. The contrary holds with respect to the mother, however, whom the child is always bound to support, if she be in indigent circumstances." Where Baron Hume, who was a very able lawyer, found that doctrine does not appear, because he cites no

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authority in support of it. But it is clear that all the authorities, if any, upon which it could be based, are as accessible to the profession now as they were to the learned lecturer.

I now come to the decisions of the Court of Session, which, if not the only, are at least the most reliable source from which the true state of the law can be ascertained. The printed decisions range over a period of nearly 200 years, beginning with the case of *Ker* v. *Tutors of Moriston* (already cited) in 1692, and ending with *Samson* v. *Davie* in 1887. It is unnecessary to refer to them in detail, because the sum and substance of what they do decide can be stated within a narrow compass.

First of all, they settle, in conformity with the text of Bankton and Erskine, that there is a joint obligation upon both parents to maintain their natural child until it becomes capable of earning its own livelihood; and that the inability of either parent casts the whole liability on the other. The duty of maintenance to that extent is, in my opinion, one which the parents owe as much to the community of which they are members as to the child whom they have irregularly brought into the world. The bulk of these cases involve nothing more than the conflicting claims of the father and mother to the custody of their pupil bastard, a controversy which throws no light upon the question which your Lordships have to decide.

As a necessary consequence of the rule, that support must be given by the parents until the child is able to provide for itself, it has been repeatedly held that the parental obligation continues, even after majority, in cases where, owing to mental or physical infirmity, the child remains incapable of gaining its own subsistence. In pursuance of that principle, the Scots Poor Law Act (8 and 9 Vict. c. 83, sec. 80) has made desertion or neglect to maintain their unemancipated child an offence, punishable by fine or imprisonment, in the case of a natural mother or putative father, as in the case of married parents.

In *Anderson* v. *Heritors and Kirk-Session of Lauder*, March 11, 1848 (10 D. 960, 20 Scot. Jur. 332), the Lord Ordinary (Cunninghame) said in his note,—"The only ground upon which it occurred that a plea might be stated for the defender (the putative father) was, as to his legal obligation *ex intervallo* to afford aliment to an illegitimate daughter, which, under the circumstances, seems a novel claim. She must once have been working for herself for a series of years; and as in law she never would have been bound to aliment the father if he had come to poverty, it might be questioned if he was now bound to aliment her. But, as no plea is raised on this ground, it is probably felt to be untenable. It was further stated that the daughter never had been able to work for her bread from some bodily maladies; if so, the case is the same as if a party begat a child born insane, or with incurable disease. In that case, the obligation of her father, if solvent, to maintain the child till her death could hardly be disputed." The case came by advocation from the Sheriff Court, where, apparently, the inquiry had been confined to the fact of the defender's paternity; and in the Court of Session it does not appear to have been disputed by the defender that the child had never been able to earn its livelihood. The opinion of the learned Judge, which is somewhat speculative, goes no further than this, that a claim against a putative father for the maintenance of his child becoming indigent, after it had been self-supporting, was, in the year 1848, an entire novelty, and that, if the liability did exist, it gave rise to no corresponding obligation on the part of the child.

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In *Corrie* v. *Adair*, Feb. 24, 1860 (22 D. 897, 32 Scot. Jur. 377), which was an action by the mother against the father for recovery of aliment for their bastard child, the Lord President (then Lord Justice-Clerk) stated that there is no obligation on a bastard to maintain its putative father. His Lordship said (p. 900),—"The bastard having no father, what is the relation of the man by whom paternity has been admitted, or against whom it has been proved? It is not a relation which creates reciprocal duties and obligations. The father has no right of custody of the bastard's person, or of administration of his estate, he has none of the characteristics of the *patria potestas*. The only relation is that the father is to a certain extent, and under certain conditions, liable to aliment the child. But, even in the matter of aliment the relation between a bastard child and his father is different from that between a legitimate child and his father. In the latter case the obligations are reciprocal, but they are not so in the former. The only vestige of connection is the obligation on the part of the father under certain conditions to contribute to the maintenance of the child while unable to support itself."

In the subsequent case of *Reid* v. *Moir*, July 13, 1866 (4 Macph. 1060), an observation was made by Lord Cowan in regard to the different character of the relations between a bastard and its male and female parents respectively. There was no question of bastardy raised in the case, which was an action by an inspector of poor against a husband for aliment supplied by the parish to the indigent parents of his wife. Lord Cowan said,—"Your Lordship has referred to the case of a bastard child. I am not prepared to give any decided opinion upon that case, which is a peculiar one, and as I view this question, it is not necessary for its decision. At the same time I see no reason to doubt that the same principle is applicable to both cases. What I hesitate about is this, I do not think there is the same reciprocity of obligation between a bastard child and its putative father as there is between a legitimate child and its legitimate father. There may be an obligation on the part of a bastard child to aliment its mother; but I do not know of any authority for holding that the same applies to the putative father."

To return to the decisions. There is no case in which a parent (whether father or mother) who had launched a bastard into the world, after educating and fitting the child to support itself, has been held liable upon the child subsequently becoming indigent to relieve its necessities. And there is not a single case before *Samson* v. *Davie* in which it was held, and (excepting Lord Cowan's dictum in *Reid* v. *Moir*), none in which it has been suggested, that a bastard is under any obligation to support either one or other of his parents when they fall into poverty.

I have now noticed in detail all the authorities which were before the Court in *Samson* v. *Davie*, so far as these consisted of the law expounded by institutional writers, decisions, or judicial dicta; and I have also briefly indicated the points which, down to 1868, had and had not been established by judicial decision. None of these authorities support the doctrine affirmed in *Samson* v. *Davie*, with the exception of one passage in the lectures of Baron Hume, and one *obiter dictum* of the late Lord Cowan. I think it unfortunate that Lord Cowan, after stating that he was not prepared to express, and that it was unnecessary to express, any opinion upon the case of a bastard child, should nevertheless have proceeded to use language which has been frequently represented as a deliberate statement of his Lordship's opinion. I venture to doubt whether the learned Judge intended his words to be so construed.

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In *Samson* v. *Davie*, Lord Cowan's dictum was much relied on by Lord Craighill, who thus endeavoured to explain the difference which it suggests between the relation of a bastard to its mother and the relation of a bastard to its putative father. "In the eye of the law, the woman bearing the child, and the child to which she gives birth are mother and son, whereas the child that is born and the man who is made liable for a contribution of aliment, the putative father, are in law in no way related." That statement appears to me to be absolutely incorrect, if the relation of the bastard to each of its parents be tested by the same legal standard. It does correctly set forth the relation between child and mother according to the law of nature, and also the relation between child and father according to the common law. It ignores the fact that at common law the mother is, as much as the father, an utter stranger in blood to her child; and that, by natural law, the father is as nearly related to the child as its mother. Reason and authority are both against the existence of any liability on the part of the bastard to support its father in his indigence; and I have been unable to discover any considerations which render the bastard's natural tie to its mother such as to raise a reciprocal obligation of support.

Some of the learned Judges in *Samson* v. *Davie* seem to have regarded as authoritative passages in the Digest which undoubtedly bear that a mother and her bastard child, or *vulgo quæsitus*, are reciprocally bound to support each other. Lord Moncreiff observed that "texts of the civil law are not indeed authorities but illustrations, and very important illustrations." I agree with Lord Young in thinking that the rules of the civil law in the age of Justinian furnish a very unsafe guide to the law of Scotland touching the personal relations of parents and their children, whether legitimate or illegitimate. The two systems of jurisprudence differ widely in regard to the relations between parent and child, and the principles upon which these ought to rest; and I am not prepared to accept, in cases like this, any canon of the Roman law, which is not clearly shewn to have been adopted as part of the law of Scotland.

The appellant relied upon seven decisions by the Sheriff or his substitute in five different counties, between 1851 and 1858, finding an adult self-supporting bastard liable in aliment to the natural mother. These were submitted to the Judges in *Samson* v. *Davie*, but were not noticed by them, obviously because decisions of the inferior Courts do not constitute the law. It might be otherwise if, upon the faith of them, rights had been created which it would be inexpedient to disturb. But it is idle to suggest that any Scotch bastard has been begotten and born since 1851 in reliance upon his future liability to support his mother.

Being of opinion that there is not in the law of Scotland sufficient trustworthy authority to support the judgment in *Samson* v. *Davie*, I think the interlocutors appealed from must be affirmed and the appeal dismissed, and I move accordingly.

EARL OF SELBORNE.—I concur in the motion which my noble and learned friend Lord Watson has made.

Apart from the decision of the Second Division in *Samson* v. *Davie*, there is an entire absence of authority in the appellant's favour; for I cannot regard one recent judgment of a Lord Ordinary, in a case which (so far as appears) never went further, as of any weight as authority. The general rule of the law of Scotland (as of England) with a view, no doubt, to the encouragement of mar-

riage and the discouragement of illicit connections, is not to recognise the natural relationship between a bastard and his natural parents, or either of them, for the purpose of those civil effects and consequences which result from the relation of a legitimate child to his parents. The bastard can take nothing from either of his natural parents by succession, or (otherwise than as a stranger in blood) by bequest; and it seems to be now admitted, even by those who have considered the bastard to be liable in law to maintain his mother, that he is not liable to maintain his putative father, though ascertained to the effect of making the putative father liable for the bastard's maintenance until able to maintain himself. It is not inconsistent with this general state of the law that both the natural parents should be liable while the bastard is in pupilage, and until he is able to maintain himself, to maintain the offspring which they have brought into existence; and it seems to me to be false reasoning to infer from this a reciprocal obligation upon the bastard after his state of pupilage and of incapacity to maintain himself has ceased.

The whole argument for the appellant depends upon the decision in *Samson* v. *Davie*. If both cases can stand together, that decision is no sufficient foundation for the argument. I must admit that such a state of law does appear to me to be arbitrary; for, if principle ought to be regarded, I should not find it easy to say that the bastard is to be recognised as a child for the purpose of imposing upon him an obligation to maintain his mother, but is not to be so recognised when the mother seeks a *solatium* for his death, in circumstances which would have given her a right of action if he had been legitimate. But if a principle is to be regarded, a state of law which imposes upon an emancipated bastard child the burden of maintaining his mother because he is her child, while it does not allow him to take from her by succession, or accept as a stranger in blood by bequest, seems to me also to be arbitrary; and in that view the present decision is the more, and that in *Samson* v. *Davie* the less, consistent with principle. If the two decisions cannot stand together, I prefer the present, as the more consistent with principle, and with the state of previous authority bearing upon the immediate question. As to the authorities on which *Samson* v. *Davie* was decided, I agree with the observations of my noble and learned friend Lord Watson, and do not think it necessary to add anything further. *Quocunque modo*, the interlocutors appealed from are right, in my judgment, and ought to be affirmed.

LORD MACNAGHTEN and LORD MORRIS concurred.

INTERLOCUTORS appealed from affirmed, and appeal dismissed.

ANDREW BEVERIDGE—WM. OFFICER, S.S.C.—DEACON, GIBSON, & METCALF—SIMPSON & MARWICK, W.S.

No. 12.

June 19, 1891. Minister of Lochlee v. Dalhousie's Tutors.

Earl of Selborne. Lord Watson. Ld. Bramwell. Lord Morris.

MINISTER OF LOCHLEE AND OTHERS, Appellants (Defenders).—*Sol.-Gen. Sir C. Pearson—W. C. Smith.*
ALFRED ROBINSON AND OTHERS (Dalhousie's Tutors), Respondents (Pursuers).—*Lord-Adv. Robertson—H. Johnston.*

Proof—Ambiguity—Decree of presbytery.—Terms of decree of a presbytery defining the boundaries of a glebe in an excambion, which *held* (*aff.* judgment of Second Division), *diss.* Lord Morris,* to be unambiguous.

(IN the Court of Session, June 27, 1890, 17 R. 1060.)

JOHN GRAHAM—MENZIES, BLACK, & MENZIES, W.S.—LOCH & GOODHART—MACKENZIE & KERMACK, W.S.

No. 13.

July 28, 1891. Welch v. Tennent.

RALPH D. WELCH (Tennent's Executor), Appellant (Defender).—*Rigby, Q.C.—C. B. M'Laren.*
MRS HAMILTON DUNBAR TENNENT, Respondent (Pursuer).—*Lord-Adv. Robertson—Strachan—Moore.*

Husband and Wife—Foreign—Sale of English heritage belonging to wife—Surrogatum—Donation inter virum et uxorem.—The wife of a domiciled Scotsman, with her husband's concurrence, sold the estate of X, in England, belonging to her, and acknowledged the conveyance before two commissioners in terms of the Act 3 and 4 Will. IV. cap. 74, for the Abolition of Fines and Recoveries, declaring at the same time that she intended to give up her interest in the estate without having any provision made for her in lieu thereof. Her husband received the price and applied it to his own uses. The spouses afterwards separated by mutual consent, and the wife executed a deed of revocation of all donations and provisions made by her in her husband's favour. She then brought an action against him for declarator that the price in his hands was either (1) a *surrogatum* for her heritage, and not subject to the *jus mariti*, or (2) was a donation to him which she had validly revoked.

Held (*rev.* judgment of First Division) that by the law of England the husband on his marriage acquired an estate in his wife's heritage, so that at the date of the sale the estate of X was the heritable estate of the husband as well as of the wife, and that the price could not be regarded as a *surrogatum* for her estate solely.

Opinion that the wife's consent to her husband receiving the price could not be regarded as a donation by her in respect that the sale could not have been carried through without the husband's consent, and that his consent was only given on these terms.

Ld. Herschell. Lord Watson. Lord Morris.

(IN the Court of Session, June 28, 1889, 16 R. 876.)
The defender appealed.
After consideration,—

LORD HERSCHELL.—The parties were married in the year 1877 without any marriage-contract, and the domicile of the husband being Scottish, it was not disputed that this was the matrimonial domicile, and that all questions as to the right to moveables accruing to either of the spouses fall to be determined according to the law of Scotland.

The respondent was at the time of her marriage the owner of a freehold estate in England called Overton. She was also possessed of a leasehold house situated there. These freehold and leasehold properties were both sold shortly after the marriage. The £950 was the purchase money of the leasehold house, and as

* Lord Morris adopted the opinion of Lord Ordinary (Kinnear), reported 17 R. p. 1061.

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the claim in respect of it was abandoned it need not be further referred to. The £18,000 was part of the price of the freehold estate which was received by the husband on the execution of the conveyance in July 1877. The balance of the purchase money, £5500, was invested as security for the payment of an annuity of £200 a-year which was charged on the estate. It is not questioned that the £18,000 was received by the husband with the full assent of his wife, but the circumstances under which it was received and the precise nature of the transaction will be hereafter considered. Mrs Tennent, on the 28th of December 1882, revoked all donations in favour of her husband, and this action was afterwards commenced.

There can be no doubt, as I have said, that the rights of the spouses as regards moveable property must, in the circumstances of this case, be regulated by the law of Scotland, but it is equally clear that their rights in relation to heritable estate are governed by the law of the place where it was situate. This is not denied by the respondent, but it is said that as soon as the heritable estate in England became by sale converted into moveables the Scottish law became applicable. The case of the pursuer was put in this way. It was admitted that all moveables accrued by the law of Scotland to the husband by virtue of the *jus mariti*, but it was said that there is an exception to this in the case of the proceeds of the heritable estate of the wife, that they do not pass to the husband but remain the property of the wife, and that if she permits her husband to receive and spend them, this is in the nature of a donation which may be at any time recalled by her. It follows, it was argued, that as soon as the estate in *England* was sold, the proceeds, though they would according to the law of England be the husband's, became subject to the law of Scotland, and so did not pass to him. It is, I think, established that moveables which represent the heritable estate of the wife are not by the law of Scotland subject to the *jus mariti*, and where the matrimonial rights are governed by that law, I think this would be the case, even though the heritable estate of the wife were situate out of Scotland. But it is manifest that the *lex loci rei sitæ* must determine whether the estate be heritable estate of the wife's during coverture, and what is the nature and extent of her right in respect thereof. It becomes necessary, therefore, to inquire what was the effect of the marriage according to the law of England upon the heritable estate of which the wife was then possessed. The husband became immediately possessed of an estate therein during their joint lives, and if there was issue of the marriage, for the term of his own life, though he survived his wife. The wife could not during her husband's lifetime convey her interest in the property to any other person except with the concurrence of the husband, and by a deed acknowledged in the manner prescribed by the 3 and 4 Will. IV. c. 74. She could not during coverture dispose of it by will, and if she predeceased her husband, and there were issue of the marriage, the estate would on the death of the husband descend to such issue.

It is therefore, in my opinion, not accurate to treat the purchase money of the Overton estate as the proceeds of a heritable estate belonging to the wife, and as *surrogatum* for that estate. It was an estate in which both spouses possessed undetermined interests, the extent of their respective interests depending on whether there was issue of the marriage, and which of them survived the other. It was heritable estate of the husband as well as of the wife, and could not be disposed of to a purchaser without the concurrence of both of them. The purchase money of the estate in which they were thus interested cannot, in my

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opinion, truly be regarded as the price of a heritable estate of the wife's, which, according to the law of England, becomes the husband's only by the *jus mariti*, and which, if the law of Scotland be applicable, must be regarded, if the wife permits her husband to retain it, as a donation by her to him. The right of the husband to the proceeds does not flow only from the *jus mariti*. It cannot be dissociated from the real property law of this country, which gave the husband the estate and interest which I have described in the heritable property possessed by his wife at the time of the marriage. The price received from the purchaser represents as much the husband's estate and interest as the wife's. The wife, it is true, was by the sale deprived of the interest which she had in the heritable property, but I do not think that her assent to the entire price being received by her husband, without that provision being made for her which she could have insisted on as the price of her concurrence in the conveyance, can be regarded as a donation. There could have been no sale without the concurrence of the husband, and if he gives that concurrence on the terms that the whole purchase money of the estate in which they both have an interest shall be received by him, I do not think that this can be regarded as a donation of all the purchase money, or even of so much of it as might be found on an actuarial calculation to represent her interest, especially where, as in the present instance, the husband has, in order to complete the sales, entered by the deed of conveyance into an onerous covenant by reason of the charge which existed on the property. But it is perhaps hardly necessary to determine whether the purchase money could be regarded as a donation by the wife to the husband to the extent to which it represented her interest as ascertained on an actuarial calculation, inasmuch as the claim in this action is not to have it ascertained how much of the purchase money received in 1877 represented the interest of the wife in the heritable subject, and to treat so much of the purchase money as should be found to represent that interest as a donation *inter virum et uxorem*, but to treat the entire price of the estate as *surrogatum* for the heritable estate of the pursuer.

For the reasons I have given, I think it is impossible to do so, even allowing the fullest effect to the Scottish law as regulating the matrimonial rights of the parties. I think the difference between the view I have indicated and that of the Court below has probably arisen from the circumstance that the contention mainly urged upon them on behalf of the appellant appears to have been that the purchase money, according to the law of England, became the husband's upon the conveyance; and that their attention was not so definitely directed as your Lordships' has been to the fact that, having regard to the English law of real property, the price could not properly be regarded as representing the heritable estate of the wife, and as *surrogatum*. Therefore, I am of opinion that the interlocutors appealed from ought to be reversed, and the defender assoilzied from the conclusions of the summons, and I move your Lordships accordingly.

Lord Watson and Lord Morris concurred.

Interlocutors appealed from reversed, and cause remitted to the First Division with directions to assoilzie the defender (appellant) from the conclusions of the summons.

A. Beveridge—Carment, Wedderburn, & Watson, W.S.—Charles Turner—John Elder, S.S.C.

No. 16.
Mar. 13, 1891.
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in the Sheriff Court were concerned, on the ground that under section 22 of the Summary Procedure (Scotland) Act, 1864, it was incompetent to award them in that Court, there being no authority for the awarding of expenses in the special Act under which the prosecution was brought, viz., the Cruelty to Animals (Scotland) Act, 1850.

THE COURT pronounced this interlocutor:—"Answer the question in the case in the negative: Dismiss the appeal: Affirm the determination of the inferior Judge, and appoint parties to be heard on the question of expenses."

On 8th June 1891, at the hearing on the question of expenses, it was argued for the respondent;—It was competent to award expenses here. The provision in section 8 of the Cruelty to Animals (Scotland) Act, 1850, implied a power to award expenses against the accused. It had been held that that involved authority to award expenses against the prosecutor.[1]

Argued for the appellant;—There was no power expressly conferred by the Act of 1850 to award expenses. The power could not be inferred by implication from the terms of section 8 of the Act.[2]

At advising,—

LORD JUSTICE-CLERK.—It seems perfectly clear from previous decisions that where an Act of Parliament authorises costs to be given against the accused it is implied that the Court has a general power of awarding costs to either party, in this view, that the power to award costs against the accused being given, it is an equitable and fair inference that the prosecutor may have expenses awarded against him if he fails in his prosecution.

Here the objection to the awarding of expenses is laid upon the 22d section of the Act of 1864, which provides that the award of expenses must be authorised by the special Act under which the prosecution is brought. The Act of Parliament with which we are dealing does not in express words say that expenses can be awarded either to or against the prosecutor. But it does say that if the penalty together with the costs are not paid, the Judge has the power to order imprisonment.

That seems to me very clearly to indicate that an award of expenses may be given by the Judge in such a case against the accused, and if such an award may be given, then I think the case that was cited to us makes it plain that it is competent to award expenses against the prosecutor. That is sufficient for the decision of the question of competency. As regards the merits, it is scarcely contended that if expenses may be given this is not a suitable case for doing so. It was a test case for the purpose of establishing a rule following upon cases in which the verdict had been one of acquittal. It was very expensive to the accused who was selected to stand the test. I think this is a suitable case for awarding expenses.

LORD RUTHERFURD CLARK.—I think, upon the only legitimate construction of the Cruelty to Animals Act, there is authority to the Judge in the inferior Court to award expenses against the accused. If so, it follows from the case of *Walker* that there is an equal authority to award expenses against the prosecutor.

[1] Walker v. Bathgate, July 19, 1873, 11 Macph. 956, 45 Scot. Jur. 508.

[2] Gray v. Mackenzie, Feb. 24, 1862, 1 Irvine, 166; Ross v. Stirling, Oct. 22, 1869, 1 Couper, 336, 8 R. (Just. Cases) 49.

No. 16. Hence, in my opinion, we should give expenses against the prosecutor in this case.

Mar. 13, 1891. Todrick v. Wilson.

LORD TRAYNER.—I agree. I think on the question of competency the case of *Walker* is conclusive. The terms of the statute there and here are practically the same, and it being competent to award expenses, I have no hesitation in saying that the expenses should be given.

THE COURT pronounced this interlocutor:—"Having resumed consideration of this case, and heard counsel on the question of expenses, find the respondent entitled to expenses, both in this Court and in the inferior Court."

CROWN AGENT—W. J. LEWIS, S.S.C.—Agents.

No. 17.

June 8, 1891. Markland v. Her Majesty's Advocate.

JAMES MARKLAND, Complainer.—*G. Watt.*
HER MAJESTY'S ADVOCATE, Respondent.—*D. Robertson, A.-D.*

Procedure—Competency of leading evidence and convicting of common law offence where statutory offence charged—Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. c.* 35), *sec.* 62.—The Criminal Procedure (Scotland) Act, 1887, sec. 62, enacts,—"Where any act set forth in an indictment as contrary to any Act of Parliament is also criminal at common law, or where the facts proved under such an indictment do not amount to a contravention of the statute, but do amount to a crime at common law, it shall be lawful to convict of the common law crime."

A person was charged with having, while an undischarged bankrupt, within the meaning of sec. 4 of the Bankruptcy Frauds and Disabilities Act, 1884, obtained credit exceeding £20 from a firm of bootmakers without informing them that he was an undischarged bankrupt, contrary to sec. 4 of said Act. The evidence having negatived the charge, the Sheriff-substitute allowed further evidence to be led of facts not mentioned in the indictment, with the result that a verdict was obtained against the accused of the common law offence of falsehood, fraud, and wilful imposition, and the accused was sentenced to imprisonment.

The Court *suspended* the conviction and sentence, holding that section 62 of the Criminal Procedure (Scotland) Act, 1887, did not entitle the prosecutor to lead evidence to prove any facts not libelled in the indictment, and thereafter convict of a common law offence which had not been charged in the indictment.

HIGH COURT. Lord Justice-Clerk. Lord Rutherfurd Clark. Lord Trayner. Justiciary Clerk.

JAMES MARKLAND, boot and shoemaker, Glasgow, brought a bill of suspension against Her Majesty's Advocate, craving suspension of a conviction and sentence by the Sheriff-substitute (Lees) of Lanarkshire, dated 21st March 1891.

The complainer averred;—(Stat. 1) "James Neill Hart, as procurator-fiscal for Lanarkshire, for the public interest, caused the complainer to be served with a charge of having, while an undischarged bankrupt, obtained credit for £30, 5s. 6d., in contravention of section 4 of 47 and 48 Victoria, cap. 16. On 10th March the complainer appeared at the pleading diet and pleaded not guilty, and on 21st March 1891 the complainer attended the Court and was tried on the said charge before Sheriff-substitute Lees and a jury." (Stat. 2) "The charge as contained in the indictment is as follows:—'That your estates having been sequestrated by the Sheriff of Lanarkshire on 9th August 1888, and you not having received your discharge, and being an undischarged bankrupt within the meaning of section 4 of the Bankruptcy Frauds and Disabilities Act, 1884, you did, on 24th September and 5th November 1890, in your premises 29 West Howard Street, Glasgow, obtain credit to the amount

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of £30, 5s. 6d. from J. Tedds & Son, wholesale boot and shoe manufacturers, Dryden Street, Leicester, without informing said firm that you were an undischarged bankrupt, contrary to said section 4 of said Act, and you have thereby incurred the penalties provided by the Debtors (Scotland) Act, 1880, 43 and 44 Victoria, cap. 34, section 13.'" (Stat. 3) "The first witness examined was the said J. Tedds, who said that he had never given the complainer credit, and that the said £30, 5s. 6d. had been paid, but that his agent had not informed him of this at the time he instructed the present proceedings. The Sheriff thereupon, after consultation with the procurator-fiscal, stated to the jury that the charge against the complainer had broken down, as he never obtained credit, but the fiscal would proceed with his evidence, and it might turn out that some other crime might be proved. Counsel for the complainer objected to such a course on the ground that the complainer was not charged with any other crime, and that no acts were set forth in the indictment amounting to a crime at common law, and that he was only prepared to meet the charge in the indictment. The Sheriff-substitute, however, repelled the objection, and insisted on the evidence being led." (Stat. 4) "At the close of the evidence the procurator-fiscal asked for a conviction against the complainer, but did not state what crime he wished the jury to convict of. After counsel for the complainer had addressed the jury the Sheriff-substitute asked the fiscal to state the charge on which he sought a conviction, and to put it in writing. The Sheriff and fiscal then adjusted a formal charge, which the Sheriff read to the jury in charging them. It was pointed out to the Sheriff, while he was adjusting the charge, the anomaly of a man being charged with a crime which neither he nor his counsel nor the Court knew the nature of till after his counsel's address to the jury. The Sheriff, however, proceeded with his charge, and the jury returned a verdict of guilty by a majority. The jury did not know what they were convicting the prisoner of, but the clerk of Court, reading from a paper handed to him by the Sheriff, read out to the jury,—'The jury by a majority found the panel guilty of having, on 24th September and 5th November, in the premises of J. Tedds & Son, wholesale boot and shoe manufacturers, Dryden Street, Leicester, and in his premises, 29 West Howard Street, pretended that he was J. Richmond, carrying on business at Coatbridge, and thus induced them to send him goods to the amount of £30, 5s. 6d., which he received and appropriated to his own uses in West Howard Street aforesaid.' The foreman of the jury assented by a nod, and the Sheriff-substitute then sentenced the complainer to forty days' imprisonment. He was immediately sent to prison to undergo the sentence."

The averments were admitted to be substantially correct.

The complainer pleaded;—(1) The charge under which the complainer was tried having been withdrawn from the jury by the Sheriff-substitute, he was entitled to be acquitted. (2) The complainer having been convicted of a pretended offence, with which he had never been charged, the conviction and sentence ought to be suspended. (3) The complainer never having been informed of the nature of the charge of which he was convicted till after the evidence was led and his counsel's address finished, the conviction and sentence are illegal, unjust, and oppressive, and ought to be suspended. (4) There being no acts set forth in the indictment criminal at common law, and the charge under the statute having been withdrawn or departed from, the conviction and sentence were illegal, and ought to be suspended.

Argued for the complainer;—The indictment charged the accused with a statutory offence only, and the *species facti* did not amount to an offence

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at common law. It was therefore incompetent to lead evidence in support of the latter charge, and the conviction of an offence at common law fell to be quashed.

Argued for the respondent;—Under the 62d section of the Act of 1887 it was competent, where a statutory offence was charged, to convict of an offence at common law if facts were proved, as they were here, amounting to such an offence.

LORD JUSTICE-CLERK.—The complainer was brought before the Sheriff of Lanarkshire and a jury on a charge of having contravened the Statute 47 and 48 Vict. c. 16, sec. 4, in respect that he being an undischarged bankrupt obtained credit to the amount of £30, 5s. 6d. from certain people in Leicester without informing them that he was an undischarged bankrupt. That was a statutory charge of a distinct kind, and a charge which on the face of it set forth no crime at common law at all. The first part of section 62 of the Criminal Procedure Act does not therefore apply. It appears that when the prosecutor had attempted to prove that the prisoner had obtained credit the evidence disclosed that this was not the case, and accordingly the prosecutor's case on the statutory charge completely broke down.

Whether it would have been right or not at once to have stopped the proceedings I do not say, but the Sheriff-substitute allowed the case to go on, and that was a competent course. Certain facts were brought out, and I shall assume that they were proved, viz., that the accused "pretended that he was J. Richmond, carrying on business at Coatbridge, and thus induced a firm" to send him goods to the amount of £30, 5s. 6d., which he received and appropriated to "his own uses in West Howard Street aforesaid." The jury returned a verdict accordingly.

That verdict found facts which there was nothing whatever in the indictment to cover. The Sheriff thought that a conviction might be good under the second part of section 62, which is as follows—"Where the facts proved under such an indictment do not amount to a contravention of the statute but do amount to a crime at common law, it shall be lawful to convict of the common law crime." ("Such an indictment" I take to mean an indictment charging a statutory crime.) I have no doubt that these words mean this—"the facts proved under such an indictment being facts charged in the narrative of the indictment." But I do not hold that these words amount to this, that if it should crop out in the evidence that some other crime might have been charged than the crime stated in the indictment, then it is competent to convict the accused of that other crime.

The indictment under a statute may set forth what is a crime at common law, not being exactly the same crime as the statute intends to strike at, and if it does, and if the evidence competently led proves that crime, conviction may follow.

But here there was no power whatever to receive evidence which would prove falsehood, fraud, and wilful imposition under this indictment. The indictment set forth a statutory offence only, and the words in which it did so do not constitute any crime at common law. Therefore this conviction is bad, and must be set aside.

LORD RUTHERFURD CLARK.—I am of the same opinion, and I put my judg-

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ment on these grounds. I think the prosecutor was not entitled to lead evidence upon any facts that were not charged in the indictment. I think that he has led evidence of facts not charged in the indictment, and has obtained his conviction in respect of the facts so proved. The appellant has therefore been convicted of an offence which was not charged in the indictment and could not be proved under the indictment; therefore I am of opinion that the conviction should be set aside.

LORD TRAYNER.—In this case the prosecutor charged the suspender with an offence under the Bankruptcy Act, 1884 (47 and 48 Vict. cap. 16), sec. 4. It appears from the statement made by the suspender and admitted by the prosecutor that the evidence negatived the charge made in the indictment. The Sheriff-substitute seems to have thought that under section 62 of the Criminal Procedure Act 1887, the prosecutor was entitled to go on and prove some other offence than that libelled, with the result that a verdict was obtained which purports to find the suspender guilty of falsehood, fraud, and wilful imposition.

I concur with both your Lordships in thinking that that conviction cannot stand. I agree with the view expressed by your Lordship in the chair as to the meaning of section 62. If an indictment charges a prisoner with a statutory offence, the *species facti* being also sufficient to constitute an offence at common law, the accused may on such an indictment be convicted of the offence at common law. But to allow a prosecutor to prove facts not charged is I think *quite* unwarrantable, and wholly improper. But in any view the verdict before us convicts the prisoner of what is not a crime at all. The verdict does not negative the idea of perfect honesty on the part of the accused, and I am clearly of opinion that this suspension should be sustained.

LORD JUSTICE-CLERK.—I entirely concur with Lord Trayner on the latter point. The case of *H.M. Advocate* v. *Swan*, Dec. 10, 1888, 2 White, 137, 16 R. (Just. Cases) 34, settled that it is not enough to aver in a common law charge that the person charged obtained credit to a certain amount, without specifying how or for what.

THE COURT suspended the conviction and sentence *simpliciter*.

CLARK & MACDONALD, S.S.C.—CROWN AGENT—Agents.

No. 18.

June 8, 1891.
Provan v. Malloch.

JAMES PROVAN, Complainer.—*Crabb Watt.*
JAMES MACGREGOR MALLOCH (Procurator-Fiscal of Burgh of Govan), Respondent.—*A. S. D. Thomson.*

Procedure—Proof—Note of documentary evidence—Summary Procedure (Scotland) Act, 1864 (27 *and* 28 *Vict. c.* 53), *sec.* 16.—The Summary Procedure (Scotland) Act, 1864, sec. 16, enacts,—"It shall not be necessary in any proceeding under the authority of this Act to record or to preserve a note of the evidence adduced, but the record shall set forth in the form of the schedule (I) to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

Held that the failure to note in the record of the proceedings at a trial two documents put in evidence was fatal to the conviction which followed.

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June 8, 1891.
Provan v. Malloch.

HIGH COURT.
Lord Justice-Clerk.
Lord Rutherfurd Clark.
Lord Trayner.
Justiciary Clerk.

JAMES PROVAN, doctor of medicine, residing in the burgh of Govan, was charged at the instance of James M. Malloch, procurator-fiscal of the burgh, with having contravened the Infectious Disease (Notification) Act, 1889, sec. 3, subsec. 1 (*b*), thereof,* in so far "as (first) he being the medical practitioner attending on David Milne, residing in Brand Street, in said burgh, and having on 10th February 1891 become aware that the said David Milne was suffering from scarlet fever, being an infectious disease to which the said Act applies, did fail thereupon to send to the medical officer of health of said burgh a certificate stating the name of the patient, the situation of the building, and the infectious disease from which, in his opinion, the patient was suffering; and (second) he, the said James Provan, being the medical practitioner attending on David Dowie, residing in M'Lellan Street, in said burgh, and having on 18th February 1891 become aware that the said David Dowie was suffering from typhoid fever, being an infectious disease to which the said Act applies, did fail thereupon to send to the medical officer of health of said burgh the name of the patient, the situation of the building, and the infectious disease from which, in his opinion, the patient last mentioned was suffering."

The complaint was brought under the Summary Jurisdiction (Scotland) Acts, 1864 to 1881.

The accused was convicted and sentenced to pay a fine of 10s. 6d.

He brought a bill of suspension, in which he averred that he was unable on 10th and 18th February 1891, or on several subsequent visits, to diagnose the diseases from which the patients were suffering. He could not be aware at that early stage that the diseases were infectious. As soon as he was of opinion that they were suffering from diseases of an infectious nature he sent certificates to that effect to Dr Barras, the medical officer of the burgh, in terms of the Act.

The complainer further averred;—"(10) Apart from medical testimony, of which none was adduced, the certificates sent by the complainer to Dr Barras, the medical officer, formed (first) the only competent evidence that the complainer's patients ever had suffered from an infectious disease; and (second) they were an essential part of the evidence necessary to convict the complainer, assuming he was otherwise guilty, of not having sent statutory certificates before the dates they bear. Moreover, they exculpated the accused, since they bore that he had complied with the statutory requirement. These certificates were produced and spoken to by the sanitary inspector at the trial, but they were most improperly and illegally suppressed or omitted from the record."

The complainer pleaded;—1. The said sentence is illegal and unwarrantable, and ought to be suspended as craved in respect (2) The certificates sent by the complainer to the medical officer of the burgh, and produced by the witness Dunne, the sanitary inspector, were omitted from the record of the proceedings.

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* The Infectious Disease (Notification) Act, 1889 (52 and 53 Vict. c. 72), sec. 3, subsec. (1) (*b*), enacts,—"Where an inmate of any building used for human habitation within a district to which this Act extends is suffering from an infectious disease to which this Act applies, then, unless such building is a hospital in which persons suffering from an infectious disease are received, the following provisions shall have effect, that is to say:—(*b*) Every medical practitioner attending on, or called in to visit, the patient shall forthwith, on becoming aware that the patient is suffering from an infectious disease to which this Act applies, send to the medical officer of health for the district a certificate stating the name of the patient, the situation of the building, and the infectious disease from which, in the opinion of such medical practitioner, the patient is suffering."

He cited *Oliphant* v. *Wilson*, Dec. 12, 1889, 2 White, 403, 17 R. (Just. Cases) 12.

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LORD JUSTICE-CLERK.—The terms of the 16th section of the Summary Procedure (Scotland) Act, 1864,* are in my opinion peremptory, and must be strictly complied with. In this case the record fails to set forth the certificates, an important part of the documentary evidence in the case. I am then for suspending the sentence.

LORD RUTHERFURD CLARK.—I agree. The statute directs that the record shall be kept in a particular form, and in a particular manner, and it is peremptory. Whenever the record is not in accordance with the statutory directions I shall not sustain a conviction proceeding upon such a state of matters.

LORD TRAYNER concurred.

THE COURT pronounced this interlocutor:—"In respect that the record fails to set forth in terms of section 16 of 27 and 28 Vict. c. 53, a note of the certificates sent by the complainer to the medical officer, and put in evidence, pass the bill, suspend the conviction and sentence complained of *simpliciter*, and decern."

SIMPSON & MARWICK, W.S.—M. J. BROWN, S.S.C.—Agents.

ISAAC WILLIAMSON, Appellant.—*Craigie.*
WILLIAM GEDDES AND ANOTHER, Respondents.—*M'Watt.*

No. 19.

June 8, 1891.

Williamson v. Geddes.

JUSTICIARY APPEAL COURT. Lord Justice-Clerk. Lord Rutherfurd Clark. Lord Trayner. Justiciary Clerk.

Appeal—Right of, where appellant abroad and no mandatary within jurisdiction—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 *and* 39 *Vict. c.* 62).—On 21st April 1891 Isaac Williamson, horse-dealer, Pulteneytown, Caithness, was charged in the Burgh Court of Wick, at the instance of Peter Morrison, procurator-fiscal of that Court, with obtaining goods under false pretences. Having pleaded guilty, he was fined £15 (which he paid) by Messrs William Geddes and George Manson, the presiding magistrates. Thereafter he left the country and went to America.

On 23d April Adam Shepherd, solicitor, Wick, applied to the Magistrates to state a case for appeal to the High Court of Justiciary under the Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62), in respect, *inter alia*, that under the Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), the penalty should not have exceeded £5. The Magistrates refused the application, upon the ground that Shepherd declined to produce a mandate from Williamson, who was outwith the jurisdiction of the Supreme Courts of Scotland.

The agent presented a note of appeal to the High Court of Justiciary on Williamson's behalf to have the Magistrates ordained to state a case, but did not produce any mandate.

The Court *refused* the note.

ALEX. MUSTARD, S.S.C.—H. & H. TOD, W.S.—Agents.

* Quoted in rubric.

No. 20.

July 17, 1891.
Whyte v. Robertson.

HELEN RUTHERFORD OR WHYTE, Complainer.—*Salvesen.*
GEORGE ROBERTSON (Procurator-Fiscal of Burgh of Queensferry), Respondent.—*Watt.*

Complaint—Specification—Objection not taken at trial.—A person was charged with "an offence within the meaning of the General Police and Improvement Act, 1862." There was no specification of the section said to have been contravened, but the acts said to have constituted the contravention were set forth. The accused stated no objection to the complaint in respect of want of specification, and was convicted. In a suspension, the Court, on the ground of want of specification, set aside the conviction, holding that it was incumbent on the prosecutor to set forth the section said to have been contravened as well as the acts said to constitute the contravention.

Hastings v. *Charles*, 2 White, 325, *followed.**

HIGH COURT.
Lord Young.
Lord Rutherfurd Clark.
Lord Trayner.
Justiciary Clerk.

HELEN RUTHERFORD OR WHYTE was charged in the Burgh Court, Queensferry, with "an offence within the meaning of the General Police and Improvement Act, 1862." The complaint stated that on 16th April 1891, "she did, in an unoccupied dwelling-house situated at East Terrace, burgh of Queensferry, said house being her property, wholly in her possession, and under her control, wilfully or negligently permit a water tap or cock attached to or forming part of the water-pipe in said house to remain open, whereby the water supplied by the Commissioners of Police of said burgh for domestic and ordinary purposes, or under their control, was wasted, whereby the said Helen Rutherford Whyte is liable to a penalty not exceeding £5."

Mrs Whyte was represented by an agent, who stated objections to the relevancy, which were repelled. No objection to the effect that the section founded on ought to have been set forth was stated. She was convicted on evidence "of the contravention charged, in so far as the said Helen Rutherford Whyte did negligently permit waste of the water libelled," and was fined 5s.

Mrs Whyte raised a suspension of the proceedings, in which she pleaded, *inter alia;*—1. The conviction in question ought to be suspended, in respect (1) that the complaint was not sufficiently specific to be relevant under the statute libelled, or at common law; and (2) that the facts charged did not amount to a contravention of said statute.

Argued for the complainer;—The complaint was irrelevant for want of

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* HASTINGS AND OTHERS *v.* CHARLES, Oct. 29, 1892, 2 White, 325.

In this case Hastings and others, a number of sailors, were charged in a complaint brought under the Summary Jurisdiction Acts, 1864-1881, and the Criminal Procedure (Scotland) Act, 1887, that they being "all employed and lawfully engaged as seamen within the meaning of the Merchant Shipping Act, 1854, . . . on board the said steamship 'Tay,' did, on 4th June 1889, at Borrowstounness, . . . neglect or refuse, without reasonable cause, to proceed to sea in said ship, . . . and this the said . . . did contrary to the Merchant Shipping Acts, 1854 to 1887, whereby the said . . . are each liable, in terms of the Merchant Shipping Acts, 1854 to 1887, to forfeit out of their wages," &c.

After evidence led the accused were convicted and appealed to the High Court, the question of law for the opinion of the Court being, "Whether the complaint was sufficiently specific to be relevant under the statutes or at common law?"

The Court *held* that the indictment was irrelevant, in respect it failed to set forth the section of the Merchant Shipping Acts, 1854 to 1887, alleged to have been contravened, and that the accused had therefore no sufficient notice of the offence to be proved against them.

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specification. The Act said to have been contravened was one of 449 sections. The section which applied to the case was probably the 226th, which was a section incorporating with the Act the Water-Works Clauses Act, 1847, "with respect to the following matters," and, *inter alia*, "with respect to waste or misuse of water supplied by the undertakers." That Act, sec. 55 and sec. 60, made certain provisions as to waste or misuse of water. But, even assuming it to be unnecessary to go outside the Act of 1862 itself, the section of that Act said to have been contravened ought to have been quoted.[1]

Argued for the respondent;—This objection came too late.[2] Though objections were stated to the relevancy, this was not one of them. The case of *Hastings* was explained by the special circumstances of the charge. Here facts amounting to a good charge were specified. The reference to the statute was quite sufficient.[3] The Summary Procedure Act, 1864,[4] made it necessary only to set forth "the Act or section of the Act founded on without setting forth the enactment in words at length." The section plainly intended was sec. 223.*

LORD YOUNG.—It is certainly a general rule of law that an objection to a complaint which might have been stated before the case went to proof shall not be allowed to be stated after verdict. But that rule, though general, is not universal.

The objection which we are considering is, that the prosecutor did not properly frame his complaint, when he gave the accused a mere reference to an Act containing 400 to 500 sections, and which she is said to have contravened, while that Act itself in sec. 226 contains a reference importing into it another statute having also very numerous sections. It was that section that the suspender's counsel said that he supposed the prosecutor to have in view.

When we were referred to the section which the respondent's counsel quoted from the Police Act, 1862 (section 223), we found it to provide against violent and fraudulent interference with a water company's works, and against wilful or negligent waste of water with which the person said to cause the waste is supplied by the water company. But there is nothing in the complaint to lead the accused to refer to that particular clause, or to lead her to that part of the clause which she is now said to have contravened, and which is said to have been intended in the complaint. And even that section, as I have just said, embraces a variety of different acts. The particular part of it to which we were referred is, that whosoever "shall wilfully or negligently waste, or cause to be wasted, any water with which he is supplied by the commissioners." Now, I think that the provision founded on ought to have been set out, not by quota-

[1] Hastings v. Charles, Oct. 29, 1889, 2 White, 325.
[2] Bolton v. Murdoch, Jan. 22, 1890, 17 R. (Just. Cases) 22.
[3] Hamilton v. Inglis, May 22, 1879, 6 R. (Just. Cases) 45.
[4] 27 and 28 Vict. c. 53, sec. 4.

* The General Police and Improvement Act, 1862, enacts by sec. 223,—"Whosoever shall wilfully or carelessly break, injure, or open any lock, cock, waste-pipe, or water-works belonging to, or under the management or control of the commissioners, or shall unlawfully flush, draw off, divert, or take water from any water-works belonging to or under the management or control of the commissioners, or from any water or streams by which such water-works are supplied, or shall wilfully or negligently waste, or cause to be wasted, any water with which he is supplied by the commissioners," shall incur a penalty not exceeding £5.

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July 17, 1891.
Whyte v. Robertson.

tion, but by a reference to the section and by a specification of the acts said to have constituted the contravention. In that opinion I am following the case of *Hastings*, which was cited to us, and with which I agree.

Now, there was nothing in the complaint of the nature I have described. Indeed, we have no assurance that the magistrates took the right view of the statute at all. They may have thought that the appellant was acting in contravention of the section even though no water was being supplied at the time. If they did so, their construction was quite erroneous, but they may have so held, because I understood the respondent's counsel to maintain that if the water was turned on to this unoccupied house, and there was in it at the time a cock not properly turned off, there was a contravention. I think that quite wrong. That doubt would certainly have been avoided if the rule laid down in the case of *Hastings* had been followed.

On these grounds I consider that the conviction cannot be maintained.

LORD RUTHERFURD CLARK.—I was a party to the decision in the case of *Hastings*, and I think it is in point.

LORD TRAYNER.—I agree with all that has been said by your Lordship in the chair. I think that the case of *Hastings* laid down a sound and valuable rule, and that prosecutors in the inferior Courts ought to understand that if they desire to state a complaint charging a statutory offence, they must set forth the statute and the section said to have been contravened as well as specify the facts said to form the contravention.

THE COURT suspended the conviction.

HUTTON & JACK, S.S.C.—WILLIAM OFFICER, S.S.C.—Agents.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1890–91.

MURDOCH M'KENZIE, Appellant.—*Guy.*
ROBERT LOCKHART AND ANOTHER, Respondents.—*Maclaren.*

No. 1.

Oct. 27, 1890.
M'Kenzie v. Lockhart.

Poaching Prevention Act, 1862 (25 *and* 26 *Vict. c.* 114), *sec.* 2—*Poaching inferred from possession of poaching implements and game.—Held* that in order to justify a conviction under section 2 of the Poaching Prevention Act, 1862,* it was not essential that the person in whose possession poaching implements and game are found should have been seen upon land in search of game or coming from land, but that the Sheriff or Justices are entitled to draw that inference from the possession of the poaching implements and game, and other facts in the case.

HIGH COURT. Lord Justice-Clerk. Lord Adam. Lord Rutherfurd Clark. Justiciary Clerk.

ROBERT LOCKHART and John M'Ewan, Pollokshaws, were charged at the instance of Murdoch M'Kenzie, sergeant of police in the Renfrewshire Constabulary, in the Sheriff Court at Paisley with a contravention of section 2 of the Act 25 and 26 Vict. c. 114, "in so far as on or about the 22d day of July 1890 the said Robert Lockhart and John M'Ewan were found by the complainer on, upon, or about the junction of the public streets . . . within the town of Pollokshaws, . . . known by the appellations of New Street and Coustonhill Street, coming from land

* The Act 25 and 26 Vict. c. 114, sec. 2, provides,—"It shall be lawful for any constable or peace officer in any county, burgh, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some Justice of the Peace for a summons citing such person to appear before two Justices of the Peace assembled in Petty Sessions, as provided in the 18th and 19th of Her present Majesty, chap. 126, sec. 9, as far as regards England, and before a Sheriff or any two Justices of the Peace in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay," &c.

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where they had both and each or one or other of them been unlawfully in search or pursuit of game, or aiding and abetting some person or persons to the complainer unknown, who had been unlawfully on land in search or pursuit of game, and having in their possession, or in the possession of one or other of them, two nets and a trail string, used for the purpose of taking game, and a bag for carrying game, which contained seven rabbits or thereby, warm and newly killed, which game the said Robert Lockhart and John M'Ewan, or both and each or one or other of them, did obtain by unlawfully going upon land or lands to the complainer unknown in search or pursuit of game; and which nets and trail string the said Robert Lockhart and John M'Ewan, or both and each or one or other of them, did use for unlawfully killing or taking game; or the said Robert Lockhart and John M'Ewan, or both and each or one or other of them, had been accessory thereto, whereby," &c.

On 5th August 1890 the Hon. Sheriff-substitute (M'Gown) found the complaint not proved, and dismissed the panels from the bar *simpliciter*.

M'Kenzie asked a case, in which the Sheriff-substitute stated the following facts as proved:—

About five o'clock on Tuesday morning, 22d July, the appellant and another constable observed the respondents at the junction of New Street and Coustonhill Street, Pollokshaws. They were known to the constables, who observing them having something bulky in their possession apprehended them and took them to the police-office at Pollokshaws. On being searched there two nets, of the respective lengths of forty-nine and forty-one yards, and a trail string, sixty-nine yards long, suitable for the purpose of taking game, and contained in a small handbag, were found upon Lockhart. M'Ewan had in his possession a gentleman's leather bag containing seven wild rabbits, warm, recently killed and gutted. The nets and trail were wet and had fresh grass upon them, shewing they had been lately used. The town of Pollokshaws was adjacent to the policy-grounds of Sir John Stirling-Maxwell, Bart., and others, on all of which game was preserved and abounded.

The Sheriff-substitute further stated his ground of judgment in the following terms:—"I held that as the respondents had not actually been seen upon land, or coming from land, they should be acquitted, and in consonance with that view the respondents were discharged."

The question of law for the opinion of the Court was, whether under the provisions of the Poaching Prevention Act of 1862, when facts and circumstances as above were proved, it was necessary to shew that the respondents had actually been seen upon land or coming from land.

LORD JUSTICE-CLERK.—The Act which we have to consider prescribes that any person who is suspected of having been on land for the purpose of poaching may be stopped and searched. If anything usually used in poaching, or any fruits the results of poaching are found in his possession, these may be taken possession of by the officer, who may then raise a complaint for the purpose of obtaining a conviction against such person for poaching, either by being himself upon any land or by being an accessory. The facts stated in this case plainly implied a contravention of the statute. But then the Sheriff-substitute had a doubt whether, although these facts were proved, any person could be convicted who was not seen on land or coming from land, and decided that he must acquit because of want of evidence of this. I think he took an entirely erroneous view, and I have no hesitation in answering the question of law put to us in the negative.

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LORD ADAM.—This Act provides for two things,—(1) searching, (2) conviction. It provides that it shall be lawful for a constable to search any person whom he may have good cause to suspect of coming from any land where he shall have been in unlawful pursuit of game. The constable under this first part of the section searched the respondents. To that there is no objection. The respondents were found to be carrying nets and other appliances for poaching, and to be in possession of rabbits recently killed. That shewed without any doubt where they had been. That being so, the next thing the statute says is, —"If such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall on being convicted," &c. There is nothing either about being seen upon land or coming from land. I cannot possibly answer the question otherwise than in the negative.

LORD RUTHERFURD CLARK.—I am of the same opinion. The Sheriff thought he was not entitled to draw the inference that the respondents had been unlawfully in pursuit of game from their being in possession of nets and of rabbits recently killed. He thought that in order to justify conviction there must be proof that the persons were seen on the lands in pursuit of game or coming from the lands. I am of opinion that he was wrong, and that we should sustain the appeal and answer the question in the negative.

THE COURT answered the question of law in the negative, and found that the Sheriff ought to have convicted the respondents.

GORDON-PETRIE & SHAND, S.S.C.—J. B. DOUGLAS & MITCHELL, S.S.C.—Agents.

No. 2.

Oct. 27, 1890.
Thomson v. Hart.

ARCHIBALD THOMSON, Appellant.—*A. S. D. Thomson.*
JAMES NEIL HART (Procurator-Fiscal of Sheriff Court of Lanarkshire at Glasgow), Respondent.—*D. Robertson, A.-D.*

Ship—Merchant Shipping Act, 1854 (17 *and* 18 *Vict. c.* 104), *secs.* 2 *and* 257 *—Persuading seaman to desert—Person verbally engaged as storekeeper who had not signed articles.*—A, a storekeeper on a homeward bound vessel, was on her arrival formally discharged, but verbally re-engaged to act in that capacity for the vessel's next voyage, and also to remain by her and to attend to the stores while she lay in harbour. Before he had signed articles for the voyage, an attempt was made to induce him to leave the vessel by a delegate of a Seamen's Union.

The delegate on being convicted of an offence under section 257 * of the Merchant Shipping Act, 1854, appealed to the High Court of Justiciary on the ground that A was not a "seaman" within the meaning of section 2 of the Act, because he had not signed articles.

Held that A was a seaman in the sense of the Act, and appeal dismissed.

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* The Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104), sec. 257, provides;—"Every person who by any means whatever persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join or to proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, shall for each such offence in respect of each such seaman or apprentice, incur a penalty not exceeding ten pounds."

Sec. 2 provides;—"'Seaman' shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship."

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HIGH COURT.
Lord Justice-Clerk.
Lord Adam.
Lord Rutherfurd Clark.
Justiciary Clerk.

ARCHIBALD THOMSON, residing at Govan, was charged in the Sheriff Summary Court of Lanarkshire at Glasgow, at the instance of the Procurator-fiscal of Court, upon a complaint which set forth that he "did (1) on 5th June 1890, on board the s.s. 'Sarmatian' then lying at Plantation Quay, Glasgow Harbour, repeatedly request Alexander Kane, seaman, lawfully engaged on board said ship, to leave the same and not proceed to sea in her, and did threaten him with violence if he did not accede to his request, and did seize hold of the said Alexander Kane, and attempt to drag or force him out of the ship, and did thus attempt to persuade the said Alexander Kane to neglect or refuse to join or proceed to sea in their said ship, or otherwise to absent himself from his duty, contrary to the Merchant Shipping Act, 1854, section 257."

Thomson was convicted of the charge and took a case, in which the following facts were stated by the Sheriff-substitute (Balfour) as proved:—The steamship "Sarmatian" one of the ships of the Allan Line, arrived in Glasgow Harbour on her return voyage from America on 2d June 1890, and Kane was employed as storekeeper of the vessel. On the day following her arrival, the crew, including Kane, were formally discharged, but Kane was immediately re-engaged verbally by the chief officer to sail with the ship on her next voyage, and also to remain by her while she lay in harbour, and to attend to his duties on board until she should again sail. Kane further undertook to sign the articles of agreement for next voyage whenever called upon to do so; and as a pledge that he would do so, he deposited his discharge in the hands of the chief officer, without which discharge it was impossible for him to obtain a berth in another ship. Kane afterwards carried out this engagement and undertaking.

It was Kane's duty to attend to the ship's stores, and it was necessary for him to be in constant attendance on board, to take charge of the stores, and serve them out when required, as well when the ship was in harbour as when at sea.

On 5th June, while Kane was engaged at his duties in the storeroom, the appellant, who had no business or right on board, came upon the ship and repeatedly ordered Kane to leave his ship and his duties, threatened him that if he would not go ashore he would put him ashore, swore at him, and put his hands upon him to shove him up the ladder. At this time, the crew for the next voyage were on board ship, in the act of signing the articles of agreement, in presence of the chief officer, and Kane signed the articles immediately after the appellant's attempt to induce him to leave the ship.

The appellant was a member and delegate of the Seamen's Union, of which Kane was not a member. When the "Sarmatian" had last sailed from Glasgow, a strike of those seamen who were members of the union was in progress. The strike terminated on the ship's return to Glasgow. Kane had joined her and sailed in her, although ordered by the union not to do so, and on 5th June the appellant, in his capacity as delegate of the union, was on board for the purpose of endeavouring to compel Kane to leave the ship.

The case further stated,—"The agent for the appellant objected that the section of the Act founded upon did not apply, and a conviction under that section was not competent against the appellant, in respect that at the time when the offences are said to have been committed Kane had not signed the ship's articles, and was not legally bound to sail with her. I held that as regards Kane he was, under the circumstances already detailed, engaged and acting as the regular storekeeper of the ship, and that he had duties to perform in the ship, not only while she was proceeding on a voyage, but while she was in harbour, and that, in point of fact, at

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the time of the offence, he was lawfully engaged in the discharge of his duties as storekeeper. . . . The objection therefore does not apply to that offence."

The question of law was, whether, in the circumstances before detailed, the appellant was legally convicted under the section of the Act founded on of the offence charged against him.

Argued for the appellant;—In order to be guilty of the offence of desertion under section 243 of the Act, it was essential that the seaman should have signed articles before his desertion. Kane had not done this, and accordingly no one could be guilty under section 257 of persuading him to commit that offence. The case of *Austin* v. *Olsen*[1] differed *toto cœlo* from the present. In it there was a valid subsisting agreement, and no evidence to contradict it. Here the only agreement to accept re-employment in the vessel was a verbal one.

Argued for the respondent;—The expression "seaman" included every person engaged on board a ship, whether he had signed articles or not. Articles were only required when the seaman proceeded to sea. An alleged informality in the seaman's engagement was not relevant as a defence in the mouth of the person who had induced him to break his engagement.[2]

LORD JUSTICE-CLERK.—It seems to me that the conviction is right. The signing of articles is declared by the statute to be necessary where a master takes any seaman to sea. The interpretation clause says that "'seaman' shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." It is evident that there may be many persons so employed who do not require to go to sea at all. The clause therefore which relates to the signing of articles has not, I think, any bearing on this case. The whole question in this case was whether the man Kane was engaged in some capacity on board the ship, and whether while so engaged he was interfered with by the accused contrary to the statute. The Sheriff-substitute was satisfied of that upon the facts, and being so satisfied he was bound to convict.

LORD ADAM.—What the Sheriff found in point of fact was this,—"I held that as regards Kane he was, under the circumstances already detailed, engaged and acting as the regular storekeeper of the ship, and that he had duties to perform in the ship, not only while she was proceeding on a voyage, but while she was in harbour, and that in point of fact, at the time of the offence, he was lawfully engaged in the discharge of his duties as storekeeper." Section 257 of the Merchant Shipping Act, 1854, imposes a penalty upon "every person who by any means whatever persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join or to proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty"; "seaman" meaning in this Act any person who is "engaged in any capacity on board any ship." That Kane was in the position of a seaman, and that the accused was endeavouring to persuade him to absent himself from his duty I have no doubt, and accordingly I have no hesitation in sustaining the conviction.

LORD RUTHERFURD CLARK.—I am of the same opinion. I think beyond all question that, according to the state of the facts as stated by the Sheriff, Kane

[1] Austin v. Olsen, 1868, L. R., 3 Q. B. 208.
[2] *Per* Mr Justice Mellor in Austin v. Olsen, p. 211.

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was at the time of the occurrence in question a seaman on board the "Sarmatian," and that the appellant committed a breach of section 257 of the Merchant Shipping Act, 1854. I think it quite irrelevant to inquire whether Kane had or had not signed articles. I agree upon that matter with the views expressed by Mr Justice Mellor in the case of *Austin* v. *Olsen*.

THE COURT dismissed the appeal, and affirmed the determination of the inferior Judge.

A. C. D. VERT, S.S.C.—CROWN AGENT—Agents.

No. 3.
Oct. 27, 1890.
Johnston v. Young.

JAMES JOHNSTON, Pursuer (Respondent).—*Baxter.*
JOHN YOUNG, Defender (Appellant).—*M'Lennan.*

Sheriff—Small-Debt Court—Review—Sequestration in security of rent of house—Warrant to search for and carry back furniture removed from house by tenant.—The tenant of a house who had paid his last half year's rent due at Martinmas 1889, and whose tenancy did not expire till Whitsunday 1890, in January 1890 removed his furniture to a house in another town. The landlord raised in the Small-Debt Court a summons of sequestration in security of the rent to become due, and on the margin of the summons he wrote a minute in which he craved warrant to carry back the furniture to his house, in respect the tenant "had removed to another house the whole of the goods in the house, and subject to the pursuer's right of hypothec for the rent thereof due" in three months' time. No notice of these proceedings was given to the tenant. The Sheriff granted warrant as craved, and a sheriff-officer proceeded to the tenant's new abode and brought back the furniture to the landlord's house.

The Court *recalled* the warrant, holding that the minute set forth no circumstances to justify the Sheriff in granting the warrant without notice to the defender.

HIGH COURT. Lord Justice-Clerk. Lord Adam. Lord Rutherfurd Clark. Justiciary Clerk.

IN January 1890 John Young, joiner, Leith, who was tenant of a house belonging to James Johnston, joiner, Leith, removed from the house to Greenock, where he had got work at better wages, taking with him his furniture. His tenancy did not expire till Whitsunday 1890, and he had paid the previous half year's rent due at Martinmas 1889.

On 1st February 1890 Johnston raised in the Sheriff Small-Debt Court at Leith a summons of sequestration against Young in security of the rent to become due at Whitsunday 1890.

On the margin of the summons the pursuer's agent wrote a minute, in which he stated that "in respect the defender, the within designed John Young, has removed the whole of the goods and effects which were in the house 10 Allan Street, and subject to the pursuer's right of hypothec for the rent thereof due at the term of Whitsunday 1890 to a house which he now occupies at 26 Blackhall Street, Greenock, and also" to certain other houses in Leith "warrant is respectfully craved to officers of Court to search for and carry back said goods and effects to the house No. 10 Allan Street aforesaid, there to be inventoried and sequestrated and secured in terms of the within warrant."

On 4th February the Sheriff-substitute (Hamilton) pronounced this interlocutor:—"Having considered the minute for pursuer written upon the margin of the first page hereof, grants warrant as craved."

Upon this warrant a sheriff-officer proceeded to Greenock, seized all the defender's furniture there, and brought it back to No. 10 Allan Street, Leith, where he inventoried it.

No notice of the summons of sequestration was given to the defender until 19th February, when the summons with inventory was served upon

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the defender, the diet of compearance being 25th February, when, the rent not being due, the process was continued generally. Two days prior to Whitsunday the defender paid the half year's rent due at that term. Thereafter, without any intimation to the defender, the pursuer enrolled the case for 20th May, and took decree in absence for £3, 17s. 4d. of expenses, and warrant was also granted to sell for that sum. Notice of sale was given on 23d May, and thereupon the defender took out a sist of the decree, and consigned the full sum decerned for. On 29th July the Sheriff-substitute recalled the sist, and decerned for additional expenses incurred therein, and granted warrant to the Clerk of Court to pay the pursuer the whole of the consigned money, to be applied *pro tanto* in extinction of the sums decerned for.

Young appealed to the High Court of Justiciary, and argued;—(1) It was an act of oppression upon the part of the Sheriff-substitute to give the decrees complained of, in respect that the original summons and relative minute was not served upon or in any way intimated to the appellant. (2) There was no provision in the Small-Debt Acts empowering a Sheriff to grant warrant to sequestrate any goods or effects saving those upon or within the premises let. The warrant to carry back the appellant's furniture from Greenock was illegal.

Argued for the respondent;—It was unreasonable to expect to find in the Small-Debt Acts provision for every case. At common law such a warrant as was here complained of had been sustained,[1] and indeed it was the practice in Sheriff Courts to grant such warrants in such circumstances.

LORD JUSTICE-CLERK.—I think it is quite unnecessary to decide here whether a person can obtain such a warrant as is here complained of without giving notice to his adversary or affording him an opportunity of being heard.

I am quite clear that if such an extraordinary warrant is to be obtained, it can only be by the Sheriff having something before him which he can consider as giving him good ground for granting it. Here the minute on the margin of the summons states nothing but the bare fact that the furniture has been removed to another house. That is not a statement upon which any Sheriff should consider himself justified in granting the warrant. Whether the respondent here could have stated more fully the grounds on which he desired to obtain the warrant we cannot tell. We have nothing before us except the proceedings in the Small-Debt Court, and they shew plainly that the warrant to bring back the appellant's furniture from Greenock to Leith was granted by the Sheriff-substitute without any facts before him for considering the case. I think it is our duty to alter his judgment.

LORD ADAM.—I concur. There is no ground set forth in the minute for granting the application without notice to the appellant. It is not said, as it was in *M'Kechnie's* case, that the goods were being removed "under cloud of night." In short, the warrant is one which ought only to be granted with great care, and after deliberation and a full statement of the circumstances which are said to make it necessary.

LORD RUTHERFURD CLARK.—I, like your Lordship, am disposed to think it unnecessary to decide any general question, for I think we can decide this case on its own special circumstances. I do not say that in no circumstances should a warrant such as this be granted without notice to the opposite party, but I

[1] M'Kechnie v. Duke of Montrose, March 28, 1853, 15 D. 623, 25 Scot. Jur. 372.

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think it should never be granted without such notice save in exceptional circumstances and with reasons assigned. On the face of the proceedings there are no reasons assigned and no facts stated. I therefore agree that we must alter the Sheriff-substitute's judgment.

THE COURT sustained the appeal, and recalled the warrant and decrees of the Sheriff-substitute, &c.

ROBERT BROATCH, Law-Agent—SNODY & ASHER, S.S.C.—Agents.

No. 4.
Nov. 3, 1890.
Roberts v. Atkinson.

JAMES ROBERTS, Appellant.—*Ure.*
JOHN BOLAND ATKINSON, Respondent.—*Murray.*

Procedure—Complaint—Specification—Coal Mines Regulation Act, 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 49, *rule* 1.—A complaint in the Sheriff Court set forth that J. R. having, on 10th June 1890, been manager of a mine, and as manager having been responsible for the due observance in said mine of rule 1 of section 49 of the Coal Mines Regulation Act, 1887,* "did, time above libelled, fail to constantly produce an amount of ventilation . . . adequate to dilute," &c. (the words of the rule being quoted without further specification), "in consequence whereof an explosion . . . took place in said level, whereby" certain persons were injured, and this J. R. did contrary to the said Act, sec. 49, rule 1. The Sheriff, after a proof, convicted the accused. The Court *quashed* the conviction on the ground that the complaint upon which it proceeded did not state in what respect the system of ventilation in use in the mine was defective, and that it had been proved that the injuries sustained by the miners had not been caused by anything but their own fault.

HIGH COURT.
Lord Justice-Clerk.
Ld. Wellwood.
Lord Kincairney.
Justiciary Clerk.

JAMES ROBERTS, mine manager, Holmes, Uphall, was charged at the instance of John Boland Atkinson, Her Majesty's Inspector of Mines for the eastern district of Scotland, in respect that he, "having, on 10th June 1890, been manager at No. 2 mine, Holmes, Uphall parish, Linlithgowshire, occupied by the Holmes Oil Company, Limited, and as manager foresaid having been responsible for the due observance in said mine of the first rule contained in the 49th section of the Coal Mines Regulation Act, 1887, did time above libelled fail to constantly produce an amount of ventilation in said mine adequate to dilute and render harmless noxious gases to such an extent that the working-places in No. 6 level in said mine and the travelling roads to and from said working-places should be in a fit state for working and passing therein, in consequence whereof an explosion of fire-damp or some other noxious gas took place in said level, whereby Hugh Gavin, drawer, Goschen Place, Uphall parish, aforesaid, and others were severely burned in their person, and this the said James Roberts did, contrary to the Act 50 and 51 Vict. c. 58, sec. 49, rule 1."

* 50 and 51 Vict. c. 58, sec. 49, provides,—"The following general rules shall be observed so far as is reasonably practicable in every mine:—Rule 1. An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working-places of the shafts, levels, stables, and workings of the mine, and the travelling roads to and from these working-places shall be in a fit state for working and passing therein."

Section 50,—"Every person who contravenes or does not comply with any of the general rules in this Act shall be guilty of an offence against this Act; and in the event of any contravention of or noncompliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine, to prevent such contravention or noncompliance."

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After evidence the Sheriff-substitute (Hog) convicted Roberts of the offence charged. In an appeal Roberts set forth the above proceedings, and the evidence was printed in an appendix.

Argued for Roberts;—The complaint was defective from want of specification. He was entitled to have had notice of the particular defect in the system of ventilation complained of.[1]

Argued for the respondent;—The duty imposed on the manager by the statute was the positive duty of providing an adequate amount of ventilation. Breach of it consisted in not doing enough to secure such ventilation. It was not then necessary to state specifically the alleged defect in the ventilation.

LORD JUSTICE-CLERK.—I think the complaint here is defective in giving no statement whatever of the alleged defect in the system of ventilation, or more properly perhaps, of what was the thing in the system of ventilation which was alleged to be defective. It is plain that a case under this statute might be brought without an explosion having happened at all, but simply upon an opinion formed by the inspector of mines, or upon complaints by the miners. Now, if it were competent to charge that simply in the form in which it is charged here, it would put upon the accused a tremendous inquiry in regard, it might be, to a very large system of ventilation in a very large mine, and even although he could prove anything to exonerate himself under section 50, it is a great burden to put upon him to meet all conceivable points. It cannot be sufficient for an inspector, or any number of inspectors, to come forward and say,—"I do not consider the system to be sufficient." They must be able to substantiate that by shewing the particular failure committed. I therefore think some specification is necessary of what is the alleged fault in the system of ventilation.

I am further of opinion that the prosecutor undertook to prove as part of his case not only that there was a failure in ventilation, but that this failure caused an explosion which resulted in injury and death to certain miners, and the verdict being a general one of the offence charged, we are bound to assume that the Judge convicted the accused of the whole charge. I think it is clear upon the evidence that the injury to these men was not caused by anything but their own fault.

LORD WELLWOOD.—There are cases in which it is sufficient to echo the words of the statute which creates the offence, but I think in the present case it was necessary that some notice should have been given to the person accused of the particular defect of which the prosecutor complained. I think the complaint is defective in specification. The matter is made the more misleading by this, that in the complaint it is stated that as a consequence of the alleged failure of duty certain persons were injured. The attention of the accused was therefore more directed to disprove that consequence of the alleged failure, and it rather appears from the character of the evidence and the witnesses adduced that that was the matter which he came principally to meet.

The respondent evidently relied upon evidence of the explosion as proving the inadequacy of the system, but it is proved that the mode of ventilation was not the proximate cause of the explosion, which was due to the carelessness of the miners. I think no offence under the statute has been proved.

LORD KINCAIRNEY.—I am of the same opinion. I think in this case the objection to relevancy should be sustained. I think it would have been fair to have disclosed the precise nature of the defect in ventilation on which the in-

[1] Walker, &c. v. Rodger, March 19, 1885, 12 R. 32, 5 Couper, 595.

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Nov. 3, 1890.
Roberts v. Atkinson.

spector founded. There was no reason for non-disclosure, and there are serious grounds for thinking that the appellant was misled.

THE COURT pronounced this interlocutor:—"Sustain the appeal, recall the conviction complained of *simpliciter*, and decern."

MACPHERSON & MACKAY, W.S.—CROWN AGENT—Agents.

No. 5.

Nov. 3, 1890.
Melvin v. Lamb.

JAMES MELVIN, Appellant.—*Crabb Watt.*
ROBERT LAMB, Respondent.—*Salvesen.*

Gaming—"Swindler"—Aberdeen Police and Waterworks Act, 1862 (25 *and* 26 *Vict. c. cciii.*), *sec.* 240.—A person was charged upon a complaint, which set forth that he "being a swindler within the meaning of the 240th* section of the Aberdeen Police and Waterworks Act, 1862, was found in a public street exhibiting a wheel of fortune or some similar implement for the purpose of inducing, and did induce and entice persons to play at a game of hazard." It was proved that the accused had exhibited a wheel of fortune at which eight persons simultaneously staked a penny each, the winner receiving fivepence, and the accused retaining threepence from the stakes as he had previously intimated. The magistrate convicted the accused.

In an appeal, *held* that as there was no evidence that the accused was a swindler the conviction could not be sustained.

HIGH COURT.
Lord Justice-Clerk.
Ld. Wellwood.
Lord Kincairney.
Justiciary Clerk.

JAMES MELVIN, Aberdeen, was charged at the instance of the Procurator-fiscal of the Police Court at Aberdeen with a contravention of the 240th section of the Aberdeen Police and Waterworks Act, 1862, in respect that "he being a swindler within the meaning of that enactment was, on 12th July 1890, found in Castle Street, Aberdeen, exhibiting a wheel of fortune or some similar implement, for the purpose of inducing, and did induce and entice persons to play at a game of hazard." Melvin pleaded not guilty.

Evidence having been led in support of the complaint it was proved that on the evening of the date libelled (12th July 1890) the appellant was in Castle Street surrounded by a crowd of people. On a table in front of him there was placed a revolving wheel to the circumference of which there were attached, at regular intervals, eight cards, placed upright, and numbered consecutively 1 to 8. Upon the table, close to the rim of the wheel, a small red flag was placed. He had also eight separate cards bearing the same numbers as those on the wheel, and which he invited the public to purchase at the price of 1d. each. When he had sold the whole of the eight cards the wheel was set in motion, and the card nearest the flag when the wheel stopped was declared the winning number. The person holding the winning card then received 5d. from the appellant, who himself retained the 3d. The appellant intimated to the crowd, when selling the cards at a 1d., that the winner would receive 5d., and that he (the appellant) would retain the 3d. After playing for some time the appellant raised the price of the cards to

* The Aberdeen Police and Waterworks Act, 1862 (25 and 26 Vict. cap. cciii.), sec. 240, provides,—"Every chaindropper, thimbler, loaded dice player, and other swindler of that or any similar description who at any places within the limits of this Act is found in possession of implements or articles for practising games of hazard, or who exhibits such implements or articles in order to induce or entice or who induces or entices any person to play at any game of hazard, or who by any fraudulent art or device cozens and cheats or attempts to cozen and cheat any person, may be apprehended by any constable or by any sheriff-officer or officer of police, and may be summarily convicted before the magistrate on the testimony of one or more credible witness or witnesses," &c.

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2d each, giving the winner 10d. and retaining the 6d. to himself—after having intimated these conditions.

It was not proved that the appellant was a convicted or habit and repute swindler.

The magistrate convicted Melvin.

Melvin appealed to the High Court, and the above facts are taken from the statement in the case.

Argued for appellant;—It was of the essence of the charge here that the accused was a "swindler." There was no definition of a "swindler" in the enactment upon which the complaint proceeded, and it was difficult to see how the fact that the appellant took a small percentage of the winnings for the use of his wheel of fortune could entitle the prosecutor to call him a swindler in the ordinary acceptation of that term.[1] Further, it was stated in the case that it was not proved that the accused was a convicted or habit and repute swindler.

Argued for the respondent;—On a sound construction of the Act actual proof of "swindling" was not necessary. A person came within the statutory words of the section if he exhibited implements to induce the public to play at hazard. Possession of those implements presumed possession for swindling purposes. As regarded the clause dealing with "one who by any fraudulent act or device cozens and cheats," it would be clearly superfluous to prove that the accused was a swindler, for the acts were criminal in themselves.

Lord Justice-Clerk.—I should be sorry if any decision of this Court should prevent the Magistrates of Aberdeen or any other town putting down the playing of games of hazard in public places. The question, however, which we have to decide is, whether this prosecution under the 240th section of the Aberdeen Police and Waterworks Act, 1862, ought to have been followed by a conviction upon the facts stated. The case turns entirely upon the interpretation to be given to that section. The section begins with the statement of the persons who may be prosecuted under it. They are—"Every chaindropper, thimbler, loaded dice player, and other swindler of that or any similar description."

The three things which are specified are well-known means of swindling in public places, means which the law has long used the utmost efforts to put down. "Other swindler" I take to apply to modes of cheating of a similar kind to those specified. The essential characteristic of the person specified in the clause is, that he must be a cheat or swindler. Where such a person is found in possession of implements for practising games of hazard he is liable to punishment. The reason for such an enactment plainly is, that where the person found in possession of such articles is a swindler, there is a presumption that he has them in his possession for swindling purposes. The second thing struck at by the statute is—"Or who exhibits such implements or articles in order to induce or entice or who induces or entices any person to play at any game of hazard"—again the presumption is that he will swindle the public. Then, lastly, the section goes on to say—"Or who by any fraudulent act or device cozens and cheats, or attempts to cozen and cheat any person"—that plainly is intended to cover such acts as may be invented by such swindlers of a similar class to those described in the first part of the section. It was suggested in argument that in the case of the last offence it would be superfluous

[1] Linton v. Clark, Nov. 10, 1887, 1 White, 522, 15 R. (Just. Cases) 25.

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to prove that the person accused was a swindler, as the acts mentioned are in themselves criminal by whomsoever they may be committed. But it must be kept in view that it may be very convenient to have a means of prosecuting such an offence under a local Act; and further, that the fact that the accused is a swindler may throw light upon his actions, and under this section such evidence of character would be admissible while it might not be so at common law. The clause is, I think, consistent with itself throughout. Its object and intention is to deal with these persons who are shewn to be swindlers, for the purpose of preventing them carrying out their schemes. The prosecutor apparently took the same view, for he has made the fact that the accused is a "swindler" a substantive part of the complaint. He has undertaken to prove it, and I think he was bound to undertake that to make the charge relevant. But, in any event, he has made it a part of his case.

Now, the statement of facts in the case makes it plain that there was nothing in the evidence to indicate that the appellant was a swindler in any sense of the word. It is expressly stated that it was not proved that he was a convicted and habit and repute swindler. Further, the description given of the game played made it impossible that in the playing of that game he could swindle at all. I think the conviction cannot stand.

LORD WELLWOOD.—I agree. Your Lordship has anticipated all I had to say on the terms of the section and complaint, which I think acknowledges that it is of the essence of the charge that the accused person is a swindler. Now, I think that fact might be inferred either from the implements found in the possession of the accused,—for example, loaded dice,—or from the game played. In this case we are told very plainly what the accused did with the implements in his possession, and while he induced persons to play at a game of hazard, and made a substantial profit, there is no statement of any attempt to swindle the public. It is stated that he announced his terms, and that the persons playing were quite aware of them. It is further stated that there was no evidence of previous conviction, or of the accused being habit and repute a swindler. I think therefore that the prosecutor has failed to make out the charge he has stated.

LORD KINCAIRNEY.—I concur. If it were enough to say that this man induced the public to gamble, we would have required to sustain the conviction. But the statute requires it to be shewn that he is or was a swindler. I think it is clear he was not a swindler. I think that there cannot be a swindle without fraud or falsehood, express or implied, concealed or overt. There was here no misrepresentation and no deceit.

THE COURT pronounced this interlocutor:—"Sustain the appeal, reverse the determination of the inferior Judge, and decern."

WISHART & M'NAUGHTON, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 6.
Dec. 19, 1890.
Kerr v. Auld.

JOHN KERR, Complainer.—*M'Lennan.*
JAMES AULD (Procurator-Fiscal of Burgh of Greenock), Respondent.—*C. J. Guthrie.*

Harbour—Bye-law of Harbour Trustees—Greenock Port and Harbours Act, 1866 (29 *and* 30 *Vict. c. clvi.*), *sec.* 93—*Harbour, Docks, and Piers Clauses Act*, 1847 (10 *Vict. c.* 27), *sec.* 83.—The Greenock Port and Harbours Act, 1866, by section 93 authorises the harbour trustees to make bye-laws, *inter alia*, "for

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regulating the conduct of the owners, masters, and crews of vessels propelled by steam with regard to the rate of speed at which they may proceed within the port and harbours."

The Harbour, Docks, and Piers Clauses Act, 1847, sec. 83, provides that harbour trustees may make bye-laws for the purpose of "preventing damage or injury to any vessel or goods within the harbour or dock, or at or near the pier."

Greenock Harbour Trustees made a bye-law purporting to regulate the speed of vessels in the fairway of the navigable channel of the River Clyde *ex adverso* of the harbour works.

Held that as the fairway of the navigable channel of the River Clyde *ex adverso* of the harbour works was not within the harbour, the bye-law was *ultra vires* of the trustees.

HIGH COURT. Lord Justice-Clerk. Lord Adam. Lord Rutherfurd Clark. Justiciary Clerk.

JOHN KERR, mate of the steamship "Eleanore," presented a bill of suspension against James Auld, Procurator-fiscal of the burgh of Greenock, craving suspension of a conviction in the Police Court at Greenock upon a complaint charging the complainer "with being guilty of an offence within the meaning of the Greenock Port and Harbours Act, 1866, and of the relative bye-laws and regulations enacted by the Parliamentary Trustees of the Port and Harbours of Greenock, dated at Greenock 7th January 1868, in so far as, on the 9th day of July 1890, he did, while in charge of the said steamship 'Eleanore,' and while sailing on the River or Firth of Clyde between Cartsdyke Quay on the east and Forsyth Street on the west, fail to slow the engines and to keep at a slow rate."

The particular bye-law alleged to have been contravened was the 68th, which provided,—"The master or other person in charge of every steam vessel shall, sailing between Forsyth Street on the west and Cartsdyke Quay on the east, slow the engines and keep at a slow rate."

The complainer, *inter alia*, averred that it was proved at the trial that the "Eleanore" was, on the occasion libelled, proceeding in the fairway or navigable channel of the Firth of Clyde, and was at no time nearer the port and harbours of Greenock than between 120 and 150 yards. The 83d section of the Greenock Port and Harbours Act of 1866 conferred no power upon the trustees to regulate the speed of vessels outside the limits of the said port and harbours, and the trustees had no power to make bye-laws except by virtue of the section. The 68th bye-law gave the trustees no jurisdiction over vessels sailing in the fairway or navigable channel of the Firth of Clyde between the points mentioned in the bye-law, but only over vessels sailing between the points within the limits of the port and harbours, and defined by the Act of 1866.

The complainer, *inter alia*, pleaded;—(2) It being established by the facts proved at the trial of the said complaint, that the *locus* of the alleged offence was not within the jurisdiction of the Police Court of Greenock, the said conviction and sentence were *ultra vires* and illegal, and ought to be suspended.

Argued for the complainer;—The Act of 1866, under which the bye-law said to have been contravened was made, gave power to the trustees to regulate the speed of steam vessels only "within the port and harbours of Greenock." They had no power to interfere with vessels sailing in the navigable channel of the river between the points mentioned in the bye-law.[1] The bye-law was therefore *ultra vires*. The 83d section of the Harbour, Docks, and Piers Clauses Act, 1847, gave them no power to make bye-laws outside the area of their jurisdiction.*

[1] Owners of "Afton" v. Northern Marine Insurance Co., Limited, March 4, 1887, 14 R. 544, affd. July 30, 1888, 15 R. (H. L.) 72.

* The Harbour, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), sec. 83, enacts,—"The undertakers may from time to time make such bye-laws as they

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Argued for respondent;—(1) The bye-law was within the powers conferred by the Act of 1866. The harbour works extended between the points mentioned in the bye-law. (2) In any case the Act of 1847 gave power to the trustees to regulate the motions of vessels wholly outside the harbour, if such tended to injure a vessel "at or near" any pier.

At advising,—

LORD ADAM.—This is a suspension brought at the instance of John Kerr, mate of the steamer "Eleanore," against the Procurator-fiscal of the Burgh Court of Greenock, of a sentence dated 21st July 1890, by which the suspender was found guilty of a certain offence charged against him, and adjudged to pay the sum of 60s. of penalty, and in default of payment to be imprisoned for twenty days.

The offence with which he was charged was, that within the meaning of the Greenock Port and Harbours Act, 1866, and of the relative bye-laws and regulations enacted by the Parliamentary Trustees of the Port and Harbour of Greenock, dated 7th January 1868, he did, while in charge of the steamship "Eleanore," and while sailing in the River or Firth of Clyde, between Cartsdyke Quay on the east and Forsyth Street on the west, fail to slow the engines and to keep at a slow rate.

The particular bye-law alleged to have been contravened is not specified in the complaint, but is the 68th, and is in these terms,—"The master or other person in charge of every steam vessel shall, sailing between Forsyth Street on the west and Cartsdyke Quay on the east, slow the engines and keep at a slow rate."

The ground of suspension is that this bye-law is *ultra vires* of the trustees.

By the 93d section of the Greenock Port and Harbours Act, 1866, the trustees have power to make such bye-laws as they may think fit for certain purposes, and, *inter alia*, for regulating the conduct of the owners, masters, and crews of vessels propelled by steam, with regard to the rate of speed at which they may proceed within the port and harbours of Greenock. There is no power given to the trustees to make bye-laws to regulate the speed of vessels elsewhere than in the port or harbours.

It will be observed that the bye-law in question professes to regulate the speed of vessels sailing between Forsyth Street on the west and Cartsdyke Quay on the east, but there is no definition of any boundary *ex adverso* of the shore or harbour between these two points, so that the bye-law implies and proceeds upon the footing that the whole river *ex adverso* of the shore between these two points is within the port and harbours of Greenock, and so within their jurisdiction. If the fact be so, then the bye-law would be valid; if the fact be otherwise, then the bye-law would appear to be *ultra vires* and bad.

There does not appear to be any room for doubt as to how the fact stands in this respect, because it was decided in the case of *Hunter* v. *The Northern Marine Insurance Company*, 14 R. 544, 15 R. (H. L.) 72, that the port and harbour of Greenock does not include the navigable channel of the river, but is limited to the artificial works vested in the Harbour Trustees, and such contiguous water as may be necessary for the accommodation of vessels using these works.

That being so, it is clear that the bye-law professes to regulate the speed of vessels over an area which is not within their jurisdiction, and is therefore invalid.

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shall think fit for all or any of the following purposes. . . . For preventing damage or injury to any vessel or goods within the harbour or dock, or at or near the pier."

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It follows that if the bye-law is invalid the conviction of the suspender for an alleged contravention of it must be bad.

But the respondent endeavoured to support the bye-law under the Harbour, Docks, and Piers Clauses Act, 1847, by the 83d section of which the trustees have power to make bye-laws for preventing damage or injury to any vessel or goods within the harbour or dock, or at or near the pier, or on the premises of the undertakers. It was said that any vessel steaming rapidly past would cause damage to a vessel lying at the pier, and therefore that the trustees had power to protect such vessel by regulating the speed of passing vessels. I should think that it was sufficiently clear that any bye-law they might make for this purpose could have effect only within the area of their jurisdiction. It may be that the trustees may be able to make a bye-law of some limited nature which may be effectual for the purpose—as to which I offer no opinion—but I am clearly of opinion that they have no power to make such a bye-law as the one in question.

On the whole matter I am of opinion that the conviction must be suspended.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

THE COURT passed the bill, suspended the conviction and sentence complained of *simpliciter*, and decerned.

MILLER & MURRAY, S.S.C.—R. R. SIMPSON & LAWSON, W.S.—Agents.

No. 7.

Dec. 27, 1890.
Scott v. Her Majesty's Advocate.

ALEXANDER SCOTT, Appellant.—*A. S. D. Thomson.*
HER MAJESTY'S ADVOCATE, Respondent.—*Dundas, A.-D.—A. O. M. Mackenzie.*

Process—Bail—Forgery—Charge admitted in declaration.—A person charged with the crime of forgery admitted the charge in his declaration.

The Court *refused* his application for bail, holding that his confession had displaced the presumption of innocence upon which an application for bail is founded.

HIGH COURT. (GLASGOW.) Ld. Stormonth Darling. Circuit Clerk.

ALEXANDER SCOTT who was in prison on a charge of fabricating and uttering five bills of the total value of about £500, the signatures of the drawers and acceptors thereof being forged, applied to be admitted to bail.

The accused had emitted a declaration in which he admitted the charge, but explained that he had discounted the bills for the sake of customers, and had received no consideration or advantage from the transaction.

The Sheriff refused to admit him to bail.

He appealed to the High Court of Justiciary.

At advising,—

LORD STORMONTH DARLING.—I have consulted with my brother Lord M'Laren, and we are of opinion that, looking to the serious character of the crime charged against the prisoner, we should not be justified in granting the application for bail. No doubt in one view it seems a little hard to use the confession of the prisoner against him, but at the same time his confession displaces the presumption of innocence on which such an application is largely founded. I apprehend this is not a case in which there will be undue delay in bringing the accused to trial. For these reasons we think the application cannot be granted.

THE COURT refused the appeal.

HOTSON & BROWN, Glasgow—CROWN AGENT—Agents.

No. 8.

Jan. 26, 1891. Mackenzie v. Martin.

DONALD MACKENZIE, Complainer.—*John Wilson.*
HENRY JAMES MARTIN, Respondent.—*A. J. Young.*

Appeal—Suspension—Competency—Revenue—7 and 8 Geo. IV. c. 53, sec. 79.—A person who had been convicted in a Justice of Peace Court of selling beer by retail without having obtained a certificate and excise licence, in contravention of the Act 24 and 25 Vict. c. 91, brought a suspension of the conviction on the ground that the Justices before convicting had seen and considered a previous conviction for a similar offence.

The Court *refused* the bill, holding that although the High Court had notwithstanding the provisions of the Act 7 and 8 Geo. IV. c. 53, sec. 79,* power to entertain suspensions in certain exceptional circumstances, the averment of the complainer was not such as to entitle him to that remedy.

Opinions that the modes of review open to the complainer were appeal to the Quarter Sessions, or appeal to the High Court on a case stated under the Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62), or appeal to the Court of Exchequer.

HIGH COURT. Lord Justice-Clerk. Ld. Stormonth Darling. Lord Low. Justiciary Clerk.

DONALD MACKENZIE, Stornoway, brought a bill of suspension against Henry Martin, officer of Inland Revenue at Stornoway, craving suspension of a conviction and sentence pronounced on 27th June 1890, whereby he was found guilty by two Justices of the Peace of a contravention of the Act 24 and 25 Vict. c. 91, in so far as he had sold beer by retail "without having duly obtained a certificate, and also an excise licence."

The complainer stated that "after the evidence had been led, Mr Thomas Shillington, excise officer, Portree, who appeared on behalf of the respondent, referred to the fact that the complainer had been convicted of a similar offence before. Mr C. G. Mackenzie, who appeared on behalf of the complainer, protested against any reference being made to said previous conviction, but the Justices overruled his objection, and in coming to a judgment had in their minds the fact that the complainer had been previously convicted, and looked at the previous conviction, and in giving judgment referred to that fact." The complainer further averred that the reference to and consideration of the previous conviction in the circumstances was illegal, oppressive, and contrary to statute.

The respondent objected to the competency of the suspension on the ground that review by suspension was excluded by 7 and 8 Geo. IV. c. 53, sec. 99.[1]

The complainer argued that the suspension was competent, as the Justices had acted contrary to the known rules of judicial procedure, and therefore illegally.[2]

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* 7 and 8 Geo. IV. c. 53, sec. 79, provides,—"And be it further enacted . . . nor shall any bill of suspension, advocation, or reduction be passed, nor shall any letter or letters of suspension, advocation, or reduction, or any other proceeding, be issued out of the Court of Session or Court of Justiciary in Scotland, to supersede, sist, stay, remove, or in anywise affect any information or judicial proceeding before the Commissioners of Excise or Commissioners of Appeal in this Act after mentioned, or before any Justice or Justices of the Peace in the United Kingdom, in pursuance of the Act or any other Act or Acts of Parliament relating to the revenue of excise or any judgment thereupon. . . ."

[1] Lazenby v. M'Arthur, Nov. 9, 1874, 3 Couper, 23, 2 R. (Just. Cases) 6; *cf.* Dodsworth v. Rijnbergen, &c., Dec. 15, 1886, 14 R. 238; Evans v. M'Loughlan, Feb. 19, 1861, 4 Macqueen, 89, 33 Scot. Jur. 293; Schulze v. Steele, Feb. 24, 1890, 2 White, 449, 17 R. (Just. Cases) 47.

[2] Hunter v. Mawlam, Nov. 21, 1883, 5 Couper, 354, 11 R. (Just. Cases) 14; M'Kenzie v. M'Phee, Jan. 28, 1889, 2 White, 188, 16 R. (Just. Cases) 53; Grant v. Allan, June 3, 1889, 2 White, 261, 16 R. (Just. Cases) 87.

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LORD JUSTICE-CLERK.—This is a bill of suspension against a conviction by two Justices in an excise prosecution. It has been stated by counsel for the complainer that the ground of suspension on which he relies is, that at the trial something illegal was done, viz., allowing a previous conviction to be referred to before judgment on the complaint. The first thing which we have to consider is what course the complainer here might have taken for the purpose of having that decision reviewed. It appears to me that there were two courses, if not three, open to him. It was competent to him to have a new trial by appeal to the Quarter Sessions. Such an appeal would have set aside altogether the whole previous proceedings except the complaint, and his case would have been tried by Quarter Sessions as if it had been a Court of original jurisdiction. Again, he might have presented an appeal to this Court upon a case stated in accordance with the case of *Schulze*. Thirdly, he might have taken an appeal to the Court of Exchequer. As regards this last mode of appeal, I do not think it necessary in this case to come to any conclusion upon the question whether that would have been a good or efficient remedy for the wrong of which he complains, because I think we have sufficient for the purpose of dealing with this case in the two modes of review I have already referred to. In my judgment, his proper remedy in the circumstances was an appeal to Quarter Sessions. Now, in these circumstances I do not think suspension is competent. Suspension is excluded by the Act of Geo. IV., and although this Court has often held that, notwithstanding exclusion of review by suspension, it can entertain a suspension of proceedings where what is complained of is that inferior magistrates have gone outside their jurisdiction, this is not a case of that nature.

LORD STORMONTH DARLING.—I concur. *Prima facie* our jurisdiction to review by way of suspension is excluded by the Act of Geo. IV., and while I agree in what has been said as to the jurisdiction of this Court in cases of flagrant injustice, it seems to me that this is not a case of that exceptional character. I also agree in what your Lordship has said as to the modes of review open to the complainer.

LORD LOW.—I am of the same opinion. It is not disputed that the complaint was properly laid under the Act 24 and 25 Vict. c. 91, and that it is a complaint which the Justices have jurisdiction to entertain and deal with. What is alleged is, that in considering the case the Justices had before them and considered a previous conviction which they ought not to have considered. That seems to me to be simply an averment that the Justices allowed incompetent evidence, and that to my mind is not a good ground for allowing the complainer here to have a remedy which is expressly excluded by statute. I think the remedies open to the complainer by statute, to which your Lordship has referred, were amply sufficient to enable him to bring under review that of which he now complains.

THE COURT refused the bill as incompetent, and decerned.

JOHN ELDER, S.S.C.—D. CROLE—Agents.

No. 9.

Jan. 26, 1891.
Gordon v. Mulholland.

ALEXINA GORDON, Defender (Appellant).—*Sym.*
JOHN MULHOLLAND, Pursuer (Respondent).—*M'Lennan.*

Process—Appeal—Small-Debts Act, 1837 (7 *Will. IV., and* 1 *Vict. c.* 41), *sec.* 31—*Oppression.*—In an action in the Sheriff Small-Debt Court for payment of £10 alleged to have been lent by the pursuer to the defender, the defender stated that the sum sued for had been given as a present to her by the pursuer. The Sheriff-substitute, on the pursuer's motion, took his oath, and refused to allow the defender to lead any evidence, and decerned against her for the sum sued for.

The Court recalled the Sheriff-substitute's judgment, holding (1) that as the defender's admission that she had received the money from the pursuer was qualified by the statement that it was a donation, the Sheriff was not entitled to proceed upon the admission, and the pursuer's testimony that it was not a donation, and to exclude the defender's evidence; and (2) that the irregularity in the procedure was such as to make an appeal competent under the Small-Debt Act, 1837, sec. 31.

HIGH COURT. Lord Justice-Clerk. Ld. Stormonth Darling. Lord Low. Justiciary Clerk.

ALEXINA GORDON, 32 Castle Terrace, Edinburgh, appealed against a decree for £10 pronounced against her in the Sheriff Small-Debt Court at Edinburgh on 10th December 1890 upon a summons at the instance of John Mulholland, Leithen Crescent, Innerleithen, for payment of that sum alleged to have been lent to her by him.

The appellant made the following statement, the accuracy of which was not denied:—"On the case being called before Mr Sheriff-substitute Hamilton in the Small-Debt Court at Edinburgh on said 10th December 1890, the parties appeared by their respective agents, and the appellant's agent stated that the sum sued for had been given as a present to the appellant by the respondent, to whom she was at that time engaged to be married, but who had since broken off the engagement, and that the same was not resting owing to the respondent. The Sheriff-substitute, however, on the motion of the respondent's agent, referred the cause to the oath of the respondent; refused to allow the appellant to lead any further evidence in support of her case, and decerned in favour of the respondent for the sum sued for."

Argued for the appellant;—The proceedings in the Sheriff Court were incompetent or oppressive. The pursuer had no evidence of loan, and could not found on the defender's admission without its qualification. It was therefore not necessary for the defender to refer to the pursuer's oath. If the pursuer had no other evidence it was for him to refer the case to the defender's oath. If the pursuer was regarded as a witness the defender was entitled to lead evidence on the other side. She cited the undernoted authorities.[1]

Argued for the respondent;—The Sheriff had held that the receipt of the money implied a loan, and that donation could only be proved by the pursuer's writ or oath, and the defender must be taken to have consented to the reference.[2] The Sheriff's error, if any, was one in law.[3]

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[1] Murray v. Mackenzie, April 21, 1869, 1 Couper, 247, 41 Scot. Jur. 394; M'Lachlan v. Tennant, May 4, 1871, 43 Scot. Jur. 390.

[2] Wilson v. Glasgow Tramways Co., June 22, 1878, 5 R. 981; Robertson v. Robertson, Jan. 9, 1858, 20 D. 371, 30 Scot. Jur. 209; M'Donald v. Burden, Jan. 23, 1829, 7 S. 306, 1 Scot. Jur. 25.

[3] Hair v. Nicol's Trustees, May 4, 1871, 2 Couper, 40; Mosson v. Brash, Sept. 27, 1872, 2 Couper, 325; Paterson v. M'Kay, Sept. 27, 1872, 2 Couper, 327.

No. 9.

Jan. 26, 1891.
Gordon v. Mulholland.

LORD JUSTICE-CLERK.—The first and most startling feature of this case is, that the procedure which took place resulted in exactly the opposite decision being pronounced to that which to all appearance must have been pronounced had the proper procedure taken place. The case was decided by the Sheriff on the merits, and in the way which he thought competent, viz., by the oath of the pursuer. No such oath should have been taken. In these circumstances it is difficult to see where there could be oppression without intention if it does not exist in this case. The Act of Parliament provides that we must proceed upon malice, oppression, or incompetency, but in nine cases out of ten where it is the duty of the Court to interfere it is not the case that there is any intentional oppression. No one can doubt that what was done here was done in good faith. It appears to have been argued to the Sheriff that, in respect of the defender's admission that she received the money, the case had to be referred to the pursuer's oath. But that admission was made with the explanation, intrinsic to the admission, that the money was given to her as a gift. The Sheriff was not entitled to take one-half of the admission, and upon that to shut the defender out from leading any evidence in the case. This is a case—taking it at the best for the respondent—in which the defender was at least entitled to lead evidence. The Sheriff has decided the case upon the merits without hearing any evidence from the defender, and I think that in law amounts to oppression.

LORD STORMONTH DARLING concurred.

LORD LOW.—I entirely concur. I do not think it is necessary to specify the particular ground of appeal under the statute under which this appeal falls. The words of the statute are corruption or malice and oppression, such deviation in point of form from the statutory enactments as the Court shall think took place wilfully or have prevented substantial justice from having been done, and incompetency, including defect of jurisdiction. It seems to me that we have a very good guide given us in this case by similar decisions in regard to decreets-arbitral, where questions have arisen as to what is, and what is not, corruption on the part of an arbiter. It has been settled that mere error in judgment on the part of an arbiter will not amount to corruption, and, on the other hand, that it is not necessary that there should be anything like wilful injustice, but if you have something more than mere error in judgment, something done or refused to be done by the arbiter which makes it impossible that justice can be done in the case, that has been held to amount to corruption. I think that is the case here. There was here such gross irregularity of procedure that it was impossible that justice could be done, and upon that ground I have no hesitation in agreeing with your Lordships. I think it is just that kind of case which would be held to be corruption in the case of a decreet-arbitral.

THE COURT sustained the appeal, recalled the judgment or decree complained of, and remitted to the Sheriff to proceed with the case in terms of law, and decerned.

EMSLIE & GUTHRIE, S.S.C.—ROBERT BROATCH, Solicitor—Agents.

No. 10.

Jan. 26, 1891.
Young v. Jameson.

ALEXANDER YOUNG, Appellant.—*Salvesen.*
MELVILLE JAMESON (Procurator-Fiscal of Perth), Respondent.—*Maconochie.*

Poaching—Accessory—Poaching Prevention Act, 1862 (25 *and* 26 *Vict. cap.* 114), *sec.* 2.—Circumstances in which it was *held* that a Sheriff was entitled to draw the inference that a carrier who had been found carrying in his cart a quantity of rabbits had been accessory before the fact to the act of poaching of the person from whom he had received the rabbits for carriage.

Question whether, if a carrier were found to have been "accessory" after the fact, it would warrant a conviction under the Act.

HIGH COURT.
Lord Justice-Clerk.
Ld. Stormonth Darling.
Lord Low.
Justiciary Clerk.

ALEXANDER YOUNG, carrier, Collace, Perthshire, was charged, at the instance of the Procurator-fiscal of Perth, with having been, on 18th July 1890, on the public road leading from Perth to Coupar-Angus, "found by James Cowie, police-constable, Balbeggie, said parish, in possession of forty rabbits, which the said James Cowie then seized, the said James Cowie then having, as he still has, good cause to suspect the said Alexander Young of coming from land where he had been unlawfully in search or pursuit of game, or of aiding or abetting some person or persons to the complainer unknown, in so doing, and the said Alexander Young obtained said rabbits by unlawfully going on land in search or pursuit of game, or was accessory thereto, contrary to the Act 25 and 26 Vict. cap. 114, sec. 2,* whereby the said Alexander Young is liable to forfeit," &c.

The Sheriff-substitute (Grahame), after hearing evidence, convicted the accused, who thereafter obtained a case, in which the following facts were stated:—"(1) That the appellant, a common carrier, was found on a public road by the police carrying in his cart on the day in question a bag containing forty rabbits. (2) That James Cowie, police-constable, who made the search, had good cause to suspect the appellant of coming from land where he had been unlawfully in search or pursuit of game, or of aiding or abetting some other person in so doing, contrary to the Act 25 and 26 Victoria, chapter 114. (3) That the said rabbits were obtained by the appellant early in the morning of the day libelled from a person who was seen to approach the appellant's house about three o'clock in the morning of the same day, carrying a bag which seemed heavy, and was similar in appearance to the one found on the appellant's cart, the sound of two men's voices being immediately thereafter heard at the house, and the

* Section 2.—"It shall be lawful for any constable or peace officer, in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game; and also to stop and search any cart or other conveyance, in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon any such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall, in such case, apply to some Justice of the Peace for a summons citing such person to appear . . . before a Sheriff or any two Justices of the Peace in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay," &c.

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shadow of the appellant's head being seen passing one of the windows. (4) That the man who carried the bag to appellant's house had a noiseless footfall as if wearing goloshes. (5) That the rabbits presented the appearance of being all netted, with the exception of one which had been killed by a trap. (6) That the rabbits were addressed to a game-dealer in Perth, without the name of the sender, and that there were holes in the bag through which the feet of some of the rabbits protruded. (7) That the appellant did not give the name of any person from whom he had received the rabbits to shew their lawful possession by the person from whom he received them. (8) That the person from whom the appellant received the rabbits had come from land where he had been unlawfully in search of game, and that the appellant, in so receiving them, and carrying them in his cart, was aiding and abetting said person in his unlawful acts."

The appellant argued that the Sheriff-substitute was not entitled to draw the inference from the facts as stated by him, that the appellant had aided and abetted the person from whom he received the poached rabbits, assuming them to have been poached.

The respondent cited the undernoted authorities.[1]

At advising,—

LORD JUSTICE-CLERK.—We have now before us in this case the facts on which the Sheriff proceeded in finding the appellant to be guilty as an accessory to this act of poaching. Upon these facts the first question for us to decide is, whether the Sheriff could be entitled to hold that the appellant was accessory, not merely as having received the rabbits, but as knowing beforehand that poaching was to be committed? If that question is answered in the affirmative, it makes it unnecessary to decide the other and more difficult question as to whether a carrier might be accessory merely by receiving into his possession rabbits and game from a person coming from land on which he had taken them by poaching, and continuing his act by conveying them. If that question had to be decided, it would present greater difficulties, although I cannot say I think I should have serious difficulty in finding that a conviction might follow. I think the facts here were facts from which the Sheriff was entitled to find that the appellant was accessory throughout, that the bringing of the rabbits to him was not an unexpected event, but one which was prearranged. (After narrating the facts stated his Lordship proceeded)—In these circumstances it seems to me that the Sheriff was entitled, if after seeing the witnesses and hearing the evidence he thought that was a good inference, to find that the appellant was accessory to the unlawful going on the land for the purpose of taking game or rabbits. I am fortified in that opinion by the fact that the appellant did not give any reasonable explanation of the circumstances. I think in such circumstances a reasonable explanation might make it impossible to find a person guilty. On the other hand, the want of explanation is a fact which may aid the inference of guilt. I am therefore of opinion that we must sustain the conviction.

LORD STORMONTH DARLING.—I agree that this case does not require us to decide whether the word "accessory" includes accessory after, as well as before,

[1] Grant v. Wright, May 31, 1876, 3 Couper, 283, 3 R. (Just. Cases) 28; Thomson v. Romanes, Jan. 3, 1865, 5 Irvine, 1; Brown v. Turner and Others, Jan. 21, 1863, 32 Law Journal, Mag. Cases, 106.

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the fact, because I agree that the facts as found by the Sheriff were such as to entitle him to come to the conclusion that this man was accessory to the unlawful obtaining of the rabbits, even upon the view that the accession must be before the fact. The Sheriff is final upon the facts. This Court can only review him upon an error in law. It cannot review the inference drawn by him from the facts, unless it is an inference which upon the rules of evidence cannot be drawn. I cannot say that the inference here is in that category. On the contrary, I think if I had been in the place of the Sheriff I should have drawn the same inference.

LORD LOW concurred.

THE COURT dismissed the appeal, and affirmed the determination of the inferior Judge.

ALEX. MORISON, S.S.C.—CROWN AGENT—Agents.

No. 11.

Feb. 2, 1891.
Agnew v. Munro.

ALEXANDER AGNEW (Procurator-Fiscal of Dundee), Appellant.—*Maconochie.*
JAMES MUNRO, Respondent.—*W. L. Mackenzie.*

Intimidation—Complaint—Relevancy—Conspiracy and Protection of Property Act, 1875 (38 *and* 39 *Vict. c.* 86), *sec.* 7 (1).—The Conspiracy and Protection of Property Act, 1875, enacts, by section 7,—"Every person who, with a view to compel any other person to abstain from doing, or to do, any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority (1) uses violence to or intimidates such other person, or his wife or children, or injures his property . . ." shall be liable to certain penalties.

A complaint charging J. M. with a contravention of the Act set forth that the accused, with a view to compel A. C. to abstain from a work in which he was engaged, and which he had a legal right to do, "did wrongfully and without legal authority intimidate A. C. by threatening him while so working" with personal violence if he continued to work.

Held that the complaint was relevant, although it did not state that the threat had the effect of inducing A. C. to abstain from work.

HIGH COURT. Lord Justice-Clerk. Ld. M'Laren. Lord Trayner. Ld. Wellwood. Justiciary Clerk.

ON 9th December 1890, James Munro, butcher, Dundee, and secretary of the Dundee Branch of the Dock, Wharf, Riverside, and General Labourers' Union, was charged, at the instance of the Procurator-fiscal of Dundee, on a complaint which set forth that the accused, "with a view to compel the persons after named, who were then engaged working at or in connection with the discharging of the steamer 'Moravia,' then lying in Dundee Harbour, to abstain from doing said work, which work said persons had a legal right to do, did, after attempting to induce said persons to abstain from doing said work by offering them money, wrongfully, and without legal authority, intimidate (1) Alexander Christie, seaman, 2 John Street Crescent, Dundee, by threatening him, while so working, that if he did not abstain from doing said work, he would 'wear sore bones for it one of these nights'"; —(Here followed the names of certain other persons and the threats used against them)—"the said James Munro meaning by the foresaid threats that personal violence would be used to the said Alexander Christie, James Preston, David Stewart, and Martin Polland if they continued to work as aforesaid; and all this the said James Munro did contrary to section 7 of the Conspiracy and Protection of Property Act, 1875."

The Sheriff-substitute (Campbell Smith) gave the complainer an oppor-

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tunity of amending the complaint by adding to it a statement that, in consequence of the threats aforesaid, "the said persons were intimidated and abstained from doing work that they had a legal right to do." The complainer declined to amend, and the Sheriff-substitute dismissed the complaint as irrelevant.

The complainer took a case, in which the above facts were stated.

The question of law for the opinion of the High Court of Justiciary was,—"Whether in the complaint there is relevantly averred any contravention of the 7th section of the Conspiracy and Protection of Property Act, 1875?"

The appellant cited *Judge* v. *Bennett*, Nov. 16, 1887, 36 Weekly Reporter, 103.

LORD JUSTICE-CLERK.—The clause in the Act of Parliament with which we have to deal is very clear and distinct. It sets forth that "Every person who, with a view to compel any other person to abstain from doing, or to do, any act which such person has a legal right to do or abstain from doing, wrongfully and without legal authority (1) uses violence to or intimidates such other person, or his wife or children, or injures his property," shall be liable to certain penalties. That makes it quite plain that the action of the person does not depend for its criminality on its success. If a person uses violence or intimidates with a view to make a person abstain from doing what he has a right to do, it is an offence, whether the person abstains or not.

I think the complaint in this case is well drawn to describe an offence under the statute. There is the statement that what was done was wrongful; there is the statement that the accused intimidated; there is a narrative of the threats used, which are plainly threats of personal violence. That statement satisfies subsection 1 of section 7. I think that clause would be perfectly nugatory if read as the Sheriff reads it. The object and intention of it is to prevent persons endeavouring by such means to induce other persons to give up doing what they have a right to do. I have therefore no doubt that the Sheriff was wrong.

We have been referred to the case of *Judge* v. *Bennett*. In that case the opinions have evidently been taken down in a very cursory manner, but I do not think they differ from the views I have expressed. The beginning of Mr Justice Stephen's opinion cannot be correctly reported, as it is unintelligible. The result of his opinion is, I think, that it is the intention and character of the threats that must be looked to—whether they are threats which are intended to and calculated to raise alarm. By alarm I do not mean necessarily physical fear, but the alarm of a good citizen that he or his family may suffer personal violence. So also Mr Justice Smith says—"Intimidation is not merely to use violence or to threaten to use violence. What is the meaning of 'intimidates'? Why, the using of the language which causes another man to fear." I do not read that as meaning that physical fear must be actually produced, but only that the conduct must be such as tends to cause alarm. In the case in question there was no suggestion that there was any expression of fear on the part of the person intimidated.

LORD M'LAREN.—I think it is important that no doubt should be cast upon the interpretation of the seventh section of the Conspiracy and Protection of Property Act. That section was introduced into an Act which repealed certain

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disabilities which formerly existed regarding trade combinations to make it clear that while persons were at liberty to combine for lawful purposes, the law would protect those who are outside the combination from illegal acts.

I do not at all participate in the doubts that seem to have been entertained by the Sheriff-substitute when he proposed to the prosecutor to make his case clear by averring that the persons intimidated had abstained from doing work which they had a legal right to do. The statute contains no such restriction. It gives protection to persons intimidated with a view to compel them to abstain from continuing to work. I should have held, independently of these prefatory words, that the offence of intimidation was complete if the person to whom the threats were applied had been put in reasonable apprehension of harm to himself or his family in consequence of his refusing to comply with the demand of the person threatening. I can hardly imagine that the Legislature could have enacted a clause that would give protection only to the coward who acts in accordance with the wishes of the person who intimidates him, and refuse protection to the honest and capable man who has the courage to resist intimidation while at the same time feeling a reasonable apprehension that the threats may be acted upon. The one is as much entitled to the protection of the law as the other. I agree that the Act of Parliament plainly contemplates such a case as is here averred, and that the complaint is quite relevant.

LORD TRAYNER.—I think it would be to deprive the statute of a great part of its benefit if the idea were entertained that intimidation was not punishable unless it was successful. The purpose of the Act is to prevent intimidation, and if a man intimidates another with a view to prevent him doing something he has a right to do, he commits the offence. I have no doubt that the complaint is relevant.

LORD WELLWOOD.—I am of the same opinion. I think it is plain that in order to make a charge under this section of the statute relevant it is not necessary to aver that the intimidation charged was successful in the sense of compelling the person intimidated to abstain from doing or to do any act which that person had a legal right to do or abstain from doing. The offence is complete when intimidation is practised "with a view to compel any other person to abstain," &c.

But it was argued that the prosecutor should at least have averred that the persons said to have been threatened were intimidated. If such an averment is required for the purpose of relevancy—and perhaps it is—it is in the complaint, because the complaint charges that the accused "did intimidate" the person in question.

If the meaning of the objection is that the prosecutor should have averred that the persons intimidated were made afraid, I do not think that the objection is well founded. To prove the statutory charge I think it is sufficient to prove that the intimidation used was such as to induce serious apprehension of violence in the mind of a man of ordinary courage, although it might not be successful in making him afraid.

THE COURT sustained the appeal, reversed the determination of the inferior Judge, and remitted to him to proceed according to law, and decerned.

CROWN AGENT—JAMES URQUHART, Solicitor, Dundee—Agents.

ROBERT MONTGOMERY, Appellant.—*MacWatt*.
HENRY LOUGHRAN, Respondent.—*James Thomson*.

No. 12.

Feb. 2, 1891.

Montgomery v. Loughran.

Sheriff—Process—Small-Debts Court—Litiscontestation—Decree in absence—Rehearing—Small-Debt Act, 1837 (7 *Will. IV. and* 1 *Vict. c.* 41), *sec.* 16.—In an action in the Small-Debt Court in which both parties appeared, the pursuer asked and obtained an adjournment on account of the non-appearance of his witnesses. At the adjourned diet the defender failed to appear, and decree was pronounced against him "in respect of his absence," with execution after a charge of ten free days.

Held that there was no litiscontestation, that the decree was one in absence, and that the defender was therefore entitled to have execution sisted and his case reheard under section 16 of the Small-Debt Act, 1837.

Observations upon *Worrall, Hallam, & Co.* v. *M'Dowall*, August 29, 1885, 13 R. (Just. Cases) 4.

Opinions (*per* Lord Trayner and Lord Kyllachy) that whenever a decree in the Small-Debt Court is pronounced in the absence of a party, whether at the first or any subsequent diet, and in respect of his absence, whether there has or has not been litiscontestation, such party is entitled to a rehearing under section 16 of the Small-Debt Act, 1837.

THIS was an appeal by Robert Montgomery, confectioner, Glasgow, against a judgment pronounced in the Sheriff Small-Debt Court at Paisley in an action at the instance of Henry Loughran, tramway-conductor, Glasgow.

HIGH COURT. Lord Justice-Clerk. Ld. M'Laren. Lord Trayner. Ld. Wellwood. Ld. Kyllachy. Justiciary Clerk.

The appeal was taken to the Circuit Court at Glasgow, and was certified by Lord Trayner to the High Court of Justiciary.

The appeal set forth,—"That on the 25th day of June 1890 the respondent took out a summons against the appellant to appear in the Sheriff Small-Debt Court at Kinning Park upon the 4th day of July 1890, at eleven of the clock forenoon, to answer to an alleged claim for payment of the sum of £12. . . .

"On the case being called in Court the respondent's agent moved the Court to continue the case, in respect that two of the witnesses he had cited had failed to attend. . . . The appellant had his witnesses in attendance, but was not even asked his defence. The Sheriff-substitute continued the cause by a minute in the Court books in these terms:—'Continues till 31st July current, Paisley Court.'

"About a fortnight before the 31st day of July the appellant and respondent had met and agreed to refer the subject in dispute to two mutual friends, who had agreed to act, and met the parties several times without their agents, and the matter was still before them on the 31st day of July last. Notwithstanding this reference, the respondent and his agent attended in the Sheriff Court in Paisley, and took decree in absence of the appellant for £12 of damages, and £1, 10s. 5d. of expenses. The entry in the Court minute-book is in these terms:—'Decerns in respect of absence at diet of proof, and for £1, 10s. 5d. of expenses, with 10s. of agent's fee, with execution after a charge of ten free days.'"

On 6th August the appellant, in virtue of section 16 of the Small-Debt Act, 1837,* obtained a warrant sisting execution of the decree in absence,

* The Small-Debt Act, 1837 (7 Will. IV. and 1 Vict. c. 41), sec. 16, provides,—"And be it enacted that where a decree has been pronounced in absence of a defender, it shall be competent for him, upon consigning the expenses decerned for, and the further sum of ten shillings to meet further expenses, in the hands of the clerk, . . . to obtain from the clerk a warrant signed by him sisting execution till the next Court day, . . . and such warrant being duly served . . . . shall be an authority for hearing the

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disabilities which formerly existed regarding trade combinations to make it clear that while persons were at liberty to combine for lawful purposes, the law would protect those who are outside the combination from illegal acts.

I do not at all participate in the doubts that seem to have been entertained by the Sheriff-substitute when he proposed to the prosecutor to make his case clear by averring that the persons intimidated had abstained from doing work which they had a legal right to do. The statute contains no such restriction. It gives protection to persons intimidated with a view to compel them to abstain from continuing to work. I should have held, independently of these prefatory words, that the offence of intimidation was complete if the person to whom the threats were applied had been put in reasonable apprehension of harm to himself or his family in consequence of his refusing to comply with the demand of the person threatening. I can hardly imagine that the Legislature could have enacted a clause that would give protection only to the coward who acts in accordance with the wishes of the person who intimidates him, and refuse protection to the honest and capable man who has the courage to resist intimidation while at the same time feeling a reasonable apprehension that the threats may be acted upon. The one is as much entitled to the protection of the law as the other. I agree that the Act of Parliament plainly contemplates such a case as is here averred, and that the complaint is quite relevant.

LORD TRAYNER.—I think it would be to deprive the statute of a great part of its benefit if the idea were entertained that intimidation was not punishable unless it was successful. The purpose of the Act is to prevent intimidation, and if a man intimidates another with a view to prevent him doing something he has a right to do, he commits the offence. I have no doubt that the complaint is relevant.

LORD WELLWOOD.—I am of the same opinion. I think it is plain that in order to make a charge under this section of the statute relevant it is not necessary to aver that the intimidation charged was successful in the sense of compelling the person intimidated to abstain from doing or to do any act which that person had a legal right to do or abstain from doing. The offence is complete when intimidation is practised "with a view to compel any other person to abstain," &c.

But it was argued that the prosecutor should at least have averred that the persons said to have been threatened were intimidated. If such an averment is required for the purpose of relevancy—and perhaps it is—it is in the complaint, because the complaint charges that the accused "did intimidate" the person in question.

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No. 12.

Feb. 2, 1891.

Montgomery v. Loughran.

Sheriff—Process—Small-Debts Court—Litiscontestation—Decree in absence—Rehearing—Small-Debt Act, 1837 (7 *Will. IV. and* 1 *Vict. c.* 41), *sec.* 16.—In an action in the Small-Debt Court in which both parties appeared, the pursuer asked and obtained an adjournment on account of the non-appearance of his witnesses. At the adjourned diet the defender failed to appear, and decree was pronounced against him "in respect of his absence," with execution after a charge of ten free days.

Held that there was no litiscontestation, that the decree was one in absence, and that the defender was therefore entitled to have execution sisted and his case reheard under section 16 of the Small-Debt Act, 1837.

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THIS was an appeal by Robert Montgomery, confectioner, Glasgow, against a judgment pronounced in the Sheriff Small-Debt Court at Paisley in an action at the instance of Henry Loughran, tramway-conductor, Glasgow.

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The appeal was taken to the Circuit Court at Glasgow, and was certified by Lord Trayner to the High Court of Justiciary.

The appeal set forth,—"That on the 25th day of June 1890 the respondent took out a summons against the appellant to appear in the Sheriff Small-Debt Court at Kinning Park upon the 4th day of July 1890, at eleven of the clock forenoon, to answer to an alleged claim for payment of the sum of £12. . . .

"On the case being called in Court the respondent's agent moved the Court to continue the case, in respect that two of the witnesses he had cited had failed to attend. . . . The appellant had his witnesses in attendance, but was not even asked his defence. The Sheriff-substitute continued the cause by a minute in the Court books in these terms:—'Continues till 31st July current, Paisley Court.'

"About a fortnight before the 31st day of July the appellant and respondent had met and agreed to refer the subject in dispute to two mutual friends, who had agreed to act, and met the parties several times without their agents, and the matter was still before them on the 31st day of July last. Notwithstanding this reference, the respondent and his agent attended in the Sheriff Court in Paisley, and took decree in absence of the appellant for £12 of damages, and £1, 10s. 5d. of expenses. The entry in the Court minute-book is in these terms:—'Decerns in respect of absence at diet of proof, and for £1, 10s. 5d. of expenses, with 10s. of agent's fee, with execution after a charge of ten free days.'"

On 6th August the appellant, in virtue of section 16 of the Small-Debt Act, 1837,* obtained a warrant sisting execution of the decree in absence,

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which warrant or sist was duly served upon the respondent, to have the case heard on 21st August.

On the case being called in Court on 21st August, the Sheriff-substitute (Begg) wrote a decree or deliverance dismissing the sist as incompetent, on the ground that the decree in absence, pronounced at Paisley on 31st July, "was a decree *in foro*, and could not be sisted, and accordingly he dismissed the sist as incompetent, and confirmed the decree previously granted."

The appellant maintained (1) that as he had duly complied with the provisions of section 16 of the Small-Debt Act, 1837, it was the Sheriff's duty to have heard the cause. "(2) By the Sheriff's refusal to allow the cause to be heard, he has wilfully disregarded the statutory enactment above narrated, and has done substantial injustice to the appellant. (3) The parties in this case have never joined issue, nor has litiscontestation taken place, and the decree pronounced on 31st July last was in absence of the defender and appellant, and neither the pursuer nor the defender has been heard on the claim, and the defender and appellant has had no opportunity of pleading his defence, or adducing evidence in support thereof."

Argued for the appellant;—This appeal was taken under section 31 of the Small-Debt Act, there having been here such deviation in point of form from the statutory enactments as had prevented substantial justice from being done. There had been no *litiscontestatio*, and consequently the decree pronounced by the Sheriff-substitute on 31st July was one in absence, and being in absence the warrant sisting execution of the decree under section 16 should have been sustained by the Sheriff-substitute. If the decree was not a decree in absence in the ordinary sense, it was one which had passed "in absence of the defender" in the sense of section 16.[1] That section fell to be construed liberally, inasmuch as it provided against the hardship of a defender or pursuer being left without a remedy if he happened through no fault of his own to be absent when the case was called. It was to be gathered from the opinion of Lord Mure in the case of *Worrall*[2] that there had been such action taken by the parties in Court as amounted to litiscontestation.

Argued for respondent;—The Sheriff had taken the proper course in refusing to sustain the warrant sisting the execution of the decree of 31st July. The question really was whether the decree was one *in foro* or one in absence, for section 16 applied only to decrees in absence, and not to decrees *in foro*. This was not a decree in absence in any sense. There had clearly been *litiscontestatio*, and a decree after *litiscontestatio* could not be a decree in absence. This was a decree by default, and therefore a decree *in foro*.[3]

LORD JUSTICE-CLERK.—This case came before Lord Trayner at the Glasgow Circuit Court, and in consequence of the decision in the case of *Worrall* was certified to this sitting of the High Court.

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cause; and in like manner where absolvitor has passed in absence of the pursuer, . . . it shall be competent for him . . . to obtain a warrant, signed by the clerk, for citing the defender and witnesses for both parties, which warrant . . . . shall be an authority for hearing the cause. . . ."

[1] Wilson v. State Fire Insurance Co., July 14, 1863, 35 Scot. Jur. 635; Gray v. Low, Feb. 22, 1856, 18 D. 628, 28 Scot. Jur. 382.

[2] Worrall, Hallam, & Co. v. M'Dowall, Aug. 29, 1885, 13 R. (Just. Cases) 4.

[3] Anderson v. Garson, Dec. 16, 1875, 3 R. 254; Rowan v. Mercer, May 12, 1863, 4 Irvine, 377; Worrall, Hallam, & Co. v. M'Dowall, *supra*.

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By the Small-Debt Act appearance in the Small-Debt Court may be sufficiently made by the personal appearance of the party in the case, or of someone to represent him. According to the practice of the Court, what occurs is, that, when a case is called, the Clerk of Court ascertains whether the parties are present by their answering or failing to answer. So far as we can learn from the record in this case, that is all that took place so far as the defender was concerned. He obeyed the citation, and when the case was called announced that he was present. The pursuer not wishing to go on got an adjournment.

In that state of matters, apart from the case of *Worrall*, my opinion is, that a decree pronounced at a subsequent sitting of the Court, in the absence of one of the parties, would not be a decree by default in respect of litiscontestation, but a decree in absence only.

The only difficulty arises from the case of *Worrall*. But I am quite satisfied from the opinion of Lord Mure in that case, that there must have been circumstances disclosed upon the record of Court, which shewed that a great deal more had taken place than the mere announcement by the defender of his presence upon the case being called, because I find that Lord Mure says this,—"The view I take of the question is, that after both parties have appeared in Court and there has been litiscontestation, there cannot be a decree in absence on either side."

I read that as meaning the appearance of the parties in Court followed by such action on their part in Court as amounted to litiscontestation. The mere appearance of the defender could not constitute that. A defender may appear as matter of respect to the Court, and not to state a defence. I therefore take it that Lord Mure means two different things by appearance and litiscontestation, and that there must have been evidence that litiscontestation had taken place. I am of opinion, accordingly, that this case is distinguishable from the case of *Worrall*, and without giving any opinion as to whether I should have agreed with the judgment in that case, I think that in this case there was no litiscontestation, and that the decree at the continued diet was not a decree by default, but a decree in absence, against which the defender was entitled to be reponed.

I am therefore of opinion that the Sheriff has erred in such a manner as entitles us to review his judgment, and that his judgment should be recalled, and the case remitted to him.

LORD M'LAREN.—In the jurisprudence of this country a distinction is taken between decrees in absence and *in foro* of this nature, that where a party has not been heard or has not taken the first step towards a hearing in his own defence, he is entitled upon certain conditions to be reponed in order that his defence may be stated.

Although there is a difference between the forms of procedure in the Small-Debt Court and the Courts of higher jurisdiction, yet the essentials of a decree in absence are, I think, in both cases the same. In order that a decree may be treated as a decree *in foro*, something must be done by the defender to traverse the allegations in law or in fact upon which the conclusions of the writ are directed against him. In the Court of Session and in the Sheriff's Ordinary Court this is done by putting in defences, but as defences are not necessary in the Small-Debt Court, it appears to me that there can only be litiscontestation by a defender appearing and stating some defence or calling a witness—in short, beginning the proceedings of a contested case. His mere assent to a motion for

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opinion upon the point referred to by Lord Trayner and Lord Kyllachy, because I am not clear that we have materials for raising such a question, and it is plain enough that there is room for a distinction between a decree where the merits have not been entered upon, and one pronounced after some progress has been made with the case.

THE COURT sustained the appeal, and remitted to the Sheriff to proceed with the case.

W. B. GLEN, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

No. 13.
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Howman v. Mackie.

MARTIN LANGSTON HOWMAN (Procurator-Fiscal at Kirkwall), Appellant. —*D. Robertson, A.-D.*
ALEXANDER MACKIE, Respondent.—*Law.*

Bankruptcy—Bankruptcy Frauds and Disabilities (Scotland) Act, 1884 (47 *and* 48 *Vict. c.* 16), *sec.* 4—*Debtors (Scotland) Act*, 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 13—*Credit obtained by undischarged bankrupt—Complaint—Relevancy.*—The Bankruptcy Frauds and Disabilities Act, 1884, sec. 4, enacts that an undischarged bankrupt who obtains credit to the extent of £20, without informing the person from whom he obtains it that he is an undischarged bankrupt, shall be deemed guilty of a crime and offence, "and may be dealt with and punished as if he had been guilty of a crime and offence under the Debtors (Scotland) Act, 1880, and the provisions of that Act shall apply to proceedings under this section." The 13th section of the Act of 1880 * enacts that the debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and, on conviction, shall be liable to imprisonment "(A) in each of the cases following, unless he proves to the satisfaction of the Court that he had no intent to defraud—that is to say—[Here various offences in relation to the disclosure of the state of his affairs to the trustee are specified]; (B) in each of the cases following . . ."

Held that it is not necessary to the relevancy of a complaint under section 4 of the Act of 1884 that the prosecutor should libel "intent to defraud," and that it is not necessary for the prosecutor to prove an intent to defraud.

Question whether the proviso in sec. 13 of the Act of 1880, "unless he prove . . . that he had no intent to defraud," was incorporated by reference into section 4 of the Act of 1884.

Opinions per Lord Justice-Clerk, Lord Trayner, and Lord Wellwood that it was not, and that the reference was merely as to the mode of trial and the punishment to be awarded.

Opinion per Lord M'Laren that it was incorporated.

Opinions per Lord Justice-Clerk, Lord Trayner, and Lord Wellwood that an intent to defraud was not an element in the statutory offence.

Observations upon *Small* v. *Hart*, March 12, 1886, 1 White, 80, 13 R. (Just. Cases) 45.

HIGH COURT. Lord Justice-Clerk. Ld. M'Laren. Lord Trayner. Ld. Wellwood. Justiciary Clerk.

ALEXANDER MACKIE was charged under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and Criminal Procedure (Scotland) Act,

* Section 13 of the Debtors (Scotland) Act, 1880, enacts,—"The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary, or before the Sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury for any time not exceeding sixty days, with or without hard labour, (A) in each of the cases following, unless he proves to the satisfaction of the Court that he had no intent to defraud,—that is to say—[Then follow six subsections specifying various offences in relation to the disclosure of the state of his affairs to the trustee]; (B) in each of the cases following—[Then follow five subsections specifying various offences]."

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1887, at the instance of the Procurator-fiscal of Kirkwall with a complaint, which set forth that, "being an undischarged bankrupt within the meaning of the Act first hereinafter mentioned, at Burness, Firth Parish, Island of Pomona, Orkney, or at some other place on the island of Pomona and county of Orkney, in the month of December 1888 or January 1889," he did "obtain credit to the amount of £60 sterling from Robert Stevenson, farmer, Burness aforesaid, without informing him that he was an undischarged bankrupt, contrary to the Act 47 and 48 Vict. cap. 16, section 4, and he has thereby incurred the penalties provided by 43 and 44 Vict. cap. 34, section 13, applicable to conviction by the Sheriff without a jury."

The Sheriff-substitute (Armour) having found the complaint irrelevant, a case was taken by the Procurator-fiscal under the Summary Prosecutions Appeals Act, 1875.

The Sheriff-substitute stated as follows:—"The respondent appeared on 15th July 1890, when his agent objected that the complaint was irrelevant, in respect (1) that the respondent was not charged with obtaining the credit with intent to defraud; and (2) that the respondent was not charged with any statutory offence under section 4 of 47 and 48 Vict. cap. 16, and section 13 of 43 and 44 Vict. cap. 34.

"The respondent argued that intent to defraud was of the essence of the crime; that unless intent to defraud was libelled and established by proof by the appellant, no crime or offence under section 4 of 47 and 48 Vict. cap. 16, and section 13 of 43 and 44 Vict. cap. 34, could be brought home to the respondent. In support of this contention reference was made to the cases of *Duncan* v. *Cooper*, Feb. 3, 1886, 13 R. (Just. Cases) 36, 1 White, 43, and *Small* v. *Hart*, March 12, 1886, 13 R. (Just. Cases) 45, 1 White, 80.

"The appellant contended that to constitute the statutory crime and offence libelled he neither required to libel 'intent to defraud' nor to instruct such intent by evidence; that the clause in the Act of 1884, under which this prosecution was brought, did not say anything about intent to defraud; that the respondent was guilty of the statutory crime and offence if the statements averred in the complaint were proved, and he undertook to do this. He made reference to the opinion expressed by Lord Craighill in the case of *Small* v. *Hart*, referred to by the respondent, and to the case of *H. M. Advocate* v. *Livingstone*, Feb. 29, 1888, 15 R. (Just. Cases) 48.

"I held that the present case was ruled by the decision of the Court in *Small* v. *Hart*, but looking to section 8 of 50 and 51 Vict. cap. 35, and the case of *H. M. Advocate* v. *Swan*, Dec. 10, 1888, 16 R. (Just. Cases), p. 34, had doubts as to whether the complaint could be held irrelevant. The appellant, however, declined to argue that fraudulent intent was to be implied; on the contrary, he intimated that he purposely abstained from charging intent to defraud in the complaint, and that he did not intend to lead direct evidence to establish fraudulent intent; and in these circumstances I sustained the objections, found the complaint irrelevant, and dismissed the respondent from the bar."

The questions of law for the opinion of the Court were—"(1) Is intent to defraud of the essence of the statutory crime and offence charged in this complaint? (2) If so, was it necessary in the circumstances stated to set forth in the complaint that the respondent did what is therein charged with intent to defraud? (3) Is it necessary, in any case, for the appellant to prove fraudulent intent; and if he proved only the statements averred in this complaint, would he be entitled to a conviction?"

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On 27th October 1890, the case was ordered, in respect of its importance, to be heard before a full bench.

Argued for the appellant;—Section 4 of the Act of 1884 which created the offence contained no proviso as to "intent to defraud." It was true there was a reference in the section to the provisions of the Act of 1880. That reference, however, was quite general, and it was obviously made for the purpose of providing for procedure, and limiting the punishment to be inflicted on conviction. The provision in the 13th section of the Act of 1880 that the accused should escape conviction if he succeeded in proving that he had had no fraudulent intent, was clearly not imported by reference into the Act of 1884. Even if it were held to be imported, it did not impose the burden upon the prosecutor of libelling or proving fraudulent intent. *Small* v. *Hart, supra,* was wrongly decided, and the opinions in *Duncan* v. *Cooper, supra,* were *obiter.*

The respondent argued that *Small* v. *Hart* was well decided; that the reference in the 1884 Act to the Act of 1880 was unqualified; that the proviso in subdivision A of section 13 of the latter Act was incorporated into the former Act, and that consequently "intent to defraud" ought to have been libelled.

LORD JUSTICE-CLERK.—As this case presents itself it is complicated by numerous circumstances, and among other things by this, that under the Act of 1887 it does not matter whether proof by the prosecutor of intent to defraud be necessary or not, as that is not a question which arises on relevancy. But I think the difficulty goes deeper than that. I think the first question is put in an unfortunate form, and does not call for an answer. The question which we have to consider is, whether it was necessary for the prosecutor, either by direct statement or through the implication of the Act of 1887, to state a case of intent to defraud, and thereby to tie himself up to prove it, and that question is I think embraced by the second and third questions stated for our opinion. Now, I think the second question depends upon the third, because if it be the case that the prosecutor would be entitled to a conviction if he proved only what is set forth, it is plain that he would not require to aver any more in his libel. The case therefore narrows itself down to a consideration of the answer to the third question. That depends upon the meaning and interpretation to be put upon section 4 of the Act of 1884. I do not think it would be possible to set forth in clearer words than is done by this clause the statement of a crime and offence. There is no mention of intent to defraud. To borrow money with intent to defraud would, I think, be a crime at common law, whether the borrower were an undischarged bankrupt or not. It is plain that this clause was intended to create an offence which was not an offence at common law, and that the offence created consists in this, that an undischarged bankrupt gets credit to a greater extent than £20 without revealing that he is an undischarged bankrupt. I do not find anything in the rest of the clause relating at all to the offence. The rest of the clause relates only to the way in which the offender is to be dealt with, and the reference to the previous Act is made for that purpose alone.

I think it right to state that failure to inform the creditor would not in my opinion constitute the offence where the creditor knew that the borrower was undischarged.

One other question arises, and that is, whether the undischarged bankrupt can escape conviction by proving that he had no intent to defraud? That is one of the questions raised by the Sheriff. I do not think that question can

possibly enter into the question of relevancy. The Act of 1880 provides with reference to certain offences that the accused is entitled to escape from conviction if, after the facts required by the statute are proved against him, he shall prove that he had no intent to defraud. I think nothing could more plainly bring out the fact that intent to defraud does not need to be averred in these cases, than the fact that disproof of the intent will enable the accused to escape. In these particular cases in section 13 the prosecutor is only called on to prove that the acts were done. The inference stands unless there is disproof. I therefore think that in this question of relevancy we cannot enter into the question whether this would be a good defence to a charge under section 4 of the Act of 1884, but I think it right to express my own opinion that it would not. I think that if the prosecutor proves the two facts, that the prisoner was an undischarged bankrupt, and obtained credit to a greater extent than £20 without informing his creditor that he was an undischarged bankrupt, he has committed the offence set forth in the clause. The permission to prove absence of fraudulent intent in the Act of 1880 applies only to some of the offences enumerated. The reference in the Act of 1884 to the Act of 1880 is quite general, and accordingly I do not see how it can have the effect of attaching such a qualification to the offence created by the Act of 1884.

I therefore think the Sheriff erred in holding the libel irrelevant, and erred also in his mode of reaching that conclusion by asking the prosecutor what he was prepared to prove. In considering relevancy he had no such question before him. To have held the libel relevant would not have precluded him from *calling* on the prosecutor to prove anything he considered necessary.

LORD M'LAREN.—I agree with your Lordship that in considering this case the first question is, what is the meaning of the statutory prohibition? I think the statute imposes upon an undischarged bankrupt an obligation to disclose to anyone, from whom he is seeking credit to the extent of £20, the fact that he is an undischarged bankrupt. The object evidently is to prevent persons obtaining credit to whom such credit would not be given if the true facts were known. Now the hypothesis of the section is, that the person from whom credit is sought is ignorant of the fact of the borrower's bankruptcy, because, if he were aware of that fact, there could be no necessity for any communication of it, and such a case I agree would be altogether outside the scope of the statute. But on the supposition that the person applied to is ignorant, the obligation to disclose is laid on the bankrupt, and the failure to perform that duty is itself the offence for which the statute imposes the penalty.

So far I think the case is clear, but there does seem to be some doubt and difference of opinion as to whether it was intended, by the general reference to the previous Debtors Act of 1880, to incorporate that part of it in which, in the cases referred to, the debtor is enabled to clear himself by shewing that he had no intention to defraud. I shall have a word to say about that in conclusion.

In the meantime, looking to the questions in the case, it appears to me that it is not necessary to answer the first question at all. On the second and third I think our answer must be in the negative, because it is certainly not necessary under the present form of indictment to set out that there was an intention to defraud, and clearly under the statute it was not necessary for the appellant to lead evidence in support of an intention to defraud.

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It is right to notice that the question of relevancy now arises under different conditions from those which prevailed when the case of *Small* v. *Hart* was decided, because that case was brought under the old common law mode of indictment, and the prosecutor had proceeded on the principle of setting out the statutes at full length, and had omitted the qualification in the Act of 1880. At that time very strict views prevailed regarding the mode of libelling a statute, and I see no reason to doubt that the decision there given on relevancy was well founded according to the views of relevancy which then prevailed, but under the present statute of 1887 a great many things which under the old system had to be set forth are now implied.

There remains only the question, whether the accused would be entitled to acquittal if he proved that there was no intent to defraud? That does not fall under any of the questions put to us, but apparently, in the view of the majority of the Judges who decided *Small* v. *Hart*, that would have been a good defence. Your Lordship has indicated a different opinion, and I shall only say that in coming to that conclusion for the purpose of determining the relevancy of *Small* v. *Hart*, what weighed with me—and still weighs with me—was that in the interpretation of criminal statutes the leaning always is to the side of freedom. The 13th clause of the Act of 1880 is divided into two parts, A and B. In the offences enumerated in one part the accused is allowed to plead that he had no intention to defraud; in the other no such qualification is expressed. It appeared to me that the reference to the Act of 1880 could only apply to the 13th section, and that the new offence created by the Act of 1884 was one *ejusdem generis* with those enumerated under head A, and that the words of reference might fairly comprehend the exception there introduced in favour of the accused person. But it is not necessary, nor is it within our power, to give a decision on that point. I only wish to reserve my opinion upon it, which I cannot say has undergone any change since I considered it in *Small* v. *Hart*.

Lord Trayner.—I have no doubt in reaching the same conclusion. I think, the relevancy is beyond question. The prosecutor has used the very words of the Act. I also concur in your Lordship's observation as to the impropriety of any Judge disposing of a question of relevancy upon questions put by him as to what the prosecutor intended to prove. I can understand that the Sheriff was a little troubled by the different opinions that were quoted to him in the cases of *Cooper*, *Hart*, and *Swan*, but for my own part I have not experienced any difficulty in coming to a conclusion upon all the three questions put by the Sheriff for our opinion, and I concur in the views which your Lordship in the chair has expressed. Questions two and three go together, because if it be unnecessary to prove fraudulent intent, it follows that it is unnecessary to aver it. That also leads to the result that the answer to the first question would have to be negative, because the statute has not made intent to defraud of the essence of the offence.

There seems to be a difficulty felt by some because of the reference from the Act of 1884 to the Act of 1880. That has not occasioned me any difficulty. The Act of 1884, after describing the particular offence thereby created, adds, that if anyone is guilty of that offence, he shall be dealt with and punished as if he had been guilty of a crime under the Act of 1880, and the provisions of that Act shall apply to the proceedings under this section of the Act of 1884. It is impossible, I think, to read that provision as meaning anything else than

that if a man has committed an offence under section 4 of the Act of 1884, you must go back to the Act of 1880 to see how he is to be dealt with, and what is the limit of his punishment. The mode in which he is to be proceeded with is set forth in section 13 of the Act of 1880, and is either before the High Court, before a Sheriff and jury, or before a Sheriff without a jury, and the limit of his punishment is two years or sixty days. I cannot read the reference to the Act of 1880 as having any bearing whatever upon the offence created by the Act of 1884 except as regards procedure and result. I think it is impossible to read the words "unless he proves to the satisfaction of the Court that he had no intent to defraud" as qualifying anything except those enumerated cases which immediately follow them. To read them as a qualification into the Act of 1884 would, I think, be to misread that Act, and to introduce a defence which it does not contemplate.

But even if that view were wrong—and it differs from the views of some other Judges of this Court—that would not affect the judgment in this case, because it relates to defence and not to relevancy. I have thought it right to express my opinion, as your Lordship has done, subject to reconsideration should the question arise directly in any future case.

LORD WELLWOOD.—I agree in the conclusion at which your Lordships have arrived. As regards the matter last touched upon by Lord Trayner I desire to reserve my opinion. If we had only to deal with the Act of 1884 I think all that the prosecutor would have to do would be to set forth the 4th section, and that he would neither require to libel intent to defraud nor to prove it. But then the respondent in the present case maintains that the provisions of section 13 of the Act of 1880 are to be read into this section of the Act of 1884, and in particular the provision in subsection A, to the effect that in each of the cases following the accused is to be deemed guilty "unless he proves to the satisfaction of the Court that he had no intent to defraud." Now, my present impression is, in accordance with the views expressed by your Lordship in the chair and Lord Trayner, that it is impossible to read these words into the Act of 1884, because the reference in the Act of 1884 is general, and does not refer particularly to A or B, and therefore the correct way to read the reference to the Act of 1880 is to refer it to the mode of trial and the punishment to be awarded. But supposing that the respondent was right in maintaining that the provision is to be read in, I do not think that affects the question we have to decide. It would only lead to this, that the accused could demand an acquittal if he proved he had no intent to defraud, but would not lay on the prosecutor any obligation to libel intent to defraud, or to lead evidence upon it.

THE COURT pronounced the following interlocutor:—"Having considered the case and heard counsel for the parties, answer the second question in the case and the first part of the third question in the negative, and the latter part of the said third question in the affirmative; reverse the determination of the inferior Judge, and remit to him to proceed according to law."

CROWN AGENT—J. D. MACAULAY, S.S.C.—Agents.

No. 14.

Feb. 2, 1891. Stewart v. M'Niven.

DONALD STEWART, Complainer.—*A. S. D. Thomson.*
DUNCAN M'NIVEN (Procurator-Fiscal at Fort-William), Respondent.—*Maconochie, A.-D.*

Suspension—Irregularity in citation—Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53)—Schedule F.—A warrant of citation to appear before the Sheriff to answer a complaint under the Summary Jurisdiction (Scotland) Acts was executed by serving a copy of the complaint and of the Sheriff's warrant, but there was no formal citation to appear under the signature of the officer in terms of schedule F of the Summary Procedure (Scotland) Act, 1864. The accused appeared at the diet specified in the Sheriff's warrant and was convicted.

In a suspension *held* that as the accused had appeared at the diet he was barred from founding on the irregularity in the mode of citation.

Suspension—Relevancy—Specification.—Held (following *Bolton* v. *Murdoch*, Jan. 23, 1890, 2 White, 410, 17 R. (Just. Cases) 22) that an objection to a complaint on the ground of want of specification of facts of which the accused is entitled to notice, which has not been stated before trial, cannot be entertained by the High Court in a suspension of a conviction on the complaint.

Suspension—Sentence—Award of expenses in sentence suspended.—In a sentence the accused was adjudged to pay a penalty and also a sum of expenses in excess of the amount fixed by statute.

The Court suspended the sentence *quoad* the award of expenses but *quoad ultra* allowed the sentence to stand.

HIGH COURT. Lord Justice-Clerk. Ld. Stormonth Darling. Lord Low. Justiciary Clerk.

DONALD STEWART, Altass, Rosehall, Sutherlandshire, was charged at the instance of the Procurator-fiscal at Fort-William, with an offence against the Public-Houses Acts Amendment (Scotland) Act, 1862, upon a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887.

The complaint set forth that he did "on 15th November 1890, traffic in spirits or other exciseable liquors, within a hut or shed, occupied or possessed by him at Achluachrach, without having obtained a certificate in that behalf in terms of the Act (25 and 26 Vict. c. 35) entitled the Public-Houses Acts Amendment (Scotland) Act, 1862."

After evidence had been led, the Sheriff-substitute (Simpson) convicted the accused of the contravention charged, and therefore adjudged him to forfeit and pay the sum of £7 of penalty with the sum of £3, 9s. of expenses, &c.

Stewart presented a bill of suspension of the sentence which contained the following statements:—"On 1st December 1890, the respondent as Procurator-fiscal of Court for the public interest, served upon the complainer the above complaint as well as the deliverance or warrant thereon, in which the complainer was cited to appear personally before the Sheriff at Fort-William, upon 11th December 1890, at eleven o'clock forenoon. There was, however, no formal requisition or citation to appear under the signature of the officer in terms of schedule F of the Summary Procedure (Scotland) Act, 1864.*

"The complainer was innocent of the offence charged against him, and being strongly of the belief that it could not be proved appeared at the diet mentioned in the warrant, and did not plead want of citation.

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* Schedule (F).—"1. Citation of respondent.—To J. K. [Designation]. Take notice that you are required to appear personally at the place and time specified in the warrant, of which the foregoing is a copy, to answer to the complaint to which this notice is attached, with certification. This I do on the day of (Signature of officer.)"

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"For the same reason he did not plead want of specification in the complaint, in so far as it did not particularly set forth (1) the kind of spirits sold; (2) nor whether the sale was retail or wholesale; nor (3) the person to whom the spirits were sold. The Sheriff in adjudging the complainer to pay £3, 9s. of expenses exceeded the amount which he was entitled to fix under section 4 (a) of the Summary Jurisdiction (Scotland) Act, 1881."*

Argued for the complainer;—The proceedings were *funditus* null in respect (1) there was no citation of the complainer under the hand of the Sheriff-officer.[1] (2) The complaint was bad for want of specification. No quantity of liquor was specified as having been sold. Such specification was essential, as, if the quantity was more than two gallons, and sold by a person holding a dealer's licence, there would be no contravention.[2] The complaint did not bear the names and designations of the two persons to whom the liquor was sold.[3] (3) The sentence was in excess of what the Court was entitled to pronounce.[4]

Argued for the respondent;—(1) The objection to citation was too late, as the complainer had appeared on the day named in the Sheriff's warrant. (2) The objections to the specification were not stated before the trial, and could not now be taken.[5] (3) The sentence was not in excess except as regarded the expenses. Where two parts of a sentence were separable, the Court had suspended *quoad* the part which was excessive only.[6]

At advising,—

LORD STORMONTH DARLING.—The first ground stated for suspending this conviction was that the complainer had not been cited in the form prescribed by schedule F of the Summary Procedure Act, 1864, the officer having merely served a copy of the complaint and deliverance thereon. The deliverance contained a note of the place, day, and hour of appearance, but there was no formal requisition to appear under the signature of the officer. This was an irregularity in point of form, but it is impossible to say the complainer was in any way prejudiced thereby, for he appeared at the place and on the day named in the Sheriff's warrant, and having done so, I think he cannot now found upon any irregularity in the mode of citing him.

The second ground of suspension is want of specification in the complaint, in respect that it did not specify the kind of liquor supplied, nor the persons to whom it was sold, though these were known to the prosecutor. I do not know that the prosecutor was bound to tie himself down to the precise kind of liquor, but I certainly think he ought to have named the persons to whom the liquor was sold, these persons being known to him. If the complainer had objected to the complaint on this ground before the Sheriff, and had asked for amendment of the complaint and adjournment of the trial, I do not doubt it would have been the Sheriff's duty to grant his crave.

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* The Summary Jurisdiction Act, 1881, sec. 4 (a) enacts;—"Where the penalty or penalties imposed shall not exceed £12, the total expenses decerned for shall not exceed £3."

[1] Stevenson v. Watson, Feb. 7, 1857, 2 Irvine, 592.

[2] Blaikie v. Linton, June 18, 1881, 18 S. L. R. 583.

[3] Muir v. Campbell, Nov. 21, 1888, 2 White, 97, 16 R. (Just. Cases) 20.

[4] Gray v. Dewar, July 18, 1889, 2 White, 290, 16 R. (Just. Cases) 97.

[5] Bolton v. Murdoch, Jan. 23, 1890, 2 White, 410, 17 R. (Just. Cases) 22.

[6] Bonthrone and Another v. Renton, Nov. 19, 1886, 1 White, 279; Macbeath v. Fraser, Nov. 20, 1886, 1 White, 286, 14 R. (Just. Cases) 16.

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Feb. 2, 1891. Stewart v. M'Niven.

It is explained in the note of suspension that the complainer refrained from doing so because he was confident of an acquittal, but I do not think an accused person is entitled to take his chance of an acquittal, and then, if convicted, to object to want of notice. I adopt the rule as stated by Lord Shand in the case of *Bolton* v. *Murdoch*, 2 White, 410, 17 R. (Just. Cases) 22—and I agree with him in thinking that it ought to be of general application—"That where a complaint contains a statement of an offence committed in regard to which the only objection on the ground of relevancy is that there is a want of specification of certain particular facts of which the accused is entitled to notice, the objection cannot be entertained in the Court of Appeal when it has not been stated in the Court below."

It appears that the Sheriff in adjudging the complainer to pay £3, 9s. of expenses exceeded the amount which he was entitled to fix, and it was stated at the bar that the respondent had tendered repayment of the whole sum of expenses awarded. In these circumstances he maintained that where the parts of a sentence are separate, one part being good, and the other bad for excess, the part which is bad may be quashed and the other sustained. This was the course followed in the cases of *Bonthrone* v. *Renton*, 1 White, 279, and *Macbeath* v. *Fraser*, 1 White, 286, 14 R. (Just. Cases) 16, and I am of opinion that it is the course which we ought to follow here.

The LORD JUSTICE-CLERK and LORD LOW concurred.

THE COURT pronounced this interlocutor:—"Pass the bill so far as regards the decerniture for expenses complained of: *Quoad ultra* refuse the bill, and decern."

J. STEWART GELLATLY, S.S.C.—CROWN AGENT—Agents.

No. 15.

Mar. 5, 1891. M'Neil v. M'Neil.

DANIEL M'NEIL, Defender (Appellant).—*Crabb Watt.*
MRS ISABELLA GORDON OR M'NEIL, Pursuer (Respondent).—*Ralston.*

Sheriff—Process—Small-Debt Court—Litiscontestation—Decree in foro—Rehearing—Small-Debt Act, 1837 (7 *Will. IV. and* 1 *Vict. cap.* 41), *sec.* 16.—In an action in the Small-Debt Court by a wife against her husband concluding, *inter alia*, for expenses incurred in connection with a mutual deed of separation, the Sheriff-substitute at the first diet—both parties being present—remitted to the Auditor before answer to report as to the law and practice with reference to the question as to a husband's liability for such expenses. After the report was lodged the pursuer enrolled the case, and intimated the diet to the defender. The defender appeared at the diet, but the pursuer failed to appear, and decree of absolvitor was pronounced in respect of her absence. She obtained a warrant for rehearing under section 16 of the Small-Debt Act, 1837, and on the case being reheard, decree was pronounced in her favour.

Held (*per* Lord Wellwood) that there had been litiscontestation at the first diet, that the decree of absolvitor was a decree by default and not a decree in absence, that the warrant for rehearing was therefore incompetent, and that the decree for the pursuer must be *recalled.*

Montgomery v. *Loughran*, Feb. 2, 1891, 18 R. (Just. Cases) 25, *distinguished.*

CIRCUIT COURT AT GLASGOW. Ld. Wellwood. Justiciary Clerk.

MRS ISABELLA GORDON OR M'NEIL brought an action against her husband in the Small-Debt Court of Lanarkshire, at Glasgow, for the sum of £12, 10s. 6d., restricted to £12, consisting of £5, 4s. of aliment, £1, 1s. 6d. of penalty and interest, all alleged to be due under a mutual agreement of separation, and £6, 5s. of law-agent's expenses.

The case was called upon 14th August 1890, and the Sheriff-substitute

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Erskine Murray), both parties being present, before answer remitted to the Auditor of the Sheriff Court to report as to the law and practice with reference to the question whether a husband is bound to pay his wife's agents' expenses in connection with a voluntary agreement to separate, and continued the case *sine die*.

The Auditor having returned his report, the pursuer enrolled the case on 25th September 1890, and intimated the diet to the defender.

The defender was represented at this diet, but the pursuer was not, and decree of absolvitor was pronounced in respect of her absence.

The pursuer then asked for a warrant under section 16 of the Small-Debt Act, 1837,* to have the case reheard. The defender objected to the competency of the warrant, on the ground that the decree of absolvitor was a decree *in foro*. The Sheriff-substitute, on 13th October 1890, called the case for rehearing, repelled the objection, and decerned for £9, 10s. and 6s. 11d. of expenses.

The defender thereupon appealed to the Circuit Court of Justiciary at Glasgow.

Argued for the defender;—The warrant for rehearing, under section 16 of the Act, was incompetently granted. The section referred only to proper decrees in absence where no litiscontestation had taken place. There had here been litiscontestation at the first calling of the case on 14th August by the proponing of a defence in regard to the expenses claimed by the pursuer. The decree of absolvitor then of 25th September was a decree *in foro*.[1] In *Montgomery's*[2] case, in which it had been held that there had been no litiscontestation, the defender had not been called upon to propone a defence, the case having been continued upon the pursuer's motion in respect his witnesses had not appeared.

Argued for the pursuer;—The decree of 25th September was pronounced in respect of her absence, and the section applied in terms. The case of *Worrall* could not be regarded as authoritative, for two of the Judges in *Montgomery's* case expressed opinions contrary to its soundness. In any event it did not apply to the present case. It did not appear from the record of the proceedings that any defence had been proponed.

Lord Wellwood.—I have a distinct recollection of the argument in the case of *Montgomery* v. *Loughran*, but I am of opinion that the present case is distinguishable from it. The respondent's counsel has said everything that could be advanced in support of his view and of the import of that case, but I cannot accede to the argument that it is conclusive of the present appeal. In that case we were all satisfied that litiscontestation had not taken place at the first diet. Both parties were stated to have been present, but there was no proof that anything amounting to litiscontestation took place at that diet—no statement even that the defender was called upon to state his defence. All the statement we had as to procedure was this, that the pursuer's

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* The Small-Debt Act, 1837, by section 16, enacts,—" . . . Where absolvitor has passed in absence of the pursuer or prosecutor, it shall be competent for him, at any time within one calendar month thereafter, upon consigning . . . the sum awarded by the Sheriff in his decree of absolvitor as the expenses for the defender and his witnesses, with the further sum of five shillings to meet further expenses, to obtain a warrant signed by the clerk for citing the defender and witnesses for both parties, which warrant . . . shall be an authority for hearing the cause. . . ."

[1] Worrall, Hallam, & Co. v. M'Dowall, Aug. 29, 1885, 13 R. (Just. Cases) 4.

[2] Montgomery v. Loughran, Feb. 2, 1891, 18 R. (Just. Cases) 25.

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witnesses not being present, the pursuer applied for and was granted an adjournment. At the adjourned diet, the defender not being present, decree was pronounced in his absence. The question thus arose, was the decree so obtained a decree in absence or not? It was contended on behalf of the pursuer who got the decree at the adjourned diet that it was not a decree in absence, and he founded strongly on the case of *Worrall*, 13 R. (Just. Cases) 4. Notwithstanding the decision in that case, the Court held in *Montgomery's* case that the decree was in substance a decree in absence, because they were satisfied, as I have said, that litiscontestation had not taken place at the first diet. I think the effect of the decision in *Montgomery* v. *Loughran* was to overrule the case of *Worrall* as it is reported, because, so far as appears from the report, it would seem that no more took place at the first diet than in the subsequent case of *Montgomery*.

But the question I have to consider here is, Can the present case be distinguished from the case of *Montgomery*? I think that it can and must. We see from the account appended to the summons that the sum claimed, £12, 10s. 6d., restricted to £12, is made up of different items, namely, £5, 4s. due in respect of an annuity or aliment; secondly, a sum of £1, 1s. 6d. of liquidate penalty and interest, payable in terms of an agreement between the spouses to separate; and thirdly, a sum of £6, 5s. to account of expenses incurred by the wife in connection with that agreement, and which it is said the husband had to pay.

Now, the Sheriff remitted that matter—the liability for these expenses—to the Auditor, who thereafter reported. An admission must have been made that the annuity was due, and a question must have arisen in regard to the defender's liability for the expenses which formed part of the sum sued for. Accordingly, on 14th August the Sheriff-substitute, as I have said, before answer remitted the account to the Sheriff Court Auditor to report as to the law and practice as to who should pay the expenses in connection with an agreement made in such circumstances. From the terms of that interlocutor it is plain to my mind that parties at the first diet joined issue in regard to the expenses claimed by the pursuer, and that a defence must have been stated and discussed.

In my opinion that is sufficient to distinguish the present from the case of *Montgomery*. I am aware that during the advising two of my brethren expressed views which, although not necessary for the decision of the case, would, if well founded, lead to my deciding this appeal in favour of the respondent. Founding on the language of the 13th section of the Small-Debt Act of 1837 they indicated an opinion that if the pursuer or defender is absent, whether at the first or any subsequent diet, and a decree is pronounced in respect of absence, the absent party is entitled to a rehearing under section 16.

With all respect I do not agree in this view. It is not to be readily assumed that after witnesses have been examined and other procedure has taken place one of the parties is entitled to have the proceedings begun *de novo* on consigning expenses and a sum of five shillings. Now, I think that the 16th section of the statute refers to proper decrees in absence where no procedure amounting to litiscontestation has previously taken place. The 13th section on the other hand deals primarily with cases where "the parties shall appear," and although it contains a provision that if one of the parties is not personally present when judgment is pronounced a charge of ten free days shall be given,—a provision which may apply equally where the decree is one in absence or one by default,—I do not think it is to be inferred that in the Small-Debt Court

there can be no such thing as a decree by default as distinguished from a decree in absence. No. 15.

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I therefore think that in this case the decree of absolvitor was a decree by default and not one in absence, and that the pursuer was not entitled to be reponed against it. I therefore sustain the appeal, and modify the expenses to three guineas.

THE COURT sustained the appeal, recalled the decree or judgment complained of, and assoilzied the appellant from the conclusion of the summons referred to.

ROBERTSON & BLAIR, Writers—WILLIAM HOWIE—Agents.

THOMAS TODRICK (Procurator-Fiscal at Haddington), Appellant.—*Wallace, A.-D.—Chisholm.* No. 16.

GEORGE WILSON, Respondent.—*Comrie Thomson—Orr.*

Mar. 13, 1891.
Todrick v. Wilson.

Cruelty to animals—Dishorning cattle—Cruelty to Animals (Scotland) Act, 1850 (13 *and* 14 *Vict. c.* 92), *sec.* 1.—In a complaint against a cattle-dealer for a contravention of the Cruelty to Animals (Scotland) Act, 1850,* alleged to have been committed in the dishorning of cattle, by sawing off their horns close to the skull, it was proved that the operation caused great pain to the animals operated upon, but that it was in common use over a large district in Scotland. It was further proved that the object and effect of the operation were to prevent the cattle from injuring each other when fed in courts, and that the operation had been skilfully performed.

Held that no offence had been committed under the statute.

Expenses—Summary Procedure (Scotland) Act, 1864 (27 *and* 28 *Vict. c.* 53), *sec.* 22—*Cruelty to Animals (Scotland) Act*, 1850 (13 *and* 14 *Vict. c.* 92), *sec.* 8.—The Summary Procedure (Scotland) Act, 1864, sec. 22, provides that in complaints brought under the Act "for the recovery of any penalty . . . expenses shall not be awarded to or against any public prosecutor or party prosecuting under the authority of any Act of Parliament for the public interest, unless such award of expenses is authorised by such Act." The Cruelty to Animals (Scotland) Act, 1850, by section 8, provides that in every case of a conviction under the Act, where the sum imposed as a penalty, together with costs (if any) awarded by the magistrate, "is not paid within a certain time," the magistrate may adjudge the offender to be imprisoned.

In a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, for a penalty incurred by a contravention of the Cruelty to Animals (Scotland) Act, 1850, it was *held* (1) that there was in section 8 of the latter Act an implied power to the Judge in the inferior Court to award expenses against the accused, and therefore, (2) that it was competent to award expenses against the prosecutor.

Renton v. *Wilson*, 15 R. (Just. Cases), 84, *approved.*

THIS was a complaint brought in the Sheriff Court of the Lothians and Peebles, at Haddington, under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure (Scotland) Act, 1887, at the instance of Thomas Todrick, Procurator-fiscal of Court, against George Wilson, cattle-dealer, Cupar-Fife.

HIGH COURT. Lord Justice-Clerk. Ld. M'Laren. Lord Trayner. Ld. Wellwood. Ld. Kyllachy. Justiciary Clerk.

The complaint set forth that the accused, "on 20th November 1889, did, within a cattle-court at the farm steading of North Berwick Abbey,

* The Cruelty to Animals (Scotland) Act, 1850, by sec. 1, enacts,—"Whereas it is expedient to prevent wanton cruelty in the treatment of horses, cattle, and other domestic animals in Scotland, be it therefore enacted . . . that any person who shall from and after the passing of this Act cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, overdriven, abused, or tortured, any animal, shall be guilty of an offence."

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in the parish of North Berwick and county of Haddington, cruelly ill-treat, abuse, or torture, or cause or procure to be cruelly ill-treated, abused, or tortured, thirty-two or thereby oxen, by sawing off with a saw or other instrument the horns of the said thirty-two oxen, close to their skulls, whereby the said thirty-two oxen were subjected to great unnecessary and cruel pain and suffering, and were thus cruelly ill-treated, abused, or tortured, or caused or procured to be cruelly ill-treated, abused, or tortured, by the said George Wilson, contrary to the Act 13 and 14 Vict. cap. 92, and particularly section 1 thereof, whereby the said respondent was liable to the penalties particularly set forth in the complaint."

After a proof, the Sheriff-substitute (Shirreff) assoilzied the accused, and refused a motion by his counsel that the Procurator-fiscal be found liable in expenses.

The fiscal took a case, in which the Sheriff-substitute stated the following facts as held proved by him:—"In consequence of complaints by the cattlemen in charge of the animals, to the effect that they were preventing each other from taking their food, and injuring each other, it was resolved to dishorn them. The cattle were mostly eighteen months old. They were dishorned by the respondent, with the assistance of four of the farm servants at the Abbey farm, at the time and place libelled. Each animal was drawn by a rope to a pillar in the cattle-court. Its legs were secured by straps connected by a rope, and the animal was cast upon its side upon a bed of straw. The horns were then sawn off by the respondent as close to the skull as possible with a fine tenor saw. The skin at the base of the horn was in some cases cut with a knife after the saw had passed through the horn, and skin remained attached to it, and in some cases also the skin was cut through before sawing in order to clear a way for the saw. The operation caused a considerable amount of bleeding, some blood squirting out from the wound when the horn was cut off. The respondent, immediately after the operation, applied a balsam to the wound. The sawing off of the horns occupied a few seconds in the case of each horn, and caused considerable pain. The sinuses of the head in each case were exposed, and atmospheric air was drawn into the sinuses, and expelled therefrom at each movement of respiration. Some of the animals commenced to eat immediately after the operation, but they had not been fed that morning; others did not eat. After four or five days, there was considerable inflammation and consequent discharge of pus in the case of some of the animals. Some were unable to eat, being in a state of fever, and evidently suffering considerable pain. With the exception of applying a little balsam, as above stated, no treatment followed the operation. The animals operated upon were afterwards more manageable than before, and ultimately they put on flesh and throve well. It was further proved that in England and Wales, in Berwickshire and Roxburghshire, total dishorning was not practised, unless for surgical purposes, and that in East Lothian total dishorning was only carried out to a limited extent. The witnesses for the prosecution, who were in the habit of feeding cattle in courts, found that the objects which total dishorning was intended to attain were met either by separating the vicious and weak animals, or by cutting off a portion from the point of the horn, but so as not to open the sinuses. It was proved that the total dishorning of cattle was regularly practised by farmers and breeders of cattle in Fifeshire, Perthshire, Forfarshire, Kinross-shire, and Kincardineshire. The object for which the operation was performed was the safety of the animals feeding in cattle-courts, which frequently suffered painful and serious injuries from goring and butting, the weaker animals being often prevented from feeding by the stronger, when the horns were allowed to remain. It was the opinion

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of the witnesses for the defence that it was impossible to feed cattle in open courts unless they were dishorned, and that as the importation of Irish and Canadian cattle (the breeds mainly fed in the before-mentioned counties), which were more inclined to be troublesome than other breeds, had increased with recent years, dishorning was now more necessary than formerly. Partial dishorning, which some of the witnesses for the defence had tried, had been found unsatisfactory. It was further proved that the respondent had considerable experience in dishorning cattle, and that the operation on the cattle in question had been performed with skill, and in the usual manner."

The question of law for the opinion of the High Court of Justiciary was,—"Do the facts as above set forth infer a contravention of the Act 16 and 14 Vict. c. 92?"

On 14th July 1890 the Lords Commissioners of Justiciary remitted to the Sheriff-substitute to state what were his findings in fact, if any, on the evidence referred to in the following paragraphs of the stated case:—"The witnesses for the prosecution, who were in the habit of feeding cattle in courts, found that the objects which total dishorning was intended to attain were met either by separating the vicious and weak animals, or by cutting off a portion from the point of the horn, but so as not to open the sinuses; and 'it was the opinion of the witnesses for the defence that it was impossible to feed cattle in open courts unless they were dishorned, and that as the importation of Irish and Canadian cattle (the breeds mainly fed in the before-mentioned courts), which were more inclined to be troublesome than other breeds, had increased with recent years, dishorning was now more necessary than formerly. Partial dishorning, which some of the witnesses for the defence had tried, had been found unsatisfactory.'—The said Sheriff-substitute to report to this Court *quam primum*."

The Sheriff-substitute on 17th July reported that "he was of opinion at the trial of the cause that it was proved that when cattle fed in courts are troublesome, total dishorning, which effectually prevents them from injuring each other, is for the benefit of the cattle. That other ways of dealing with troublesome animals, viz., by fastening wooden balls to the tips of the horns, and partial dishorning, do not so effectually prevent cattle from injuring each other."

Argued for the appellant;—The operation fell within the words of the statute. It was not necessary to shew that the respondent's act was "wanton." It was sufficient if there was the infliction of great pain for an object which could have been otherwise attained by painless means. The Sheriff-substitute stated that "tipping" the horns was an operation which accomplished the desired object. It might not be so effectual as total dishorning, but the advantage gained by the latter mode was out of all proportion to the pain inflicted.[1] In *Callaghan's*[2] case, the judgment of the Court which sanctioned the operation was based upon a finding that the advantages attainable by the practice were vastly out of proportion to the pain inflicted thereby, provided the operation was skilfully performed.

Argued for the respondent;—The object of the statute was to prevent "wanton cruelty." The operation could not be said to be of this nature. It was skilfully conducted so as to reduce pain to a minimum. It was

[1] Ford v. Wiley, 1889, L. R., 23 Q. B. D. 203; Brady v. M'Argle, 1884, 14 L. R. (Ir.) 174.

[2] Callaghan v. Society for Prevention of Cruelty to Animals, 1885, 16 L. R. (Ir.) 325.

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for the benefit of the cattle, and was extensively performed over a large area in Scotland.[1] *Ford* v. *Wiley* was inapplicable. The judgment there proceeded upon the view that it was proved in evidence that dishorning was neither necessary nor customary in England.

At advising,—

LORD M'LAREN.—This is an appeal in the form of a case stated under the Summary Prosecutions Appeals Act from a sentence of absolvitor pronounced by the Sheriff-substitute at Haddington in a complaint at the instance of the Procurator-fiscal of the county charging the respondent with a contravention of the Act 13 and 14 Vict. c. 92, passed for the prevention of cruelty to animals. In a previous complaint against the same respondent—*Renton* v. *Wilson*—it was determined that the dishorning of cattle performed in circumstances set forth in the case did not amount to a contravention of the statute. In a case which afterwards came before the High Court of Justice in England, a Court consisting of the Lord Chief-Justice and Mr Justice Hawkins, they came to a contrary conclusion on the facts laid before them, and the case which we are now to decide was instituted, as I understand, with the view of having the question of the legality of dishorning considered by a Court differently constituted, and consisting of a greater number of Judges. I may observe in the outset that the question put to us is not very well devised for the purpose of obtaining a decision on any general proposition, because the terms of the question are, Do the facts, as above set forth, infer a contravention of the statute? It is necessary, however, that we should endeavour to generalise these facts—so far as the Sheriff's findings enable us to do so—in order that we may compare the act done with the description of acts prohibited by the statute. The operation of dishorning, as performed by the respondent on thirty-two cattle, is described somewhat minutely in the case, and it is not necessary that I should occupy time by reading the description. The operation consists in sawing off the horns with a fine saw close to the sinuses of the head, and it is evident that in this case the operation was not only very painful during the few seconds which sufficed for its performance, but that it was the cause of prolonged pain and distress to the animals until their wounds were healed. So much is found by the Sheriff-substitute, who also finds that the respondent had considerable experience in dishorning cattle, and that the operation on the cattle in question was performed with skill and in the usual manner.

It may also be taken as proved that dishorning makes the cattle more valuable to the owner. This might perhaps be assumed, as it is not to be supposed that stock farmers would be in the habit of inflicting torture on their cattle without motive. But it is found in the case that the animals after being operated upon became more manageable than before, and that eventually they put on flesh and throve well.

It appeared to us, when we first considered the case, that the findings of the Sheriff-substitute were not sufficiently specific as to two points, which are indicated in our interlocutor of 14th July remitting the case to the Sheriff-substitute for further findings on these points. The report of the Sheriff-substitute is quite explicit on both the points referred, and is in these terms:—(His Lord-

[1] Renton v. Wilson, June 1, 1888, 2 White, 43, 15 R. (Just. Cases) 84; Lewis v. Fermor, 1887, L. R., 18 Q. B. D. 532; Callaghan v. Society for Prevention of Cruelty to Animals, *supra*, p. 43, note 2.

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ship quoted the terms of the report). The facts being as stated, we have now to consider whether the dishorning of cattle, when performed with skill and in the usual manner, for the purpose and with the effect of preventing the animals from injuring one another, is an offence under the statute.

It is plain enough that the restraining effect of the statute does not amount to a universal prohibition of operations which cause pain to the lower animals, irrespective of the motives of the operator and of the objects sought to be attained. The cases of surgical operations, and the pain and punishment inflicted in the training of domestic animals, are instances to the contrary, and it appears from the preamble to the Scottish statute that the thing which the Legislature meant to prevent was the infliction of "wanton cruelty"—that is, as I understand, purposeless cruelty. I am far from saying that legislation may not very properly be directed against the infliction of pain for purposes which are inadequate, though not unlawful or immoral; and we know, for example, that the performance of painful experiments on animals for the mere instruction of the operator is prohibited absolutely, while the performance of such experiments for the purposes of proper scientific research is subjected to certain restrictions, which I do not stop to specify. What we have here to consider is not the question of the expediency of prohibiting dishorning of cattle, but whether the practice is prohibited as being included in the general enacting words of the statute libelled. The offence prohibited is the cruelly ill-treating, abusing, or torturing of animals. These words must be construed according to the ordinary use of language, because they contain nothing that is technical. Comparing them with the facts as found by the Sheriff-substitute, I am of opinion—an opinion in which I believe your Lordships are agreed—that the language of the statute is not in fair and just construction applicable to the case of the operation of dishorning when performed with skill, and for the legitimate purpose of preventing the cattle from injuring one another. It is of course open to anyone to say that total dishorning is unnecessary for the purpose in view, and that partial dishorning, or some mechanical expedient—such as tipping the horns—might be found to answer the purpose equally well. If I were sitting as a juryman with the evidence of experts before me, it is possible that I might take this view; I should certainly have a leaning towards the view that dishorning as practised by sawing off the horns close to the skull is not necessary. But sitting as a member of the Court of Appeal, I must take the facts as they are found by the Sheriff, because under the constitution of this Court we cannot review a sentence of any kind on the merits, but only on questions of law arising on the facts as stated in the case.

In the argument addressed to us at the rehearing on the amended case, all the authorities bearing on the interpretation of the Cruelty to Animals Acts were brought before us; but with the exception of the English case of *Ford* v. *Wiley*, and the case of *Renton* v. *Wilson* in this Court, I cannot say that the previous decisions throw much light on this question.

I am sure that on a question of statute law all your Lordships are disposed to give the greatest weight to the decision of a co-ordinate English Court, and I have certainly no desire to criticise in any way the opinions of the very eminent Judges by whom the case of *Ford* v. *Wiley* was decided. Indeed, I am not sure that I should dissent from the reasoning or the conclusions embodied in those opinions as applicable to the case before the English Court, because I observe that the learned Judges had agreed, on the evidence before them, in

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holding it proved that the operation of dishorning was neither necessary nor customary in England. In their view of the facts, dishorning is treated as a purely experimental proceeding, not productive of benefit to the owners of the animals, and a cause of needless and therefore cruel suffering to the animals themselves. I need hardly repeat that the facts as laid before us point to a very different conclusion, and while our decision is necessarily different in its legal consequences from the decision of the Supreme Court in England, it does not appear to me that there is any fundamental difference in the principles of interpretation which have been applied by the Courts of England and Scotland to the construction of this statute. These principles are very fully expounded in the opinion delivered by Lord Young in the case of *Renton*, in which I concurred at the time, and I may be allowed to add that I see no reason to recede from anything said by myself on that occasion. I of course assume, in accordance with the Sheriff-substitute's findings, that the dishorning was performed with skill and without the infliction of unnecessary pain. Under these conditions, I am of opinion that the respondent has not rendered himself liable to a criminal prosecution, and that the judgment of the Sheriff-substitute ought to be affirmed.

LORD TRAYNER.—The question submitted for our judgment is one of importance, and I have carefully considered the argument addressed to us as well as the whole cases cited by the parties. I am of opinion that the case of *Renton* v. *Wilson* was rightly decided, and concur in the opinions expressed by Lords Young and M'Laren in deciding that case. I do not think it necessary to go over the various cases in which conflicting decisions on a similar question have been pronounced in England and Ireland, but content myself with saying that the reasons given for the judgment in *Ford* v. *Wiley* (so far as not based upon the particular facts there found proved) seem to me inadequate and inconclusive, while the judgment in *Lewis* v. *Fermor* appears, on the other hand, to be well founded both in sense and law. I am therefore of opinion that the question before us should be answered in the negative.

LORD WELLWOOD.—What we are asked by the appellant to decide practically is, that the dishorning of cattle is in all circumstances illegal, and an offence against the Act 13 and 14 Vict. cap. 92, section 1. The question which is submitted to us is one of law and not of fact. We must take the facts from the Sheriff-substitute, and we can only decide in favour of the appellant if the facts so found infer in our opinion a contravention of the Act.

Now, the Sheriff-substitute finds that the operation was skilfully performed; that it effectually prevents the animals from injuring each other, and is for the benefit of the cattle; and that other remedies suggested do not so effectually prevent cattle from injuring each other. In this state of the facts he has acquitted the respondent.

Now, in order to a conviction of cruelty in the sense of the Act, I think there must be evidence of wanton cruelty in the sense of pain inflicted without reasonable and adequate cause. I do not think that mere *bona fides* on the part of the operator is of itself a sufficient defence, but if there is *bona fides*, and if the object is reasonable, a broad view of the matter must be taken, and the question of adequacy or inadequacy should not depend on the individual views of the Judge as to propriety of the act or operation. In order to justify con-

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riction the inadequacy of the object must, I think, be such as would lead any reasonable and humane man capable of weighing evidence to hold that the pain inflicted was out of all proportion to the object in view. On the facts stated I cannot hold that the Sheriff-substitute's decision is wrong; on the contrary, I think it is right.

As to the previous cases, I agree with Lord Trayner in preferring the grounds of judgment in *Renton* v. *Wilson* and the English case of *Lewis* v. *Fermor* to the judgment of the Court in the later case of *Ford* v. *Wiley*. In the last named case the facts on which the Justices of Norfolk dismissed the information were practically the same as those in the present case, and if those facts were correctly found by them, I am humbly of opinion that their decision (which was reversed by the Queen's Bench Division) was right. It appears from the report that the learned Judges in the Queen's Bench Division took a different view of the evidence from that on which the Justices proceeded, but even on the facts as set forth in the opinions of the Judges, I should not have been prepared to agree in the result at which they arrived.

I therefore think that we should answer the question put to us in the negative.

Lord Kyllachy.—I agree with all your Lordships that the facts of this case as now found by the Sheriff-substitute leave really no room for doubt as to the propriety of the Sheriff's judgment. He finds as matter of fact—and we must assume, correctly—that this operation of which we have heard so much is not merely useful in the interest of the owner of the cattle, but is also useful and even necessary in the interest of the beasts themselves. In these circumstances it is plainly impossible to affirm that the operation is one which comes within the scope of the statute, unless indeed it is to be held—which nobody has suggested—that the statutory offence is committed by the mere infliction of pain.

I therefore concur in the previous judgment of this Court in the case of *Renton* v. *Wilson*, and I am unable to agree with the judgment of the Court of Queen's Bench in the case of *Ford* v. *Wiley*. At the same time, with respect to the general question of the purpose and constitution of the statute, I should like to say this—that I am not disposed to quarrel with the definition or rather test proposed in the English judgment, according to which the question always is whether the pain inflicted on the animal is inflicted for an adequate object, and is no more than necessary for that object. I confess that as an abstract statement that strikes me as correct enough. The objection to it is that for practical purposes it does not much advance the argument. Because the question always is, Who is to judge of the adequacy of the object? Is the reference to be to the mind and judgment of the accused, or to the opinion of the Judge who tries the case, or to that of the Court of Appeal, or to the general sense of the community as indicated, for example, by established custom. You must, in short, determine what is to be your standard of adequacy. And it is at that point—as it seems to me—that the real difficulty exists. And it is a difficulty which does not perhaps admit of being quite satisfactorily solved. Each case must largely depend on its own circumstances. For my own part, all that I should be disposed to say is, that the statute is not contravened by the infliction of pain for an object which a man of ordinary humanity might reasonably consider adequate, the operation, whatever it is, being performed in a proper manner, and with a due regard to the infliction of as little pain as possible. It is not, however, necessary for the purposes of the

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present case to lay down any general principle. It is enough that upon the facts as found by the Sheriff-substitute, and upon any construction of the statute which has been or can be reasonably suggested, the operation here complained of was not within the statute.

LORD JUSTICE-CLERK.—As your Lordships are aware, I have no vote in deciding this case unless there should be an equality of opinion among your Lordships, when I have a casting vote in order to make a majority. Your Lordships are all agreed as to what the judgment in this case should be, and there is therefore no duty upon me to express my opinion, but in the circumstances I may be allowed to say that the view I take of the case is entirely in consonance with the opinions which your Lordships have expressed. Where pain is inflicted, it may be inflicted as deliberate and wanton cruelty for no purpose at all except for the infliction of pain. There may also be the infliction of pain for another purpose altogether, not of cruelty, but still so inflicted as to amount to an offence against the statute. It is quite plain that the verdict in such a case must be a verdict of opinion, not of opinion whether certain facts are proved, but whether certain facts being proved, cruelty in the sense of the statute had been established as matter of opinion. I agree in the opinions expressed by your Lordships, that that can only be decided by the opinion, the reasonable opinion, of ordinary humane men, or of a jury, if such a question could come before a jury on the facts.

It appears to me that where we are dealing with a case of pain undoubtedly inflicted, not for a wanton and cruel purpose, but for the ultimate purpose of advantage to the owner of an animal, or to the animal itself, or to both, three elements must be present to free the party from a charge of cruelty under the Act. In the first place, the purpose must be reasonable; in the second place, the mode of carrying out the purpose must be a reasonable mode; and in the third place, I think the manner of carrying out the operation under that mode must be reasonable. But all these questions are questions of fact. As regards the first, the fact that it possibly improved the value of the animal itself—improved its marketable value—may be a reasonable purpose. I think that prevention of injury to other animals with which it is enclosed may also be a reasonable purpose. As regards the mode adopted of carrying it out, I do not think there is any suggestion that the mode of carrying it out in this case was not as skilful as could be, and therefore reasonable, if the act of removing horns was to be effected. Lastly, as to the manner of carrying it out in this particular case, I think that not only was the mode adopted skilful, but the mode in which it was carried out by the operator was skilful, and therefore it appears to me we have all the three elements, one of which must be negatived before a case of infliction of pain could be shewn for which there could be a conviction. I think the findings of the Sheriff-substitute amount to this, that the accused here did with skill in the usual manner an operation customary, and which has not been pronounced illegal, but on the contrary, has been pronounced legal by the Supreme Court in Scotland.

I therefore entirely concur in thinking that the acquittal by the Sheriff-substitute on the facts he found proved was right.

Counsel for the respondent moved the Court for expenses in this Court and in the Sheriff Court.

The motion was opposed by counsel for the appellant so far as expenses

CASES

DECIDED IN

THE COURT OF SESSION, &c.,

1890–91.

WINTER SESSION.

ROBERT SCOTT RIDDELL, Pursuer (Respondent).—*Salvesen.*
MRS AGNES STIRLING RATHBONE OR RIDDELL, Defender (Reclaimer).—*M'Lennan.*

No. 1.

Oct. 18, 1890.
Riddell v. Riddell.

2D DIVISION.
Lord Kincairney.

Process—Proof—Commission—Form of commission for the examination of a lunatic in a foreign country.—Riddell raised a process of divorce against his wife for adultery with one Weegman. The Lord Ordinary granted decree, and the defender reclaimed. She asked for a commission to examine the alleged paramour Weegman, who was at this time in New South Wales, and was confined in an asylum for the insane. The Court granted the commission in these terms, viz.:—"To take the examination of Eugene Weegman, who is now or lately was an inmate of the Hospital for the Insane, Callan Park, Balmain, near Sydney, New South Wales, provided always that the said commissioner is satisfied that the said Eugene Weegman is mentally fit to be examined; appoint said examination to take place on interrogatories and cross-interrogatories to be adjusted by the Clerk of Court, and appoint the said commissioner, before proceeding to take the said examination, to satisfy himself by all proper evidence that the said Eugene Weegman is mentally fit to be examined."

ALEXANDER WARDROP, Solicitor—W. DONALDSON, Solicitor—Agents.

DUKE OF BUCCLEUCH, Pursuer (Reclaimer).—*Asher—Low—Dundas.*
JOHN BOYD, Defender (Respondent).—*Murray—Boyd.*

No. 2.

Oct. 21, 1890.
Duke of Buccleuch v. Boyd.

Superior and Vassal—Prescription—Possession.—The vassal in possession of certain lands, held under a lord of erection, in 1818 obtained from the Crown a charter of confirmation, and in 1841 a charter of resignation and confirmation, which bore that the lands were to be holden of the Sovereign as immediate lawful superior,—coming in place of the monastery and abbey of Melrose by virtue of the Acts of Annexation,—for a reddendo of 10s. Scots, payable to the Crown or its donatory, the lord of erection. The vassal for the prescriptive period paid to the lord of erection £3, 10s. Scots, which was the reddendo stipulated in a charter of the lands granted in 1627 by the lord of erection, and on which various writs by progress had followed down to 1776. No vassal had entered with the lord of erection, as superior, after 1776. The lord of erection having raised an action against the vassal for payment of a casualty, as having been impliedly entered with him as superior in 1874, the vassal pleaded that he had prescribed a right to hold of the Crown, and explained

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the payment made by him as being a payment to the donatory of the Crown under the crown charter. The discrepancy between the sum actually paid and the reddendo in that charter he explained by producing a correspondence in 1866 between the agents of the parties, from which it appeared that a question having then been raised as to whether the reddendo was £3, 10s. or 10s. Scots annually, the vassal agreed to pay the larger sum rather than raise any question. From that correspondence it appeared that the pursuer's agents were then made aware of the existence of the crown charter, and claimed the payments as due to their client as lord of erection and donatory of the Crown, not as feudal superior.

Held that the vassal had by prescription obtained right to hold of the Crown, and must be *assoilzied*.

2D DIVISION.
Lord Kinnear.
M.

THE DUKE OF BUCCLEUCH raised an action in the statutory form for payment of a casualty of a year's rent against John Boyd of Maxpoffle, on the footing of his having been entered with his Grace, as superior of these lands, by the operation of the Statute of 1874.

The Duke, who claimed to be superior of the lands as representing the lord of erection of Melrose, in setting forth his title to the superiority, stated that in 1627 the Earl of Haddington, who was then in right of the superiority as lord of erection, granted a charter to Nicolas Carncroce of these lands, the reddendo being in these terms, viz.:—"Reddendo annuatim pro dictis quinque mercatis terrarum de Maxpoppill summam trium librarum sex solidorum et 8d. et trium solidorum et 4d. in augmentatione rentalis monetae prescriptae ad terminos antedictos per prefatas equales portiones."

The pursuer further averred;—The lands were transmitted through a series of proprietors, who made up their titles by precept of *clare constat*, until, in 1771, they were conveyed to one James Newbigging, who was infeft, and obtained a charter of confirmation from the Duke of Buccleuch, in right of the superiority, in 1776. There had been no entry with the superior since that date.

In 1807 Newbigging sold the lands to Scott of Raeburn, who obtained from the Crown a charter of confirmation in 1818. The charter bore that the lands were to be held "de nobis nostrisque regiis successoribus ut devenientibus in loco Monasterii et Abbatiae de Melrose per Abolitionem Religionis Papalis in Scotia et secundum deditionem terrarum ecclesiasticarum et actorum annexationis in feudifirma feodo et haereditate pro perpetuo"; and the reddendo was thus expressed:—"Reddendo inde annuatim nobis nostrisq. regiis successoribus immediatis legitimis superioribus earundem aut nostris Donatoribus erecti Dominii de Melrose aut illis jus habentibus ex iisdem summam sex solidorum et octo denariorum monetae Scotiae et trium solidorum et quatuor denariorum in augmentationem rentalis."

After various transmissions the lands came into the hands of William Bissett, who, in 1841, obtained a charter of confirmation and resignation from the Crown, with the same tenendas and reddendo as in that of 1818. Bissett disponed on 25th September 1849 to John Boyd, who took infeftment on the precept contained in the crown charter of 1841, and on his death in 1861 John Boyd, the defender of the action, was served heir in special to his father, John Boyd.

The Duke averred, with reference to the crown charters,—"The said charter was obtained from the Crown outwith the knowledge of the then Duke of Buccleuch, the true superior, and under error as to the true state of the facts. The pursuer did not know that the said crown charters had been granted until the present claim was made."

The defender answered,—"The pursuer or his predecessors have for many years, and at least for a time beyond the prescriptive period, been aware of the existence of the said crown charters. During the whole

time no objection has been made to them by the pursuer or his predecessors, nor has any such claim of superiority as is now alleged been made by them."

To explain the granting of the crown charters the defender referred (1) to the Statute 1587, c. 29, whereby all kirk lands and superiorities of kirk lands were, with a few exceptions, which had already been erected into lordships and baronies, annexed to the Crown; (2) to the Statute 1633, c. 10, whereby the superiorities of all such lordships were annexed to the Crown, reserving to the lords of erection "the feu-maills and feu-fermes of their said superiorities"; and (3) the Statute 1661, c. 53, confirming the foregoing Act. It also enacted that the vassals of all lands mentioned in the said Acts might hold of the lords of erection, but that they should be entitled to recur to the Crown as their lawful superior, and to be entered as crown vassals, unless they had renounced that right by an act of consent, amounting to a resignation of their right to hold under the Crown.

The defender explained, if it were necessary for him to offer any explanation as to the foundation of his prescriptive title, that the crown charter had been applied for in the exercise of this latter right.

Besides the question of prescription, on which alone the Court gave judgment, and which alone is here reported, the question was debated whether the defender had any right to recur to the Crown or not, it being maintained that the lands in question never were kirk lands, or, in any event, that the defender had elected to hold of the lord of erection, and so renounced his right to recur to the Crown.

The pursuer pleaded;—(1) The pursuer, being superior of the lands and others described in the summons, and not having received any casualty in respect of the infeftment and consequent implied entry of the defender, is entitled to decree as concluded for. (3) The pursuer is, in any event, entitled to decree against the defender for payment of such sum as the Court shall fix to be the amount of the casualty exigible by him, with expenses of process. (6) The crown charters of 1818 and 1841 having been granted without the knowledge of the pursuer or his predecessors, and the defender and his predecessors not having possessed the lands in virtue thereof, the pursuer's rights cannot be affected thereby. (7) The proprietors of Maxpoffle having for nearly two centuries recognised the pursuer's predecessors as their superior, were not thereafter entitled to revert to the Crown.

The defender pleaded;—(3) Prescription. (4) The defender being entered with the Crown in virtue of the Conveyancing (Scotland) Act, 1874, he is not indebted to the pursuer in the casualty sued for. (5) The defender and his predecessors never having renounced their right to enter with the Crown as their lawful superior, they were entitled to do so by means of the crown charters produced and founded upon.

No proof was led, but it was admitted that the Duke and his predecessors had, notwithstanding the crown charters, continued to receive all along £3, 10s. Scots, and not 10s. The receipts granted by his Grace bore to be for "feu-duty" payable to the Duke.

On the other hand, a correspondence was produced by the defender's agent, which had passed between the country agents of the Duke, Messrs Oliver of Hawick, and Mr Fyfe, S.S.C., Mr Boyd's agent in 1866-7. Messrs Oliver had requested payment of £2, 0s. 10d. as seven years' arrears of feu-duty at the rate of 5s. 10d. (*i.e.*, £3, 10s. Scots) per annum, and in May 1866 Mr Fyfe wrote,—"Would you be so good as explain how this feu-duty arises, for Maxpoffle is held of the Crown? Is it a payment to the Duke as lord of erection, or in what character?"

No answer to this letter was received, and in October 1867 a renewed

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application for feu-duty having been made, Mr Fyfe wrote again,—"I examined the crown charter to-day again with Mr Boyd, and find the feu-duty payable by Mr Boyd to the Crown or to those having right as lord of erection of the lordship of Melrose of 6s. 8d. Scots money, and 3s. 4d. Scots in augmentation of the rental. If you can give me any satisfactory explanation of the claim, Mr Boyd is quite ready to settle."

Messrs Oliver then replied,—"The annual feu-duty is 5s. 10d. stg., and it has been regularly paid by the proprietor for the last one hundred years at least, and is due to his Grace as lord of erection of Melrose. We cannot explain about the sums of Scots money you mention, but there should have been in the charters a reservation of the 5s. 10d. stg. payable to the Duke. It is possible that the reservation may have been omitted in Mr Boyd's charter, but the Duke cannot suffer from this, as he is no party to the granting of it." They then went on to say that, if the matter was to be further investigated it must be through the Duke's Edinburgh agents.

Upon this Mr Fyfe intimated that, rather than trouble the Duke or his agent about so trifling a matter Mr Boyd would pay the 5s. 10d. sterling. He accordingly continued to do so.

The Lord Ordinary (Kinnear), on 30th November 1889, assoilzied the defender.*

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* "OPINION.— . . . Now, it appears to me very clear, according to the pursuer's statement of the titles, that the defender is duly entered with the Crown.

"The statement is that in 1807 James Newbigging conveyed the lands to William Scott of Raeburn, who obtained from the Crown a charter of confirmation, dated the 21st, and written to the seal and registered the 30th of December 1818, and from that time the lands have been held directly of the Crown. After a number of transmissions they came into the hands of William Bisset, who obtained a crown charter of confirmation and resignation in 1841, and without taking infeftment conveyed the lands to the defender's father, the late John Boyd. Mr Boyd completed his title by taking infeftment on the open precept contained in the crown charter of 1841; and upon his death in 1861 the defender completed his title by expeding and recording a decree of special and general service as eldest son and heir of line to his father. All that remained for the defender to do, in order to complete his title under the Crown, was to obtain a crown charter or writ of confirmation, and that has now been done by force of the Act of 1874, to the same effect as if an actual charter had been granted. It cannot be maintained that, in that state of the titles, the Act operated to enter the defender with the pursuer, because the lands have been held by the successive proprietors upon crown titles since 1818. The proprietor is entered by the statute to the same effect as if the superior had granted a writ of confirmation according to the law and practice existing at the date of the Act. There can be no doubt that the Crown could have confirmed the defender's sasine, or that he must have obtained a charter for that purpose if he had applied for it, and it is equally certain that no valid confirmation could have been granted except by the Crown. As the titles stood in 1874, a charter or writ of confirmation by the pursuer, assuming him to have been the true superior, would have been altogether inept and ineffectual. The defender therefore is not entered with the pursuer, and I do not think it doubtful that he is duly entered with the Crown. . . .

"The first crown title to which the defender traces his right is the charter of confirmation under the Great Seal of 1818, already mentioned, by which King George III. confirms the disposition by James Newbigging to Scott of Raeburn and Raeburn's sasine in the lands of Maxpoffle, which are to be held of the King and his royal successors as come 'in the place of the Monastery and Abbacy of Melrose, by the abolition of the papal religion and the Act of Annexation,' for payment to the King and his successors, as immediate lawful superiors of the

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The pursuer reclaimed, and argued;—The Lord Ordinary was wrong, for although no doubt the crown charter was a good foundation for pre-

lands, or to the King's donatory of the erected lordship of Melrose, of six shillings and eightpence and three and fourpence yearly; and under this charter, and by the progress of titles following upon it, the lands have undoubtedly been held by Scott of Raeburn, and his successors, including the defender, ever since. The pursuer alleges that the charter of 1818 was granted *a non habente potestatem*, because his ancestor was at that time the true and undoubted superior, under the Crown. The defender concedes that his lands were at one time held of the Dukes of Buccleuch and their predecessors. But he maintains that they were kirk lands, as appears from the terms of the charter itself; and, therefore, that the vassals, for whatever time they had held of the lords of erection, were entitled to recur to the Crown and to be entered as crown vassals. There can be no question as to the general rule upon which the defender founds; and, therefore, if the facts asserted by the charter are true, or if they are to be accepted without inquiry, the title is unimpeachable. The charter asserts that the lands were held of the Abbacy of Melrose, by the predecessor of the vassal infeft; and it assumes that the superiority has come into the hands of a lord of erection, and in that situation the King asserts the right of entering the vassal immediately of the Crown itself, for payment of a feu-duty to the lords of erection. The title is therefore *ex facie* perfectly valid. But it is said to be ineffectual because an investigation of the prior titles will shew that the lands were not in fact in the situation alleged. The pursuer does not dispute the general law as to the right of Church vassals. But he maintains that it is inapplicable on two grounds, first, because the defender's predecessors in the *dominium utile* were not Church vassals but subfeuars; and, secondly, because the Statutes of 1633 and 1661, upon which the right to hold of the Crown depends, cannot be made applicable to the lands in question, because of the special terms of the Act of 1609, by which the Abbacy of Melrose was erected into a temporal lordship in favour of the pursuer's predecessor, Lord Haddington. Both of these points would have required serious consideration if the question had been open. But as the case stands, I do not think it necessary or proper to decide them, because I think all such questions are excluded by the defenders' title and possession. I am not satisfied that the pursuers' argument is sound upon either point; but, whatever weight might have been due to it otherwise, it is irrelevant, because, since the crown charter of 1818 has been followed by an uninterrupted possession, the defender has acquired a prescriptive right, which cannot now be challenged on the ground of any defect of power or right in the crown to grant the charter. When prescription has run, there is a presumption of law which cannot be redargued, that a title which is habile in form was also good and valid in substance. It is incompetent, therefore, to go beyond the charter in order to discuss, upon extrinsic grounds, the merits of the right which the Crown alleges as justifying the grant. The case of the *Duke of Buccleuch* v. *Cunynghame*, 5 S. 57, appears to me to be directly in point. In the case of the *Lord Advocate* v. *Graham*, 7 D. 183, this was referred to as a very strong case indeed, because of its deciding the exact point which the pursuer raises in the present case. 'It was not,' says the Lord Justice-Clerk, 'the case of a party onerously acquiring from a former holder, but of a party beginning and making his prescriptive title, by going, as it was said, to a wrong superior, the Crown, and taking a charter from that superior. Yet the Court sustained the prescriptive title as a title to exclude.'

"It is said that the defender's possession is inconsistent with a prescriptive right, because during the period of prescription he has paid feu-duties to the pursuer. But the condition of his title requires him to pay to the lord of erection. The only point that can be raised upon the fact of payment is that the sums paid to the pursuer and his predecessors are in accordance with the earlier titles granted by them, and not in exact accordance with the reddendo of the crown charter. I do not consider how this discrepancy arises, because there has been no proof on the question of possession, and I am not satisfied that the

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scription, there could be no good prescriptive title without possession on it, and there was here no possession on the crown charter. The rights of a superior could not be lost *non utendo*, and therefore it was no answer to the pursuer to refer to the fact that he had for so long allowed the lands to be in non-entry. Now, the badge of possession was the payment of feu-duty, and the feu-duty which was paid was the feu-duty due under the Duke's charter, not that due under the Crown's. The Duke was infeft in the superiority, and drew his feu-duty all along. Could it be said that his right had been lost? Nor could the vassal be heard to say that he was possessing on the crown charter. [LORD RUTHERFURD CLARK.—Then upon what was he possessing? He had no title from the Duke, for the crown charter was a charter of resignation, *i.e.*, the vassal disponed all that was in him to the Crown, who gave it back again as from itself.] He was possessing on a personal title flowing down from Cairncroce. If the Crown was not truly superior, the vassal at any moment of the currency of the prescriptive period, if asked under what title he was holding, must have answered, "under the old title," for till the prescriptive period ran out he had no other good title. [LORD RUTHERFURD CLARK.—But he may, may he not, elect to possess on the bad title; may he not make up a title to it?] But he may also elect to possess on the personal title, and the question of fact is, on which did he possess? On that matter the payment of the feu-duty was conclusive.

As regarded authority, the case of *Cunynghame*, referred to by the Lord Ordinary,[1] had no bearing on the present question. There was no point as to possession there. The point determined was that a crown charter, although it proceeded on a narrative which was false would form a good foundation for prescription. The other case referred to by the Lord Ordinary[2] had no bearing on the present case, save for the dictum quoted by the Lord Ordinary. But a judgment pronounced by Lord Gifford[3] was a direct authority for the pursuer here. The pursuer in that case reduced a crown charter in similar circumstances on the grounds

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facts as to the use of payment have been fully ascertained. But taking the facts as the pursuer represents them, I am of opinion that they constitute no interruption of possession. On the contrary, these payments can only be ascribed to the vassal's right under the crown title. For the pursuer's case is that the lands have been in non-entry, that is to say, that no vassal has held under him for more than forty years; and for a much longer period he and his predecessors have been receiving feu-duties from successive proprietors of the lands who were not their vassals, but were holding under the Crown. Now the lord of erection could have no right to exact feu-duties from anybody except from a proprietor infeft either of himself or of the Crown, and therefore the acceptance of feu-duties by the Dukes of Buccleuch from successive proprietors who did not hold of them, but who held of the Crown, appears to be very like a recognition of the crown title. At all events it precludes the pursuer from denying that the crown vassals were in possession of the lands or alleging that the exaction of payment by himself and his predecessors was an invasion of that possession. And the point is of no importance unless it can be held that the payment of feu-duties interrupted the possession, because the amount to which the pursuer is entitled as successor to the lord of erection is not in question in this action.

"The better answer, however, is that the possession on which the defender is entitled to found is his actual and continuous occupation of the lands under crown charters and infeftments for more than forty years, and this possession requires no further proof than the pursuer's averments on record. . . ."

[1] Duke of Buccleuch v. Cunynghame, Nov. 30, 1826, 5 S. 57.

[2] Lord Advocate v. Graham, Dec. 10, 1844, 7 D. 183, 17 Scot. Jur. 90.

[3] Duke of Roxburghe v. Scott, reported *infra*, p. 8.

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that it had been obtained without his knowledge, and that the old feu-duty having been paid all along, there had been no possession under the crown writ.

The defender argued;—His title was a good prescriptive title founded on the crown charter of 1841. It was said against that that it could not be (1) as having been granted without the Duke's knowledge; and (2) as not having been clothed with possession. But (1) no such answer could be put forward against a plea of prescription, and a superior might be changed by the operation of prescription—*Ferguson* v. *Gracie*[1]—so that there was nothing unknown to the law in such a title. As regarded (2) possession, there had been actual possession of the lands. Of that there was no doubt. Payment of feu-duty was not possession by the vassal, it was merely evidence as to what title he was possessing upon. The payment to the Duke was accounted for by the fact that he was the King's donatory, and the payment of a wrong feu-duty was cleared up by the correspondence, which shewed also that the vassal believed that he was holding of the Crown, while the Duke believed at that time that he was drawing the annual payments, not as himself superior, but as the Crown's donatory. In the case decided by Lord Gifford there was not the speciality which here existed of the original superior having another alternative title on which the payments might have been made, so that they could only be referred to the old title of superiority. Here the vassal must have been possessing on the crown charter, for he had no other title. By the resignation which had taken place he had nothing else left in him, the personal title was gone. In cases of double title it had been held that, while a destination could not be evacuated by the mere form of a service, *i.e.*, by serving, not as heir of the destination, but under the old investiture, yet, if a new investiture were taken from the Crown the personal title under the destination was gone, and could not be revived.[2]

LORD YOUNG.—I agree with the Lord Ordinary in thinking that the existing crown title, fortified as it is by prescription, is a conclusive answer to the present action.

The crown title which was made up in 1841 was *ex facie* a good title, subject to challenge by anyone who thought that his rights were prejudiced by it. It was a good foundation for prescription. That is to say, that after prescription had run all objections proceeding on the ground that the right ought not to have been granted, because the right of another was thereby infringed, are excluded by the lapse of time.

The title was made up on the footing that these lands were kirk lands, and that the vassal was therefore entitled to claim to hold immediately under the Crown, reserving to the superior under whom he formerly held, the lord of erection, the right to the feu-duties.

It was admitted for the pursuer that, but for the circumstance that a sum continued to be paid equal to the sum of feu-duty due to the Duke as superior, notwithstanding the terms of the crown charter, which stipulated for a lower feu-duty, he would have had no case. I quite agree that that is so, and that presents the case thus, viz., does the fact of £3, 10s. Scots having been paid in place of 10s. interpose as a bar so as to prevent prescription running on the crown

[1] Jan. 17, 1782, 3 Ross' Leading Cases, Land Rights, p. 369; see also Moreton v. Lockhart, Aug. 15, 1853, 25 Scot. Jur. 559.

[2] Molle v. Riddell, June 19, 1816, 2 Ross' Leading Cases, Land Rights, p. 619, and other cases under that head.

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title, which contains a different reddendo, 10s. Scots? I do not think it does, and I can find no principle in the law for it.

But the correspondence laid before us throws some light on how this came about. It seems that the sum in the crown charter must have been erroneously introduced. How it was introduced we cannot tell. It was a very insignificant blunder, and when the matter was brought under notice in 1866, on the occasion of seven years' arrears of this trifling reddendo being demanded, Mr Boyd's agent pointed out that the demand was in excess of what the crown charter bore. The Duke's agents reply that the reservation should have been five shillings and tenpence. Mr Boyd's agent concludes by saying that such a bagatelle is not worth corresponding about or discussing any further, and therefore he agrees to pay on the footing that the sum should have been five shillings and tenpence. Payment on that footing cannot have the effect the pursuer attributes to it.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

THE COURT adhered.

ROBERT STRATHERN, W.S.—WILLIAM BOYD, W.S.—Agents.

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Oct. 21, 1890.*
Duke of Roxburghe v. Scott.

THE DUKE OF ROXBURGHE, Pursuer.—*Watson.*
MISS JANET SCOTT, Defender.—*Clark—Crawford.*

Superior and Vassal—Prescription—Possession.—A person in possession of lands which were alleged to be kirk lands resigned them in 1806 to the Crown for new infeftment and took a charter on a blench tenure for a penny Scots *si peteretur tantum.* Up to this date the lands had been held in feu of a subject-superior (who held his superiority under a strict entail), for a reddendo of £6 Scots. After obtaining the crown charter the vassal held the lands for more than the prescriptive period, but paid the feu-duty of £6 Scots to the subject-superior, who remained infeft in the superiority; no payment was ever demanded by the Crown, except some payment on the charter being granted, the character of which was not ascertained. Some of the vassals from 1806 downwards were enrolled as freeholders, and voted as such.

The subject-superior having in 1871 brought against the vassal a reduction of the crown title, as having been unwarrantably obtained in prejudice of his rights as superior, the vassal pleaded prescription. *Held* (*per* Lord Gifford, Ordinary) that there had been no sufficient possession by the vassal on that title, and the plea of prescription *repelled*, and the title *reduced.*

OUTER-HOUSE Lord Gifford.

THE following narrative is taken from the Lord Ordinary's opinion:—"The object of the action is to reduce and set aside certain crown charters which the defender or her authors have obtained in the lands of Woodend or Wooden and others, the *dominium utile* of which belongs to the defender, and to have it declared that the pursuer, the Duke of Roxburghe, is vested with the superiority or *dominium directum* of the defender's lands. The question therefore really is, who is the superior of the defender's property—the Crown or the pursuer?

"The Lord Advocate, as representing the Crown, was called as a defender, but has stated no defence, and the record has been made up between the pursuer, the Duke of Roxburghe, claiming the superiority, and the defender, Miss Scott, the proprietrix of Wooden, who claims to hold directly of the Crown. The Lord Ordinary has assumed that the defender, Miss Scott, is entitled to maintain all the pleas which might have been stated by the Crown.

* Decided June 22, 1871, and referred to in the preceding case.

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"Preliminary defences were lodged by the defender, who pleaded prescriptive possession upon an exclusive title, that is, under the crown charters sought to be reduced. As it became obvious, however, that the preliminary defence was in its essence the defence upon the merits, or at least one of the defences upon the merits, the preliminary defences were reserved, the production satisfied, and the record closed of new upon the whole cause.

"As the point of possession was exceedingly material, and as parties were at issue upon that and upon other matters of fact, a proof was allowed. A short proof was led, a great variety of titles and documents were recovered, and the Lord Ordinary heard a full debate on the whole cause. He is of opinion that the pursuer is entitled to decree in terms of the whole conclusions of the action.

"It is proved by the title-deeds produced that the defender's lands of Wooden were for many years prior to 1807 held of and under the Duke of Roxburghe and his predecessors, as superiors thereof. The earliest charter, which seems to be the constitution of the relation of superior and vassal, is the charter of 4th September 1634, by the Earl of Roxburghe to Andrew Kerr, but it is sufficient in the meantime to say that there is a series of charters by the pursuer's predecessors to the defender's authors, the last of which appears to be a charter of confirmation and precept of *clare constat* by the Duke of Roxburghe to Robert Walker of Wooden, Writer to the Signet, dated 6th August 1787, upon which the said Robert Walker, W.S., was infeft the same year. The feu-duty payable by Robert Walker is £6 Scots, or 10s. sterling, and it is admitted that this feu-duty has been regularly paid by the said Robert Walker, and by the subsequent proprietors of Wooden, including the present defender, to the pursuer and his authors, and that down to the present date.

"In 1806 the said Robert Walker, W.S., who then held the lands of Wooden feu under the Duke of Roxburghe, and who stood infeft upon the Duke's precept of 1787, executed a procuratory of resignation, in which he resigned the lands for new infeftment to be made in his own favour, and upon this procuratory he took out a charter, not from the Duke of Roxburghe, but from the Crown, dated 4th July 1807. The tenure in this crown charter is blench for a penny Scots if asked only, and upon this charter Robert Walker was infeft on 26th September 1807. This forms the foundation of the defender's alleged prescriptive possession under the Crown.

"There are two subsequent crown charters expede by the defender's authors in 1827 and 1837, and the whole three charters are now sought to be reduced by the pursuer."

The pursuers pleaded;—(6) The authors and predecessors of the defender, the said Janet Scott, having for more than forty years, and down to the year 1863, paid to the pursuer and his predecessors, as superiors of the said lands, the feu-duties stipulated in the charters of said lands granted by the pursuer's predecessors, and having otherwise recognised the pursuer and his predecessors as superiors of the said lands, the said Janet Scott is barred from pleading a prescriptive title on the crown charters libelled, or any one of them. (7) The pursuer, in virtue of his titles set forth in the condescendence, has the only and undoubted right and title to, and is fully vest and seized in, the superiority or *dominium directum* of the said lands of Woodend or Wooden and others, described in the summons, and is entitled to have decree of declarator, in terms of the declaratory conclusions of the summons. (8) The pursuer, in virtue of the titles set forth in the condescendence, and of uninterrupted possession thereon for more than forty years, or from time immemorial, has the

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only and undoubted right and title to the superiority or *dominium directum* of the said lands of Woodend or Wooden and others, described in the summons, and is entitled to decree, in terms of the declaratory conclusions of the summons.

The defender pleaded;—The defender, and her predecessors and authors, having possessed the *plenum dominium* of the lands of Wooden under the Crown upon the titles produced, without challenge or interruption for more than forty years, the defender has a sufficient title to exclude that of the pursuer, . . . and ought to be assoilzied.

After dealing with the question of prescription so raised, and with a plea to the effect that the plea of prescription was not well founded in respect that the Duke had been for part of that period a minor, the Lord Ordinary had also to consider on the merits the question whether the crown title should be reduced, or should be upheld on the footing that the lands were kirk lands, and that the vassal was therefore entitled to go past the lord of erection, and apply direct to the Crown for a title. On these questions, the Lord Ordinary was of opinion that the plea of minority was well founded, and on the merits, after repelling the plea of prescription both on this ground of minority and for the reasons stated below in his note, his Lordship held that the vassal was not justified in passing over the Duke and going direct to the Crown for a title, because the lands were not shewn to be kirk lands, and the Duke was not shewn to be a lord of erection, and that even if the defender could overcome these considerations, she had barred herself from recurring to the Crown by electing to hold under the Duke.[1] The Lord Ordinary accordingly reduced the crown writs, as craved.*

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[1] To shew that a vassal might be so barred, his Lordship referred to these authorities, viz.:—Mackenzie's Obs. p. 403; Heriot's Hospital v. Hepburn, June 9, 1714, Mor. 7986, reversed on appeal, see House of Lords Report, Robertson's Appeal Cases, 124; Dundonald v. Fullerton, Jan. 24, 1730, Mor. 7997; Duke of Gordon v. Fyfe, March 4, 1773, Mor. 15,096; see also Erskine, ii. 10, 28.

* "NOTE.— . . . (On the question of prescription)—The Lord Ordinary will, as briefly as possible, consider the various questions thus raised.

"I. It may be convenient to take first the defender's plea of prescriptive possession upon the crown charter of 1807, sasine thereon, and subsequent crown titles.

"Now, it is quite true that if a vassal holding of one superior disclaims that superior and takes a charter from another superior, and thereupon refuses to pay any duties or casualties to the first, but pays the whole to the second, and if this goes on without interruption for forty years, the first superior will lose his right, and the second superior, supposing him to have a sufficient title, as in this case the Crown undoubtedly has, will acquire and hold the superiority by a prescriptive title.

"The Lord Ordinary thinks that the defender's plea of prescription is not applicable to the present case, and must be repelled for the following reasons:—

"(1) The defender's possession under the crown charters is not sufficient. She and her authors have never paid feu-duty to the Crown, the holding being blench; and although, on taking out the charters of 1827 and 1837, something was paid to the Crown, it does not appear whether it was merely the fees attending a crown charter, or whether there was composition or relief, and if so, what the composition or relief duty really was. This is very slender possession on the part of the Crown.

"The only other acts of possession relied on by the defender were that her authors, Robert Walker, W.S., Robert Haldane Scott, Esquire, and George Scott, were enrolled as freeholders, attended meetings as such, and voted at parliamentary elections. To some extent this is proved, but the Lord Ordinary thinks that these are not good acts of possession as against the pursuer. The Duke of Roxburghe and his authors were not freeholders; they did not and

The defender acquiesced in this judgment.

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could not attend the courts or meetings of freeholders, and as Peers they could not take any part in the elections. They had no title to challenge the claim of an alleged freeholder to be put on the roll, and they were not bound to know, and possibly did not know, anything about the roll of freeholders. If they could not challenge the claim it cannot be held as prescriptive possession against them.

"In one view, indeed, the fact that Robert Walker, W.S., immediately after getting his crown charter of 1807, claimed to be put, and was put, on the roll of freeholders, suggests a solution of the whole mystery. The Lord Ordinary immediately asked, Was the then Duke of Roxburghe not manufacturing votes? Did he not convey the superiority to Robert Walker, W.S., to be held of the Crown, on which Robert Walker, W.S. (not an unlikely voter), took infeftment, and expede a crown title? If so, there would be an end of the whole case.

"But the answer was, There was no such conveyance. Nor could there be, for the Duke of Roxburghe held the superiority under strict entail, and could not make a vote without a forfeiture. The records and registers have been strictly searched, and the defender admitted that no trace whatever had been found of any conveyance, act, or deed of any kind by the then Duke of Roxburghe. This being so, the Lord Ordinary cannot hold, without any evidence, that the superiority was alienated, and that a fatal contravention of the entail had been committed.

"(2) The alleged possession of the defender's authors was not exclusive under the Crown. They still paid the full feu-duty to the Duke of Roxburghe, and this must be held, unless the contrary be shewn, as acknowledging him and possessing under him as superior.

"No doubt the defender says that the feu-duties were paid to the Duke of Roxburghe, not as superior, but as lord of erection, but then this is not proved, and cannot be assumed. This will be adverted to afterwards, but in the meantime it is sufficient, in the question of prescription, for the Duke to point to the charter of 1787 and prior charters, which expressly stipulate the feu-duty of 10s. per annum, as conclusively proving not only the title under which that feu-duty was levied, but as fixing its character as feu-duty of lands held feu under the Duke.

"A few of the receipts for the feu-duty have been recovered, and they all bear to be 'feu-duty of the lands of Wooden,' due to the Duke. In one of the receipts the lands of Wooden are parenthetically mentioned as 'part of the Abbacy Lands of Kelso,' but this is of no consequence in the question of prescription, the point being that the levying of a feu is an act of possession on the part of the superior. This suggests—

"(3) That there has really been during the prescriptive period complete possession on the part of the Duke of Roxburghe as superior. He has always stood infeft in the lands as superior. He has levied every farthing of the feu-duty, which, though small (10s. per annum), is not nominal. What more could he do? No doubt he might have insisted in non-entry at or after 1825, for his last vassal, Robert Walker, W.S., died in that year, but it cannot be held that a superior, infeft in the lands and regularly levying his feu-duty, can lose his right merely because he does not insist upon his vassal's heir taking out a charter. . . .

"(5) And lastly, the Duke and his authors were not bound to search the Registers of Sasines to see that no infeftment was put on record adverse to their superiority title. This is not the purpose of the records. A superior who has a vassal infeft under him, and who is regularly getting his feu-duty, is entitled to assume that no adverse or different infeftment will be put upon record. It is the vassal's duty to institute a challenge if he is to dispute the right of superiority.

"In every view therefore the Lord Ordinary thinks that the plea of the prescription must be repelled."

No. 4. HENRY MONCREIFF HORSBRUGH (D. Souter Robertson's Trustee), Pursuer (Reclaimer).—*C. S. Dickson—W. Campbell.*

Oct. 24, 1890. Robertson's Trustee v. Royal Bank of Scotland. ROYAL BANK OF SCOTLAND, Defenders (Respondents).—*Low—Fleming.*

Retention—Bank—Contract of deposit.—A bank has a right to retain all negotiable instruments belonging to a customer and in its possession, for the purpose of securing a debtor balance on general account, but this right may be excluded by agreement, express or implied.

Certain bonds were deposited from time to time with a bank by a customer—the receipts by the former bearing that they were held "for safe keeping on your account and subject to your order." It appeared that advances were made by the bank to the customer concurrently with the making of the deposits, and that the bank's agent had asked that the deposits should be made in order to meet these. In an action by the trustee on the customer's sequestrated estate for delivery of the bonds, *held* that the terms of the receipts did not instruct any special agreement of parties such as would exclude the right of retention which the custody of the bonds gave to the bank, especially when supported as it was by the actings of parties.

1ST DIVISION. Lord Kinnear. M.

MR DAVID SOUTER ROBERTSON died on 10th November 1888. His estates were sequestrated, and Mr H. M. Horsbrugh was appointed trustee on 18th March 1889.

Mr Souter Robertson had kept a bank account with the branch of the Royal Bank of Scotland at Brechin, of which branch Mr James Guthrie was agent. At his death there were in the hands of the branch bank four City of Edinburgh Annuity Bonds, which were payable to bearer and transmissible by simple delivery,—the first for £3500 capital, and the other three for £500 each,—all with coupons attached, which had been deposited by Mr Souter Robertson with the bank—the first on 25th November 1887, the second and third on 12th April 1888, and the fourth on 27th April 1888. The bank had granted receipts for the bonds in their agent's name in the following terms, which, *mutatis mutandis*, were the same in each case:—"Royal Bank of Scotland, Brechin, 25th Nov. 1887.—D. Souter Robertson, Murlingden.—Dear Sir,—We hold for safe keeping on your account, and subject to your order, City of Edinburgh Annuity Bond, No. 3937, for the payment annually of £105, with coupons attached, £52, 10s. each, payable half-yearly on 1st February and 1st August.—Yours, &c. DAVID GUTHRIE & SONS, Agents." These bonds were only a portion of those originally deposited.

The coupons, &c. were collected by the bank when due, and the proceeds placed to Mr Souter Robertson's account.

In July 1889 the trustee brought an action against the Royal Bank for delivery of the bonds.

The defenders in answer claimed a right to retain the securities until payment of the debt due to them by the late Mr Souter Robertson. They further stated,—"Explained further, that it was all along understood and agreed upon, both by him and by the defenders, that the bonds lodged with them were to be held by the defenders against any advances by them to Mr Souter Robertson, and that on the faith of this understanding and agreement the defenders allowed advances to the extent of the value of the said bonds, increasing the advance as additional bonds were lodged with them, but in no case without remonstrance allowing the amount to be exceeded. On the only occasion when the advance exceeded the value of the bonds lodged, the defenders wrote asking for additional bonds to be lodged."

The pursuer pleaded;—(1) The bonds and coupons referred to being part of the sequestrated estates of Mr David Souter Robertson, the pursuer is entitled to delivery thereof. (2) In respect of the acknowledg-

ments quoted, the pursuer is entitled to decree, as concluded for. (3) The defenders' statements are irrelevant; *et separatim*, they can only be proved *scripto*.

The defenders pleaded, *inter alia*;—(2) The defenders, being entitled to retain the bonds sued for until payment of the debt due to them, should be assoilzied, with expenses.

On 5th November 1889 the Lord Ordinary (Kyllachy) allowed, before answer, the defenders a proof *habili modo* of their averments and the pursuer a conjunct probation, and on 7th December following the First Division refused a reclaiming note at the instance of the pursuer against that interlocutor.

A proof, both oral and documentary, was led.

From the letters which had passed between Mr Guthrie, the bank-agent, and Mr Souter Robertson and his sons, Mr George and Mr Thomas Robertson-Chaplin, and from Mr Guthrie's own testimony, it appeared that the latter had intimated his view that the bank held the bonds in security of overdrafts, and that Mr Souter Robertson had not dissented from that view. The details of the evidence and of the state of Mr Souter Robertson's account with the bank are fully given in the opinions of the Judges, particularly in those of the Lord Ordinary and Lord Adam.

On 25th February 1890, the Lord Ordinary assoilzied the defenders.*

* "OPINION.—Having considered the proof in this case, I have come to the conclusion that the bank have established the lien which they claim.

"Had it appeared that the receipts which are quoted on record constituted or fully expressed the contract between the parties, and had those receipts required to be construed without any help from outside, I should probably have *felt* compelled to come to a different conclusion. For I before observed that a deposit for safe keeping appeared to me to be *prima facie* a deposit for a special purpose, and a special purpose inconsistent with the general lien which the defenders claim. And I have seen no reason to change that opinion. It is true, as the defenders urge, that the deposit here was of negotiable securities, and it may be that, as between a banker and his customer, a deposit of negotiable securities has different incidents from, *e.g.*, a deposit of plate. But if the deposit is expressed to be for safe keeping, and there is nothing to qualify that expression, I have not been able to see that a deposit of bonds is in a different position from, *e.g.*, a deposit of plate. And therefore, although there have been dicta of some authority to the effect that a banker's lien extends over all paper securities placed for any purpose in the banker's hands, I am not, I confess, prepared, in the absence of direct decision, to carry the banker's lien so far. Indeed, as regards decision, the leading case on the subject, *Brundao* v. *Barnett*, decided in the House of Lords (12 Clark and Finelly, p. 787), appears to me to confine the lien within considerably narrower limits. For in that case the lien was held excluded where Exchequer bills (usually deposited in the banker's safe in a box, of which the customer kept the key) were handed to the banker to obtain payment of the interest due and to have the bills renewed, and where the customer failed, while the new bills still remained in the banker's hands waiting for redeposit in the customer's box.

"But the question always is, what were the terms of the contract under which the deposit was made; and here I am not able to accept the pursuer's argument that it is illegitimate to look beyond the terms of the receipts which the bank granted to the deceased. For that argument implies that those receipts must be taken as expressing the final and whole contract between the parties, and as expressing it, moreover, in terms which do not admit of construction even by the subsequent writings or subsequent actings. Now, I do not think that the receipt granted upon the deposit is a document which at all necessarily expresses the terms of the deposit. It may do so, but on the other hand it may not. The contract of deposit may lie behind the receipt altogether. It may have been concluded by a formal deed, or by missives, or by correspondence,

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The pursuer reclaimed, and argued;—The terms of the receipts were such as to exclude the right of retention which the bank would otherwise

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or even by verbal agreement, and the receipt may in such cases be merely executive of the contract, and of little or no importance even for purposes of construction. Or the receipt may be one of several sources from which the terms of the contract fall to be gathered. For example, it may fall to be read simply as a letter in a correspondence, or as a letter or telegram passing in the course of communications partly written and partly verbal. It is certainly not a document which is at all in the position of a formal deed. And the contract of deposit being always a consensual contract, capable of being constituted verbally and proved by parole, I confess I see no reason why, in a case like the present, the whole communications between the parties should not be considered, and the true terms of the contract ascertained.

"In this view I think it is quite legitimate to look at the evidence which has been adduced by the bank, which evidence consists partly of the testimony of Mr Guthrie, the bank's agent in Brechin, partly of certain correspondence passing between that gentleman and the late Mr Robertson, and partly of Mr Robertson's bank account, a copy of which, taken from the bank's books, is produced.

"Mr Guthrie's evidence, if accepted, appears conclusive. I do not suppose that can be disputed. His statement is that Mr Robertson's account being, in November 1887, overdrawn, he (Mr Guthrie) suggested a deposit of bonds, or rather a deposit of additional bonds, by way of cover, and that Mr Robertson at once agreed to this; and the deposit first mentioned on record was arranged and made expressly for the purpose of covering the then overdraft. He says further, that the deposit having been thus arranged and made, the receipt granted was expressed as for safe keeping, in the same terms as previous receipts, because both he and Mr Robertson considered, rightly or wrongly, that those terms were quite consistent with the bank's lien, which lien it was the expressed object of both of them to bring into force. He says, further, that Mr Robertson was allowed further credit in respect of the increased cover thus obtained; and that the two subsequent deposits mentioned on record—both made in April 1888, were arranged in the same way, and were followed by similar extended credits. In short, if Mr Guthrie's evidence is to be accepted, there was in the case of each deposit an express agreement that the bank should have a lien over the bonds deposited for their general balance.

"The question, however, is, whether Mr Guthrie's evidence is sufficiently corroborated. For, entirely as I believe his statement, he is certainly in the position of a party, and perhaps a deeply interested party; and I should have at least hesitated to accept his unsupported testimony as against the *prima facie* import of the three receipts. But I am glad to be relieved from considering that question, because I am of opinion that Mr Guthrie is amply corroborated not only by the bank account, which, so far as it goes, supports his statement, but also by the correspondence which passed between him and Mr Robertson and Mr Robertson's son—Mr George Robertson-Chaplin. I incline to think that the terms of the contract in which the first deposit (that of November 1887) was made are sufficiently ascertained, apart from the parole evidence altogether, by Mr Guthrie's letter to Mr Robertson-Chaplin of 4th November 1887, and Mr Robertson's postscript to his letter of 19th November 1887; and I think that the bank's view of the several transactions is also borne out and illustrated by, *inter alia*, Mr Guthrie's letter of 1st June 1888, Mr Robertson's letter (no date), No. 47, and Mr Guthrie's letters to Mr Robertson-Chaplin of 12th June 1888 and 31st July 1888. These letters I think shew pretty conclusively that throughout the communications Mr Guthrie, Mr Robertson, and his son Mr George Robertson-Chaplin (who lived with him and acted for him), recognised that the bonds held by the bank were subject to the bank's general lien; and that, when additional credit was required, further bonds required to be lodged.

"I therefore hold that Mr Guthrie's account of the matter is sufficiently corroborated; and, in these circumstances, it is not necessary to consider how far, if the contract had been constituted by the receipts and the receipts alone,

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have had. It might be that the words "for safe keeping on your account" were not sufficient to exclude the right, but the addition of the words "subject to your order" made it clear what the purpose of the deposit was, and that the depositor was to retain his control over the bonds. These words were equivalent to "returnable on demand." It was not as bankers that the defenders received the bonds; they were given to them for custody only, and to be put into their safe, and not like bills for collection or to be discounted.[1] The case was one of proper deposit, which, being of a confidential character, would not ground retention.[2] Where, as here, the receipt fully expressed the contract it was not legitimate to appeal to parole evidence outside it. It was only where the receipt was silent as to the terms of the contract that parole was available to clear it up. It was true that the bank collected the interest coupons, and that that part of the contract was not expressed in the receipt. But such an arrangement was not inconsistent with the contract as expressed in the receipt. The other evidence which it was proposed to introduce was inconsistent with the terms of the contract, and was inadmissible. The case could not be illustrated by the law of retention in bankruptcy. There the debt must arise out of the contract in the execution of which the deposit of the documents which it was sought to retain took place.[3] Further, there were no cases where that doctrine had been carried so far as in the cases of *Meikle* and *Robertson*, and it was doubtful how far they were sound law. The doctrine of balancing accounts in bankruptcy did not go the length of including incorporeal moveables, unless in cases where there was a general lien.[4]

Argued for the respondents:—It was well-established that bankers had a right of retention for an unsecured balance over unappropriated paper securities in their hands.[5] There was an *onus* on the pursuer here to shew a special contract taking it out of the general rule. The securities in the case of *Brundao* were Exchequer bills, which were kept by the bank in a box of which their customer had the key, so that the bank was not so much the custodier of the securities as of the box. But it was not disputed that the bills were held by the bank in their capacity as bankers. The terms of the receipts in the present case did not conflict with the general right of lien which the bank had, and merely expressed what would have been implied if nothing had been said. The bonds were

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the subsequent correspondence and subsequent actings of parties would have sufficed to construe the receipts in a manner favourable to the bank. It is not, however, to be overlooked that the actings of parties make it at least plain that the deposits in question were in no view deposits for safe keeping merely. That is to say, it is clear upon the proof that, although not expressed in the receipts, it was a part of the arrangement between the parties that the bank should undertake to collect the coupon interest as it fell due and to put it to the credit of Mr Robertson's account. That at least goes to shew that the receipts did not express the full contract between the parties.

"On the whole, therefore, I conclude, as I said at the outset, that the bank have established their lien, and that they are entitled to absolvitor, with expenses."

[1] Brundao v. Barnett, 1846, 12 Clark and Finelly, H. L. Reps. 787, Lord Campbell, p. 808.

[2] Bell's Princ. 211, 1414; Bell's Comms. ii. (5th edn.), 93, 119; Erskine, iii. 1, 26.

[3] Meikle & Wilson v. Pollard, Nov. 6, 1880, 8 R. 69; Robertson v. Ross, Nov. 17, 1887, 15 R. 67.

[4] Strong v. Philips & Co., March 16, 1878, 5 R. 770; Anderson's Trustees v. Fleming, March 18, 1871, 9 Macph. 718, 43 Scot. Jur. 373; Distillers Co., Limited, v. Russell's Trustee, Feb. 9, 1889, 16 R. 479, Lord Shand's opinion, p. 491.

[5] Bell's Comms. (5th edn.) ii. 118, (7th edn.) ii. 114.

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transmissible by delivery under the statute,* and by possession a formal title of property in them was acquired. An agreement for "safe keeping" was quite consistent with the bank's right of lien.[1] The written receipts did not embody the whole contract, and it was competent to look at the communications and actings of the parties in order to ascertain the true nature of the contract. Further, the collection of the half-yearly coupons was a matter outside the written contract, and shewed that the case was not one of proper deposit. Otherwise the bank would not have had power to cut off the coupons and draw the proceeds. Parole being admissible, the evidence of Mr Thomas Robertson-Chaplin (who was examined after the case came into the Inner-House) and of Mr Guthrie, the bank manager, was conclusive as to the intention of parties. Further, the correspondence between the value of the bonds deposited from time to time, and the amount of the overdrafts at the different periods pointed to an understanding that the former were cover for the latter. The delivery of these bonds was not the constitution of a contract of pledge or deposit, but of property,[2] nor, in any event, could the mandate or trust of deposit subsist after the bankruptcy of the mandant.[3]

At advising,—

LORD PRESIDENT.—This is an action at the instance of the trustee upon the sequestrated estate of the late David Souter Robertson, which is brought for the purpose of compelling delivery of four City of Edinburgh bonds, which are specifically identified in the conclusion of the summons. The defence is embodied in the second plea in law for the defender, which is—"The defenders, being entitled to retain the bonds sued for until payment of the debt due to them, should be assoilzied, with expenses." The Lord Ordinary has in effect sustained this plea and assoilzied the defenders. This is a plea of retention, and it appears to me that the ordinary rule and doctrine of retention is directly applicable to the settling of accounts between a banker and his customer whether in bankruptcy or in the case where the customer is still solvent. It is generally spoken of, particularly by Mr Bell in his Commentaries, as bankers' lien, but it seems to me to be simply the right of retention which is known to the common law and applicable to cases of this description.

The question is whether it is applicable to the circumstances of the present case. The rule may be fairly defined as a general right to retain all unappropriated negotiable instruments belonging to the customer in the hands of the banker for securing his balance on general account. It cannot be doubted in the present case that there is a large balance due to the banker by the customer, and further, that the four bonds in question are in the possession of the banker. But it has been maintained by the pursuer that the bonds were lodged for a specific purpose and not in the usual course of business so as to constitute a security for a general balance. Of course the doctrine of retention to which I have referred is subject to this exception, that if a negotiable instrument is lodged with a banker for the purpose of securing payment of a particular debt, or for any specific purpose, then in that case the general rule does not apply, but on the other hand that specific purpose must be clearly ascertained, otherwise the general rule will prevail.

* Edinburgh and Leith Agreement Act (1 and 2 Vict. cap. 55), secs. 44 and 45.

[1] *In re* United Service Co., 1870, L. R., 6 Chanc. Apps. 212.

[2] Hamilton v. Western Bank of Scotland, Dec. 13, 1856, 19 D. 152, 29 Scot. Jur. 77, explained in National Bank v. Forbes, Dec. 1858, 21 D. 79, L. J.-C. Inglis, p. 86.

[3] Bell's Comms. (5th edn.) ii. 129, (7th edn.) ii. 123, and Murray's Creditors v. Chalmers, 1744, M. 2626, there cited.

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The only evidence on which the pursuer relies as indicating the specific appropriation of the bonds in the present case is to be found in the terms of the receipts granted by the agent of the bank at Brechin, when the bonds were handed to him on 25th November 1887, 12th April 1888, and 27th April 1888, and the receipts are all substantially in the same terms. The first of these receipts is in the following terms—"We hold for safe keeping on your account, and subject to your order, City of Edinburgh annuity bond . . . for the payment annually of £105 with coupons attached, £52, 10s. each, payable half-yearly on 1st February and 1st August. The words which are particularly relied upon by the pursuer are "for safe keeping on your account, and subject to your order." The terms of the document are not "for safe keeping only" or "exclusively," but "for safe keeping on your account and subject to your order." I think it may be very fairly assumed that, when a customer of a bank deposits a negotiable instrument with his bankers, one object which he has in view is the safe custody of the document, because a bank has means of keeping such paper securities more safely than the customer can. The bank has safes on their premises, which private individuals have not, and by depositing with the bank the customer gains the advantage of much safer keeping. We may, therefore, reasonably infer that the object for which the bonds were handed to the bank partly was to place them in safer custody than he could himself command. This purpose has a still more special significance because of the nature of the documents deposited. The bonds are transmissible by mere delivery from hand to hand and the interest coupons are payable to the person who presents them for payment when they *fall* due. They are documents which it is particularly easy to negotiate and they afford the most handy and available security to a banker. So long as the customer's account remains in a wholesome condition, I think the receipt very fairly expresses the relation of the parties, because if there is no overdraft then the object in handing the bonds to the bank was only that of "safe keeping on your account and subject to your order," and it was in the power of the customer at any time to demand redelivery. But if it were intended by Mr Robertson, the depositor, that the bonds in question should be specifically appropriated, we should have expected that this would have been more distinctly set out in the receipt. The presumption is that custody gives a right of retention, and I think that that presumption cannot be rebutted without something express and distinct.

The evidence otherwise is entirely in favour of the defenders. The Lord Ordinary has dealt with the case as if it lay upon the defenders to remove the presumption which is created by the terms of the receipt. I confess I can hardly go along with his Lordship in this view, because I do not think that the terms of the receipts remove the original presumption caused by the custody of the bonds. With that reservation, I agree entirely with his Lordship as to the import of the evidence. One point to which I attach the highest importance, and which indeed by itself appears to me to be quite conclusive, arises upon the face of the bank account and the vouchers, which have been produced. On each occasion on which a bond was handed to the bank, the customer was desirous of making an overdraft or an additional overdraft upon his account,—and the overdraft which he proposed to make was quite understood by the parties to amount to a certain definite sum. If we look to the state of the bank account and of the vouchers, we find that at the same time as the overdraft was obtained there was deposited with the bank a City of Edinburgh bond of such an amount as precisely to cover the amount of the overdraft. On

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each occasion on which an advance was made, the exact sum to be advanced was ascertained, and an additional security was given, and the amount of the overdraft corresponded with the amount of the bond even to shillings and pence. It is impossible to say that these actings of parties are not completely subversive of the construction which the pursuer seeks to place upon the terms of the receipts taken by themselves. Where the object appears to have been that, if an overdraft was given, upon the same day a bond should be handed over to the bank to an amount precisely corresponding to the amount of the overdraft, and where the two sums thus exactly square, the inference is irresistible that the purpose of the deposit was to cover the overdraft.

The evidence of Mr Guthrie, the bank-agent, is also very important, but, no doubt, the observation is very justly made by the Lord Ordinary, that he was probably much interested in the result of the case. At the same time when we take Mr Guthrie's very clear testimony as to what passed between him and the late Mr Souter Robertson and his son,—and when we take in conjunction with that testimony the bank account and the vouchers to which I have referred,—I think there is such a corroboration of Mr Guthrie's evidence as puts it beyond all suspicion. The correspondence between the parties throws a good deal of light upon the question, and so does the evidence of Mr Souter Robertson's son who was examined after the case came into the Inner-House. It is sufficient for me to say that I agree with the Lord Ordinary in the result at which he has arrived, and I think that the defenders must be assoilzied.

Lord Adam.—This is an action brought by the trustee on Mr Souter Robertson's sequestrated estate, who asks that there shall be handed over to him four City of Edinburgh annuity bonds, of the *cumulo* amount of £5000. The bonds are all payable to bearer, and they are transmissible by simple delivery. That being the character of the bonds, I think they are clearly documents of such a nature as that the bankers' lien must apply to them. On Mr Souter Robertson's death, on 10th November 1888, the four bonds were found in possession of the bank. That being so, it appears to me that there is an *onus* on the pursuer to shew that the ordinary rule that a bank has a lien over securities of that kind in their possession for a general balance due to them by the depositor does not apply, and accordingly he has maintained that the bonds in question were deposited with the bank for a special purpose only, and that they do not therefore fall within the general rule to which I have referred.

The question is whether the pursuer has proved the specific appropriation. The evidence on which he relies to prove this, and, I think, the only evidence, is the terms of the receipts which were granted by the agent of the bank when the documents in question were handed to him. The receipts are all in the same terms, and the contention is that they bear that the deposits were made for safe keeping, and for safe keeping only. I agree with the Lord Ordinary that the case would have been a difficult one if the receipts had been the only evidence to which we were entitled to look in deciding the legal character of the deposit. I quite concur in the view expressed in that part of his Lordship's note where he says, —"I do not think that the receipt granted upon a deposit is a document which at all necessarily expresses the terms of the deposit. It may do so; but, on the other hand, it may not. The contract of deposit may lie behind the receipt altogether. It may have been concluded by a formal deed, or by missives, or by correspondence, or even by verbal agreement, and the receipt may in such

cases be merely executive of the contract, and of little or no importance even for purposes of construction. Or the receipt may be one of several sources from which the terms of the contract fall to be gathered. For example, it may fall to be read simply as a letter in a correspondence, or as a letter or telegram passing in the course of communications partly written and partly verbal." I think that is a correct exposition of the law. The true question, however, appears to me to be not the terms of the original deposit, but the terms upon which the bonds were being held at the date of Mr Souter Robertson's death. If that be so, it is obvious that the terms upon which the original deposit was made are only one of the elements of proof to be taken into consideration along with others. They are all admissible for the purpose of shewing on what footing the bonds were held at the date of Mr Souter Robertson's death. It is obvious that all the correspondence and actings subsequent to the deposits being made must be relevant to establish the defenders' contention.

I do not propose to go over the proof in detail, because it is clear that upon the evidence of Mr George Robertson Chaplin and others the bonds were being held by the bank in security of the overdrafts. I may refer, however, as an example to a letter dated 1st June 1888 from Mr Guthrie, the bank-agent, to Mr Chaplin, which is proved to have been shewn by him to his father. In that letter, Mr Guthrie says,—" . . . I think your father has some spare Edinburgh City Debt bonds at the Commercial Bank, has he not? Perhaps he could send us a bond for £500 or £1000 without any trouble. It would enable us to say that we held additional security to warrant these recent additional advances. I shall be *glad to* hear from you." And it seems to me to be capable of only one construction. He asks for "additional" security. Additional to what? To the only security held by the bank for their overdraft, namely, the four bonds. But further the actings of the parties shew clearly what was the character of the deposit.

Thus, I see that prior to 25th November 1887 the state of the bank account was that there was due to the bank a sum of £3210, and they then held bonds to the amount of £3000 only. The bank then applied to Mr Souter Robertson to get additional security, and upon 25th November he lodged a bond for £3500, getting back the bond for £3000. He lodged two bonds for £500 each on 12th April 1888, and upon the same date he passed a cheque for £750. On 27th April following other bonds were lodged to the amount of £800, and next day a cheque was passed for an additional £500. The passing of the cheques immediately followed the delivery of the bonds, and no one can doubt that the bonds were lodged as security for the drafts.

Apart altogether from Mr Guthrie's evidence, I should have been disposed to decide this case in favour of the defenders; but if we are to believe that evidence, I can have no doubt whatever. I quite agree with the Lord Ordinary that Mr Guthrie occupied an interested position, and if his evidence had stood alone there might have been a difficulty in acting upon it. But I think that the written evidence, and the actings of parties, are entirely corroboratory of that evidence, and upon the whole matter I think the Lord Ordinary's interlocutor ought to be adhered to.

LORD M'LAREN.—I concur in the judgment proposed, and will merely indicate my view of the principle on which cases of this nature ought to be decided. It is a general principle in our law that every agent has a lien or right of retention against his principal for the balance due to him, and this right of retention

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is not confined to moneys collected, such as rents and dividends, but may extend to securities, the precise extent of the lien being determined by the nature or character of the agency. The so-called banker lien is an example of this rule of law, and in this case the decisions establish that a banker has a lien over all such negotiable securities of the customer as are lawfully in his possession and are subject to his control, but this lien may be excluded by agreement, express or implied. If the bill or security is specially appropriated, this is equivalent to an exclusion of the lien, because in the case supposed the banker has received the instrument under instructions which are inconsistent with the supposition that he is to have a lien.

In the present case I hardly think that the question raised is one of special appropriation, but the argument submitted by the trustee for Robertson's creditors is to the effect that the lien which the Royal Bank would, under other circumstances, have acquired was excluded by agreement.

In considering the meaning of the expressions used in the receipts which were granted by the Royal Bank for these bonds, it is necessary to attend to the distinction between a right in security and a lien. A proper security can only be constituted by the acts of the parties, the debtor and the creditor in the series of transactions, and if a question of construction arises, the creditor must establish affirmatively that a right of security was given to him. But a lien is something which the law gives to the creditor, or holds to arise to him from the mere fact of his possession of his debtor's property in the character of an agent; and where the relation of principal and agent or banker and customer exists, it is not necessary that the lien should be set up by proof,—the party claiming adversely to the lien must shew that by agreement the lien is excluded.

It appears to me that the expressions used in the receipts for these negotiable bonds are insufficient in themselves to exclude the banker's lien. The bonds are said to have been received "for safe keeping," and to be held "to the order" of Mr Robertson. If the Royal Bank had given notice of their intention to sell the bonds with the view of applying the proceeds in reduction of the overdraft, I do not doubt that this would have been a breach of contract, and that the sale might have been interdicted, because the terms of the receipt made it clear that the bank did not receive these instruments under a security title. But the bank is only claiming a right to detain the bonds until its claims are satisfied, and this lesser right, which results from the lien, extends to all negotiable instruments which the bank may have received in the ordinary course of business, and not under a special trust exclusive of lien.

Even if the case were more doubtful on the terms of the receipts, the evidence appears to me to place the right of the Royal Bank beyond dispute. Their agent, Mr Guthrie, in his letters to Mr Robertson's son, asserted his lien, and asked for further deposits of a like nature to cover advances. These letters were communicated to Mr Robertson, who did not dissent from Mr Guthrie's interpretation of the rights of the bank. It is therefore established that Mr Robertson had no intention of excluding the lien, and there being no intention to exclude the lien, it cannot be said that the lien was excluded by agreement. There is also the circumstance that the advances were made concurrently with the deposit of the bonds, and apparently in reliance on the right of lien which would in ordinary course result from such deposit. I am accordingly of opinion that the Lord Ordinary's judgment is well founded, and that the reclaiming note should be refused.

THE COURT adhered.

SKENE, EDWARDS, & BILTON, W.S.—DUNDAS & WILSON, C.S.—Agents.

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Forsyth v. Ramage & Ferguson.

ALLAN FORSYTH, Pursuer (Respondent).—*A. J. Young*—*A. S. D. Thomson.*
RAMAGE & FERGUSON, Defenders (Appellants).—*Salvesen.*

Reparation—Master and Servant—Employers Liability Act, 1880 (43 *and* 44 *Vict. cap.* 42)—*Insufficient provision for servant's safety—Known danger.*—In an action of damages raised by an engineer against his employers, a firm of shipbuilders and engineers, the pursuer averred that he had been employed in fitting up the boilers in a steamer which had been constructed by his employers, and was in course of completion; that he was in the habit of going to his work by the forward hatch, but as this passage was blocked he had, on one occasion, to proceed by the after hatch and through the engine-room; that in doing so he fell into a manhole in the floor of the engine-room and was injured; that the manhole was unprotected, except for some lead pipes which were lying on one side of it; that he was unaware of its existence, as it had been covered over on the only two occasions on which he had previously been in the engine-room; that at the time of the accident the light in the engine-room was dim; that there was a duty on the defenders to cover or protect the manhole so as to prevent accidents, but that they had failed to do so, although similar occurrences had taken place before; that it was the duty of the defenders to have had the engine-room properly lighted; and that their failure in these respects had led to the accident.

Held that, having regard to the circumstances stated, there was no relevant averment of fault on the part of the defenders, and action dismissed.

1ST DIVISION. Sheriff of the Lothians. M.

ALLAN FORSYTH, an engine-fitter in the employment of Messrs Ramage & Ferguson, shipbuilders and engineers in Leith, raised an action against his employers in the Sheriff Court at Edinburgh, concluding for damages at common law, or under the Employers Liability Act.

The pursuer averred;—In May 1890, he had been in the service of the defenders for about a year, and was then employed as an engineer on board the steamship "Talune," which was in course of being completed. (Cond. 3) "On or about Monday the 19th day of May 1890, at ten o'clock in the forenoon, the pursuer had gone down the after hatch of the said vessel, for the purpose of commencing his usual work of fixing on the mountings of the boilers, at which he had been engaged for some weeks previously. In order to reach the boilers the pursuer's way, on this occasion, lay through the engine-room of the vessel, in which there is a manhole leading to a water tank underneath the engine-room, and which is used for ballast purposes. At the time above mentioned there were some lead pipes on the one side of the said manhole, but it was otherwise quite unprotected, and on making his way to the boilers on the morning in question, the pursuer on stepping across the foresaid lead pipes went into the manhole, and fell violently upon the other side of it, breaking three of the ribs of his left side, and otherwise sustaining serious bruises and injuries. . . ." (Cond. 4) "The pursuer was unaware of the existence of the manhole in question. It is explained that for some time previous to the said 19th day of May the pursuer had gone to his work upon the boilers by the forward hatch, which led to them direct. On the said 19th day of May, or the day previous, the forward hatch was blocked up, and he was compelled to proceed to his work by the after hatch, and through the engine-room, which was the only other road. Previous to the accident the pursuer had been only twice in the engine-room, and upon these occasions the said manhole was hidden by timber, or other material having been thrown over it, as he did not notice it." (Cond. 5) "It is believed and averred that the defenders, or at all events their foreman, James Aitken, under whose superintendence and directions the pursuer was working at the time of his accident, and for whom the defenders are responsible, as being a superintendent within the meaning of said Act,

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and whose whole duty was that of superintendence, and who was not ordinarily engaged in manual labour, knew that the said manhole was not covered or protected and was dangerous. It was the duty of the defenders, or of their foreman, the said James Aitken, to cover or protect the said manhole in order to prevent accidents to their workmen; but although they had received repeated warnings of the danger by other workmen stepping into the said hole previous to the pursuer's accident, they failed to cover or protect the said manhole, although this might have been done without in the least hindering the work and at insignificant expense. In so failing, the defenders or their said foreman were guilty of gross carelessness and neglect, and it is averred that this was the cause of the accident to the pursuer." (Cond. 6) "At the time of the said accident the light in the engine-room was dim, and there was no lamp burning to shew the pursuer the open manhole. The defenders in failing to have the said engine-room properly lighted were in fault, and their failure in this respect contributed to the pursuer's accident."

The pursuer pleaded, *inter alia*;—(1) The pursuer having sustained loss, injury, and damage through the fault or negligence of the defenders, or of those for whom they are responsible, the pursuer is entitled to compensation from the defenders. (2) The pursuer having, while employed as a workman in the service of the defenders, been injured by reason of the fault or negligence of the defenders or those for whom they are responsible under the Employers Liability Act, 1880, he is entitled to decree for the sum second above sued for.

The defenders pleaded;—(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons.

The Sheriff-substitute (Rutherfurd), on 11th July 1890, repelled the defenders' first plea in law, and allowed a proof.

The defenders appealed for jury trial to the Court of Session under the 40th section of the Judicature Act, and argued that there was no relevant averment of any duty which the defenders had neglected.[1] The case was one of carelessness on the part of the pursuer. The pursuer was quite in a position to see the manhole, because he saw the lead pipes.

The pursuer argued that the case ought not to be disposed of without inquiry.

Lord President.—This is the case of an accident which occurred to a workman who was engaged in completing the construction of a vessel. There is no doubt that when a vessel is in course of construction there are a great many risks incident to the employment in which the workmen are engaged. The vessel in question was not only not finished as regards her decks, but there were necessarily several holes in the flooring which were left for the convenience and use of the workmen employed. The pursuer was employed in fixing on the mountings of the boilers, and the way by which he made his way to that part of the vessel where he was engaged up to the 19th May 1890 was by going down the fore hatch, which enabled him to get easily to the boiler-room. But this route became blocked from some unexplained cause, and the pursuer was forced to use the after hatch. His averment is that,—"In order to reach the boilers the pursuer's way, on this occasion, lay through the engine-room of the vessel, in which there is a manhole leading to a water tank underneath the engine-room, and which is used for ballast purposes. At the time above mentioned there were some lead pipes on the one side of the said manhole, but it

[1] Moore v. Ross, May 24, 1890, 17 R. 796.

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was otherwise quite unprotected, and on making his way to the boilers on the morning in question, the pursuer on stepping across the foresaid lead pipes went into the manhole, and fell violently upon the other side of it."

When the pursuer says that the manhole was unprotected, I do not understand him to mean that it is part of the duty of the owners or of their superintendent of works to have the manhole fenced. That is impossible, because it would be quite inconsistent with the progress of the work of completing the ship that such fencing should be required. Accordingly, the only allegation in the article I have read which has a bearing upon the question is, that there were some lead pipes lying between the pursuer and the manhole, and that he stumbled across these and fell in. That appears upon the face of it, if the fact is correctly set forth upon record, to have been a very careless proceeding. It is further stated that at the time of the accident the light in the engine-room was dim, but if this was so there was all the more need of caution on the part of the pursuer in threading his way to the place where his work was going on. Whether he knew of the existence of the manhole in question beforehand or not, it was undoubtedly his duty to look very carefully before him as he went along, because there were in that part of the vessel through which his way lay a number of manholes of a similar kind. He could not help knowing this, and that if the light was dim they would be very apt to be a trap for anyone who might be walking at all carelessly.

The only other averment which it is necessary to notice is in the 5th article of the condescendence,—"It was the duty of the defenders, or of their foreman, the said James Aitken, to cover or protect the said manhole in order to prevent accidents to their workmen." The pursuer does not explain what he intends when he says that there was a duty to "protect the manhole." It had no doubt to be left open for the constant use of the workmen who were completing the vessel. This allegation of duty is on the face of it very clearly irrelevant, because in order to make it intelligible it would be necessary to shew how the manhole could have been covered consistently with carrying on the completion of the ship. The pursuer upon his own statement acted very carelessly, and there is nothing set forth on this record which can be said to imply any failure of duty on the part of the defenders.

Lord Adam.—It appears to me that workmen engaged on a vessel which is in course of construction are bound to exercise caution in making their way about the ship, and in this particular case we know that there were a number of manholes in the floors of the engine and boiler-rooms. In regard to the accident, the fault alleged is that there was a failure of duty on the part of the defenders to have the manhole protected. In the case of a ship under construction, I think this would be out of the question. The manholes were left open from necessity, and I think there was no failure of duty. It is not said how the protection could have been carried out, nor is it said that the pursuer had any reason to anticipate that there would be no manhole at the place in question. I think there was a duty on the pursuer to see where he was going. The only other thing which is said is that the light was dim; if this was so there was the greater necessity for care on his part. I see no relevant averment of fault on the part of the defenders. I think the pursuer's carelessness was the cause of the accident.

Lord M'Laren.—I also agree with your Lordships in thinking that there is

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no relevant averment of a duty neglected on the part of the defenders. The ship was in course of construction, and it is ridiculous to make it a matter of complaint that the vessel had not at that time all the appliances which it would have in its completed state. I am far from saying that the want of any provision for lighting an uncompleted ship may not amount to negligence in the legal sense. In no case, of course, could it be lighted as thoroughly as it would be if on a voyage, but there ought at least to be a light or candle to guide the workman to the part of the vessel at which he is working. If it had been alleged that there was a total absence of lighting, I should have been inclined to let the case go to a jury; but all that is said is that the light was dim, which is quite inconsistent with the view that there was enough of light to enable the pursuer to see his way. I think the action should be dismissed as irrelevant.

THE COURT recalled the Sheriff-substitute's interlocutor, found the pursuer's averments irrelevant, and dismissed the action.

HUTTON & JACK, Solicitors—MACPHERSON & MACKAY, W.S.—Agents.

No. 6.

Oct. 25, 1890. Thomson's Trustees v. Henderson.

JAMES FORD AND OTHERS (Thomson's Trustees), First Parties.—*Salvesen.* MRS SARAH THOMSON OR HENDERSON, Second Party.—*Asher*—*A. S. D. Thomson.*

Trust—Powers of trustees—Investments.—A truster gave a general power to his trustees to continue to hold the investments which he might have at the time of his death in any public companies, "and power to invest the funds . . . which shall devolve upon my daughter in heritage and preference stocks of railways in Scotland or England, and in the stock of Scotch banks." *Held* that it was competent for the trustees to hold the funds liferented by the daughter in the shape of shares in public trading companies, which were held by the testator at the time of his death, they being bound, however, to exercise their discretion from time to time as to the expediency of retaining them.

2D DIVISION. M.

WILLIAM THOMSON, died on 28th March 1889, leaving a trust-settlement wherein he provided a third of the residue of his estate to be held by his trustees for behoof of his daughter for her liferent use only, and for her children in fee.

The powers of his trustees were thus expressed:—"Power to sell the whole or any part of the estate, heritable or moveable, hereby conveyed, by public roup or private bargain, and power to continue the investments in any public companies in which I may have my capital invested at the time of my death, and power to invest the funds which shall be liferented by the said Mrs Sarah Duncan Wishart or Thomson, should she survive me, and the funds which shall devolve upon my said daughter in heritage and in preference stocks of railways in Scotland or England, and in the stock of Scotch banks, with power to renew and alter said investments at pleasure." The truster's widow died shortly after him, and the estate was for the most part distributed, the share falling to the daughter in liferent being retained by them.

This share, to the extent of £17,000, consisted of shares in public trading companies "of a more or less speculative nature," which were held by the testator at the time of his death.

The daughter, Mrs Henderson, and the trustees submitted a special case to the Court to determine whether the trustees were bound to sell these shares. The trustees stated that they had "been advised that it is doubtful whether they are entitled, under the powers conferred on them by the trust-deed, to hold any of these shares without incurring responsibility to

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the beneficiaries in the event of loss being occasioned to the trust-estate by reason of their doing so." They stated, however, that the companies were in good credit, and that, if it was competent for them to continue to hold the shares, they were quite willing to do so.

The daughter maintained that it was competent for the trustees to continue to hold the investments, and it was admitted that to alter them would result in a considerable diminution of income.

LORD JUSTICE-CLERK.—It is quite reasonable that the trustees should be sure of their position, but the terms of their deed are on the whole quite clear. The intention of the truster was that his trustees should continue to hold such shares in public companies as he himself held at his death. But the right to do so in no way affects their duty to look closely after these investments, and to make sure for themselves that they are reasonably safe. All that the deed will do for them is to relieve them of responsibility for holding investments of that class. I read the deed as meaning "I have certain shares in public companies, and I give my trustees power, so long as they think these investments are reasonably safe, to hold them." Our judgment will not, as I have said, relieve them of the exercise of their discretion from time to time in assuring themselves as to the soundness of those investments.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

THE COURT found that, "under the terms of the trust-deed, it is competent for the parties of the first part to continue to hold the shares in public companies which were held by the testator at the time of his death, but declaring that the trustees must exercise their own discretion as to the desirability, in the interests of the estate, of their continuing to hold such investments."

BOYD, JAMESON, & KELLY, W.S.—DAVIDSON & SYME, W.S.—Agents.

No. 7.

Oct. 28, 1890.
Reid v. Edmiston.

JOHN REID (Inspector of Kilmarnock), First Party.—*C. J. Guthrie—Aitken.*
ALLAN A. EDMISTON (Inspector of Rutherglen), Second Party.—*J. A. Reid.*

Poor—Residential settlement—Married woman deserted by husband, who had no Scots settlement.—Held that a residential settlement acquired by a Scotswoman was not lost on her marriage to an Irishman who had no settlement in Scotland, and, not having been lost by absence, became available on her becoming a pauper by the desertion of her husband.

2D DIVISION. M.

IN a special case presented by John Reid, inspector of poor of Kilmarnock, and Allan Edmiston, inspector of poor of Rutherglen, the following facts were stated:—

Theresa Convery was born in 1856 in the parish of Kilmarnock.

In 1874 she became a teacher in the Roman Catholic school at Rutherglen, and resided in that parish for ten years thereafter, supporting herself by teaching in the school. By this residence she acquired for herself a residential settlement in the parish of Rutherglen.

In February 1884 she married, at Kilmarnock, John Lawrie, a native of Ireland (whose birth settlement in that country was capable of being ascertained), who did not then possess or afterwards acquire any settlement in Scotland. After the marriage Lawrie and his wife resided for ten months in Glasgow, and then they removed to Kilmarnock.

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In August 1886 Lawrie deserted his wife, and on 1st April 1887, being burdened with two pupil children, she applied for and received parochial relief from the inspector of poor of Kilmarnock.

A question having arisen as to whether Kilmarnock, as the pauper's parish of birth, or Rutherglen, as the parish in which at the date of her marriage she possessed a residential settlement, was liable for her support, this special case was brought. The question of law was,—"Does the burden of supporting the pauper fall upon the parish of her birth, or upon the parish in which at the date of her marriage she possessed a residential settlement?"

Argued for the first party;—It was quite settled that where a woman with a Scots settlement married a man who had no Scots settlement, and never acquired one, and was deserted by him, she was entitled, if in poverty, to relief from her own maiden settlement.[1] But in no case was a birth parish liable if a subsequent settlement existed.[2] In the present case the subsequent residential settlement acquired by the pauper in the parish of Rutherglen still subsisted when she became chargeable, as she had not been absent from the parish for four years and a day. It was contended on the authority of *Kirkwood* v. *Manson*[3] that her marriage absolutely destroyed that residential settlement, so that it could not revive on the dissolution of the marriage. But in that case the question was expressly reserved, and the ground of decision did not touch the present case. The early editions of Professor Bell's Principles contained the doctrine that marriage only suspended a maiden residential settlement, which revived at the dissolution of the marriage. This doctrine had been assumed in *Hay* v. *Skene*,[1] *Hay* v. *Carse*,[2] and *Thomson* v. *Knox*,[4] and had also been sanctioned in England.[5] The editor of the 9th edition of Bell's Principles[6] relied solely upon *Kirkwood* v. *Manson*[3] for his statement that the doctrine was now negatived, and, as already stated, the point was in that case expressly reserved.

Argued for the second party;—*Stante matrimonio* a married woman could have no settlement in her own right, whether her husband had one or not.[7] The pauper's marriage had extinguished absolutely her residential settlement, and the parish of her birth was liable for her support.[3]

Lord Young.—There is no doubt that when a woman marries she takes the settlement of her husband, whatever her own settlement may have been before her marriage. The only practical difficulty which is found in applying this doctrine is, where the husband has no settlement in Scotland, or is a wanderer. If he deserts his wife in these circumstances and leaves her adrift in Scotland, what is her settlement to be? She has, like everyone else born in Scotland, a settlement of birth, and of last resort where there is no other. This must be so, or the pauper would go unrelieved altogether.

But another settlement may be, frequently is, and here was acquired, by in-

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[1] Hay v. Skene, June 13, 1850, 12 D. 1019, 22 Scot. Jur. 420; Carmichael v. Adamson, Feb. 28, 1863, 1 Macph. 452, 35 Scot. Jur. 286; Johnston v. Wallace, June 13, 1873, 11 Macph. 699, 45 Scot. Jur. 422.

[2] Hay v. Carse, Feb. 24, 1860, 22 D. 872, 32 Scot. Jur. 366.

[3] Kirkwood v. Manson, March 14, 1871, 9 Macph. 693, 43 Scot. 333.

[4] Thomson v. Knox, June 28, 1850, 12 D. 1112, 22 Scot. 513.

[5] Rex v. Inhabitants of St Botolph's Without Bishopsgate, 1755, 2 Burrow's Rep. 367.

[6] 6 Bell's Prin. secs. 2197 and 2202.

[7] M'Crorie v. Cowan, March 7, 1862, 24 D. 723, 34 Scot. Jur. 365.

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dustrial residence. In this case the settlement was acquired by industrial residence for a period of ten years, between 1874 and 1884. In the latter year the pauper's settlement of birth was entirely superseded by a residential settlement in Rutherglen properly acquired. Then she married, and her husband deserted her. He has no settlement in this country at all, and he cannot be found. Where is her settlement? It was yesterday in Rutherglen, the parish in which she had acquired a settlement by residence, but it is maintained that that settlement, which took her five years to acquire, is destroyed by her marriage, it may be for a day or a week, if her husband deserts her. No one can assent to that proposition.

I think if her husband has a settlement she will take it, but if he has none, and she has to be brought back to her own settlement, then it must be to her last settlement. I see no reason to go back upon her settlement of birth. I reject any argument which leads to the conclusion that if a woman by an industrious life has acquired a settlement, and made enough money to support herself, and then marries a blackguard who robs her, he robs her also of the settlement which she has acquired, and leaves her with the poverty which he has created to go to the parish of her birth.

That is not the law of Scotland. There is no statute nor common law sanctioning it, and every consideration of good sense is against it.

In this case, as in every other case where the husband's settlement fails, she must go to her own settlement and to her last settlement of residence. That settlement may be lost by non-residence for a period of four years and a day, but till it is so lost, it remains her settlement to which resort must be made.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"The Court are of opinion that the burden of supporting the pauper falls upon the parish of Rutherglen, in which, at the date of her marriage, she had a residential settlement: Find and declare accordingly."

H. & H. TOD, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

No. 8.

Oct. 30, 1890.
Chaplins' Trustees v. Hoile.

GEORGE AULDJO JAMIESON AND ANOTHER (Chaplins' Trustees), Pursuers (Reclaimers).—*Low—C. K. Mackenzie.*
MRS KATHERINE ROBERTSON KIRKLAND OR HOILE AND OTHERS, Defenders (Respondents).—*Law.*
STEWART SOUTER ROBERTSON AND ANOTHER, Defenders (Respondents).—*MacWatt.*

Liferent—Clause of forfeiture—Sale.—In a disposition and settlement of landed estate there was a destination of the subjects to one person in liferent and his issue in fee, whom failing, to certain other persons in liferent and fee respectively. The disposition also declared that all who took a beneficial right under it were "prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars"; such sales or mortgages were declared void, and parties signing them were to lose all their rights under the settlement, and give place to the next in succession. *Held* that the clauses of prohibition and forfeiture were valid and effectual to prevent a sale by the liferenter of his liferent right.

Process—Declarator—Declarator ab ante.—Held that it was competent for a liferenter, who held an estate in liferent under a disposition which provided that his liferent should be forfeited in the event of his selling it, to raise *ab ante* a declarator of his right to sell without incurring any forfeiture.

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2D DIVISION. Ld. Kyllachy. I.

GEORGE ROBERTSON CHAPLIN, of Colliston, by a disposition and settlement, dated in 1867, conveyed certain lands to David Souter Robertson, in liferent, for his liferent right and use allenarly, and after his death to Thomas Robertson Chaplin, son of David Souter Robertson, in liferent, for his liferent right and use allenarly, and to the heirs of his body in fee, whom failing, to George Robertson Chaplin, another son of David, in liferent, for his liferent right and use allenarly, and the heirs of his body in fee, whom failing, to the heirs of the body of the said David Souter Robertson, of Lawhead, in fee, whom failing, to the heirs of the body of Mrs Margaret Souter or Kirkland, in fee.

By the same disposition Mr Chaplin conveyed other lands in similar terms to David Souter Robertson, in liferent, and to his sons George and Thomas and their issue, in liferent and fee respectively, whom failing, to Mrs Katherine Kirkland or Hoile and her issue as liferenter and fiars respectively.

By the same disposition the testator conveyed in similar terms other lands to David in liferent, and on his death to his son George in liferent and his children in fee, whom failing, to David's eldest son Stewart in liferent and the heirs of his body in fee, whom failing, &c.

Mr Chaplin died in 1869, and David Souter Robertson in 1888. Thereupon one of the sons, Thomas, succeeded to one parcel of lands in liferent, and George to two parcels in liferent.

These two sons, who were not married, conveyed their whole estates to Mr Jamieson and Mr More, as trustees for creditors, and these gentlemen proposed to sell the liferent interests of their principals in the lands above mentioned.

The disposition, however, under which the liferenters held bore to be granted under certain conditions, which were declared to be inherent qualities of the conveyance, and *inter alia*, under the conditions that "all parties who shall, at my death, or at any time thereafter, have any beneficial interest, contingent or otherwise, under this settlement are thereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is thereby stipulated and provided that such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession who shall be entitled to come in the right and place of the party signing such deeds or instruments."

The trustees accordingly raised an action, asking for declarator that they had full right to sell and dispose of the respective liferent rights of their principals without incurring any forfeiture, and pleading;—(1) The said liferent rights not being protected against creditors, the pursuers, as trustees for behoof of creditors, are entitled to sell and dispose of the same.

They called as defenders the whole of those having interest under the deed.

Mrs Hoile and her children, and Stewart Souter Robertson (David's eldest son) and his eldest son appeared, and pleaded;—(2) The action is incompetent. (4) On a sound construction of the said disposition and settlement of the said George Robertson Chaplin, of Colliston, the liferent interests thereby respectively conveyed to the said George Robertson Chaplin, of Murlingden, and the said Thomas Robertson Chaplin, in the respective lands above mentioned, are alimentary rights not attachable by creditors, and cannot be sold, mortgaged, or otherwise disposed of without incurring the irritancy provided for in the said disposition and settlement.

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The Lord Ordinary (Kyllachy), on 20th March, found the pursuers' averments to be not relevant or sufficient in law to support the conclusions of the action, and dismissed it.*

* "OPINION.— . . . The pursuers contend that this clause of irritancy and forfeiture is wholly ineffectual, (1) because it is not supported by a trust; and (2) because it does not strike at gratuitous alienations or the diligence of creditors, but only at sales and mortgages. They refer to the case of *White*, June 1, 1877, 4 R. 786, and *Kirkland*, March 18, 1886, 13 R. 798, as authorities in their favour, and they maintain that there is no distinction in this matter between a right of fee and a right of liferent, it being, as they contend, equally impossible in both cases to restrict the owner's power of disposal.

"The defenders, on the other hand, contend that there is nothing incompetent in the creation of a temporary interest in land which shall, in certain events, last for life, and in certain other events last for a shorter period, and that it is of no moment whether the event which brings the temporary right to a close is some outside event or some act of the party concerned. They say, for example, that a liferent may be constituted terminable on the succession to some estate, or upon marriage, or upon second marriage, and that it can make no difference in principle that it should be terminable upon, *e.g.*, the execution of some deed, whether a deed dealing with the liferent itself, or any other deed. They admit, indeed, that if a right of fee is once given it is impossible to fetter the fiar's power of disposal, because a fee necessarily involves the power of disposal; but they say that that doctrine has no application to limited interests, which must stand or fall according to their own limitations; and in particular, that it has no application to life-rents, which are truly of the nature of burdens, and the subsistence of which may be made to depend on any conditions which the donor may choose to attach.

"The defenders further argue that in any case the forfeiture here must take effect as regards the liferents to which the trusters have only a prospective right, —that is to say, a right on the failure of the issue of each other. And with respect to the cases of *White* and *Kirkland*, they point out that those cases did not—so far as decision went—touch the present question, and that any dicta in either which may be thought to favour the pursuers' view did not really contemplate the case (which is for the first time presented here) where there is not only prohibition against alienation and a declaration that such alienation shall be null, but where it is an inherent quality of the liferent right that it shall terminate upon a sale or mortgage being attempted.

"The defenders maintain finally that the action is incompetent, in respect that it asks the Court to declare hypothetically the rights of the pursuers with respect to a course of action which they have not taken, and which they may never actually take, and they found upon the doctrine expressed in Mr Mackay's book, vol. 2, p. 93, and the case of the *Earl of Galloway*, 26th June 1838, 10 Scot. Jur. 524, 16 S. 121, there referred to.

"I have felt the questions thus raised to be attended with some difficulty, especially in view of the dicta expressed in the case of *Kirkland*, where this very deed was before the Court. But I have come to be satisfied that the question which is now presented for decision was not really considered by the Court in that case, and did not require to be considered, and, therefore, that I am bound to deal with it as one of principle, and one which is still open. In that view I have come to the conclusion that the defenders are right, and substantially upon the grounds which I have endeavoured to express as their grounds of argument.

"I do not think it necessary to proceed upon the incompetency of the action, although I have, I confess, grave doubts whether the present case does not fall within the principle of that of *Galloway*. But on the merits I accept the defenders' distinction between an attempt to fetter the powers of disposal inherent in the owner of a fee and a declaration, such as we have here, that a right of liferent shall terminate if a sale or mortgage of the liferent (that is to say, of the future fruits which are the subject of the liferent) shall be attempted. I only desire to guard myself by saying that I by no means regard this as implying that if a grant of liferent or of an annuity be conceived in absolute terms, the

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The pursuers reclaimed, and before stating their argument intimated that it would be confined to the liferents in possession, and that they did not propose to deal with those liferents which were *in spe*. Their argument was as summarised by the Lord Ordinary in his note.

The defenders argued in addition to the points stated by the Lord Ordinary;—This right would not be adjudgable, for there was in the selection of the liferenter a *delectus personæ* of the same character as in a tack, and the right of the tacksman was not adjudgable.[1] The contrast between the rights of a fiar and of a liferenter, whereby conditions involving forfeiture could be attached to the latter but not to the former, was brought out in the case of *Mason*.[2] In *Pirie* v. *Murray*[3] conditions of a similar character were found attaching to an infeftment in locality lands.

At advising,—

LORD YOUNG.—This is an action of declarator at the instance of trustees for creditors acting under a voluntary trust-deed granted by the debtors. The trusters are entitled to the liferent of certain estates bestowed on them by the testamentary settlement of a relative, the conveyance being to them respectively for their liferent use allenarly and the heirs of their bodies in fee, whom failing, to certain other persons. The further details are unimportant to the question which was argued to us, and which we are now to decide.

The deed contains this provision,—"All parties who shall at my death, or at any time thereafter, have any beneficial interest, contingent or otherwise, under this settlement are thereby prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars of any of the said estates, and it is thereby stipulated and provided that such sales or mortgages, if made, shall be void, and all deeds or instruments purporting to be a sale or mortgage of such interest, or any part thereof, shall be null and void, and all parties signing such deeds or instruments shall thereby forfeit and lose all right and benefit under this settlement, and shall give place to the next in succession who shall be entitled to come in the right and place of the party signing such deeds or instruments."

The declaratory conclusion of the action at the instance of the trustees of the

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right can be effectually restricted by a mere declaration that it shall be alimentary, or incapable of alienation. Such a condition, I incline to agree with the pursuers, would be ineffectual, at least without the interposition of a trust; for the liferent or annuity would in that case have a fixed duration; and for its duration must be as much at the disposal of the owner as a right of fee is at the disposal of the fiar.

"With respect to the pursuers' argument that gratuitous conveyance is not struck at by the clause, and that adjudication is competent to creditors, I reserve my opinion. I do not at present, I confess, see any good answer to the pursuers' point, at least as regards the liferents in possession. But it is not necessary to decide any question of that kind here, because I see no reason in principle why a testator should not be at liberty to terminate a liferent or annuity on an attempt at sale or mortgage, and yet to leave it open to the liferenter or annuitant to alienate gratuitously, or to the creditors of the liferenter or annuitant to adjudge for debt. The testator in the present case may possibly have considered that gratuitous alienation *inter vivos* was not a very probable event, and may not have desired or may not have seen his way to exclude the diligence of creditors. . . ."

[1] Elliot v. Duke of Buccleuch, 1747, M. 10,329.

[2] Mason v. Mason, 1557, M. 7180.

[3] 1766, M. 8248.

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liferenters is that they are at liberty, this clause notwithstanding, to realise their liferents to pay creditors.

The competency of the action is objected to. I shall deal with that question after dealing with the merits, because I think my views of the merits will serve to illustrate my opinion as to the competency of the action.

The action, I think, must be dealt with on the same grounds, and must be determined on the same considerations, as if it had been brought by the trusters themselves. I cannot distinguish between the position of the liferenters and that of their trustees; every argument which was addressed to us for the trustees is equally available to their principals, and equally forcible in their mouths. I have thought through the matter as well as I am able, and I cannot see any argument available to the trustees which is not equally good—or bad—in the mouths of their principals.

The chief argument in support of their liberty to realise their liferent interest, and of the contention that the clause is ineffectual, is the repugnancy which arises from bestowing on a person an estate, and declaring at the same time that he shall not be able to deal with it as he pleases. If the estate is given, it is said, the person taking it must be able, within the limits of that estate, to deal with it as he pleases. It is quite settled, both here and in England, that, where the whole estate is bestowed on a person, any limitation on the right to use it is void for repugnancy. That is true with respect to all kinds of property; it is obviously true of a sum of money; and it is as true of all other kinds of estate. If you give it without reversion or remainder to anyone else such restrictions are void for repugnancy.

But the same rule is not applicable, the same considerations are not applicable, to a partial or particular estate in a subject, *i.e.*, an estate with a residue or remainder to other persons. That, again, is obviously true with regard to money. Take, again, the instance of a lease. That is an estate given for a number of years. It may be exceedingly valuable. It may be more valuable than the fee; it often is. It is an immediate enjoyment. But the rule as to prescribing terms upon which it is to be held is not at all the same as in the case of a right of fee. You may prescribe in the case of a lease any terms you please; you may say that, on certain events happening, the interests of others shall come in. There is no inconsistency there between the gift and the conditions as to the termination of it.

Now, a liferent is a limited estate, a partial estate. It does not exhaust the whole property; there is a reversion or remainder over to other persons. There is therefore nothing to prevent the condition that this particular limited estate shall terminate earlier in certain events than the end of the life of the person enjoying it. One illustration is a liferent given to a widow on condition that she does not marry a second time. That is not void for repugnancy. There is another estate in existence, through the medium of which the restriction will be enforced. You give the fee to someone else, and, on the occurrence of the event provided for, it comes into play. It is the same with the gift of the interest of money.

The case, then, we have to deal with here is a case of that kind. There are two estates created and given to two different people—the liferent use is given to the liferenters, the fee is given to their issue, and failing them to other people. That fee is brought sooner into operation in certain events.

The testator's purpose was to secure the liferent income of the land to the

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liferenter, and to prevent him from anticipating—*i.e.*, capitalising—it, which the testator thought would not be for his interest. The mode he took of effecting this was to prohibit it being capitalised, and to create another interest—the fee—through the medium of which he thought his intention could be carried out.

The competency of that course is here in question. Now, I think that this was a legitimate purpose, viz., to prevent the liferenter from anticipating, capitalising, or realising their rights. I do not consider—it is not my duty to consider—whether means of baffling that purpose exist. Of course a person can never be completely protected. So soon as he draws his interest at any term it is free from the prohibition, for it then becomes his absolute property. But if the liferenter cannot sell or pledge to creditors his right, moneylenders and others will be slow to minister to his demands, and that is a very considerable protection.

The moment a proposal to sell is made the fiars spring to the front, and say, "our rights are now in possession." The terror of the forfeiture will prevent a sale. That is the operation of the clause, and I think it is valid and effectual to prevent a sale.

That leads me to consider the competency of the action. The question as to the validity and the operation of this restriction is a very fitting subject for a declarator. The liferenters are excusably uncertain as to their rights, as to whether this clause is effectual to prevent a sale. The proposition that they must test their rights by experiment, with the possible result of incurring a forfeiture, is an idle proposition. As I said at first, the same is true of the trustees. They also are entitled to know whether they are at liberty to sell without incurring a forfeiture.

I think that the action is quite competent, and on the merits I am of the opinion which I have already stated.

What creditors might do in the way of realising the estate I am not called on to determine, but I may say that I have the greatest possible doubt whether creditors, who can only take through their debtor, could sell. Of course they may pick up everything as it falls due. But, on the other hand, if you have a direction that on certain conduct by the liferenter the estate shall pass to someone else, that I do not doubt is lawful, and is effectual.

Lord Rutherfurd Clark.—The question is, whether the pursuers can sell the liferents into which they have been assigned and give a good title to a purchaser, or whether the sale will be void by reason of the prohibition to sell and the resolution of the liferents in the event of a sale.

It was conceded that these conditions would be ineffectual to prevent a fiar from selling. And the pursuers contended that conditions which were of no force in the case of a fee must be ineffectual in the case of a liferent. They urged that though the rights are different in their nature they are both equally absolute and equally transferable.

There is a very obvious reason why a prohibition to sell though fenced by a resolutive clause cannot prevent a fiar from selling. The seller transfers the estate to the buyer so that the former is entirely divested, and the latter is fully vested in the fee without being affected by any of the conditions which are personal to the seller. For we are dealing with a case where there is no irritant clause, and I have not to enter on the vexed question whether the occurrence

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of such a clause would make any difference at common law. The result is that after his infeftment the buyer is the owner, and uses not the rights of the seller, which have been extinguished, but his own.

A liferent is no doubt transferable, but the rights resulting from the transference are very different from those resulting from the transference of a fee. I shall avail myself of the language and authority of Pothier to explain the effect of selling a liferent. He says,—"A liferenter can sell his right of liferent; but this sale comprehends rather the emolument which the right of liferent can produce than the right itself, for this right being a right attached to the person of the liferenter cannot be transferred. Consequently the right of liferent subsists in the person of the liferenter notwithstanding that he has sold. The buyer only acquires the emolument of this right, and the power of reaping the fruits in the place of the liferenter so long as the liferent endures"—Pothier, Tr. de Vente, part 6, ch. 3, art. 3, sec. 549. By the sale of the fee the right of the seller is extinguished. The sale of a liferent produces no such result. The liferent continues to exist in order that the buyer may obtain the benefit of his purchase, and in order to do so he uses the rights of the liferenter, so that as soon as the liferent ceases the right of the buyer is necessarily at an end.

It is a quality of the liferents which we are considering that the liferenters are forbidden to sell, and that if they do sell the liferents are resolved. But the resolution of the right of the liferenter at once determines the right of the buyer, which can only exist so long as the liferent subsists. The qualities and conditions inherent in the liferent necessarily affect the buyer because they are inseparable from it.

There remains, however, the argument that the prohibition is of no force as being repugnant to the nature of the right conferred on the liferenter. The pursuers say that the disposition of Mr Robertson Chaplin conveyed a full and absolute liferent, and that the limitation effected by the prohibition against sale and consequent forfeiture is repugnant to such a right.

I do not see why the granter of a liferent is not entitled to fix the conditions on which it shall continue to subsist. He can undoubtedly make it terminate on the occurrence of certain events, as, for instance, on the liferenter entering into a second marriage or succeeding to a particular estate. Why shall he not be able to make it terminate on a sale? If he is entitled to give a liferent which will determine on the occurrence of a certain event, I think that he may make it to determine on the occurrence of any.

Nor is this a matter without interest to the granter in connection with the rights of the fiars. For though it may be said that the powers of the original liferenter and the purchaser are necessarily the same it does not follow that they will be exercised in the same way. The only interest which a purchaser could have would be to make as much out of the liferent as he possibly could. Probably the full purpose of the granter has not been attained because gratuitous alienation is not prohibited. But that is no reason for not giving effect to the conditions which he has imposed so far as they go.

It was not maintained on the part of the pursuers that the defenders had no title to enforce the forfeiture of the liferents. Nor do I think that there is any room for such a plea. For by declaring that the persons so forfeiting their liferent shall give place to the next in succession the testator has raised a title to enforce the forfeiture, though probably no such express declaration was necessary. The pursuers further contended that the diligence of creditors was not

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excluded, and that therefore they should be allowed to do directly what the creditors might do indirectly. I think it very doubtful if the diligence of creditors is excluded. That is, however, a question which I cannot decide in this case. But assuming that the diligence of creditors is not excluded, and that they can proceed with it in ordinary form, I do not think that we can pronounce in favour of a power of sale. For creditors could not sell. They could only adjudge and acquire the liferent as their own by obtaining a decree of expiry of the legal. If they afterwards sold, they would be selling in their own right and not in the right of the liferenters, although no doubt the right of the liferenters would be the subject of sale. It is obvious that the rights of creditors are in no degree commensurate with the powers which the pursuers claim.

Nor can the pursuers obtain any aid by referring to the possibility of sequestration. There is no sequestration, and we cannot determine in this action what the powers of a trustee may be.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD JUSTICE-CLERK.—I am of the same opinion, and it is unnecessary for me to say much after the clear and elaborate judgments which have been delivered by your Lordships.

The condition on which the liferenter is alone entitled to hold the liferent is one which the truster had a perfect right to impose. The clause imposing it is not at all, as regards its effect, in the same position as an irritant clause in a gift of fee would be. The right of one who takes by transference from a fiar is, as Lord Rutherfurd Clark has pointed out, quite different from the right of one who takes by transference from a liferenter. The fiar transferring can by his transference make another a fiar, but the liferenter cannot make his transferee a liferenter. All he can transfer is his own claim to receive the proceeds of an estate for his own life. If, then, the condition on which he holds that claim is inconsistent with any gift by him receiving effect, his transferee can be in no better position, and the limitation imposed upon the right, by one who had a right to impose it, must receive effect.

THE COURT adhered.

TODS, MURRAY, & JAMIESON, W.S.—JOHN RHIND, S.S.C.—ALEX. MORISON, S.S.C.—Agents.

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EGLINTON CHEMICAL COMPANY, LIMITED, Complainers (Reclaimers).—*Asher—Salvesen.*

WILLIAM DAVID M'JANNET (Procurator-Fiscal to Dean of Guild Court in Irvine), Respondent.—*J. Comrie Thomson—W. C. Smith.*

Burgh—Dean of Guild—Jurisdiction.—Held (*dub.* Lord Young) that the Dean of Guild has jurisdiction to require the plans of all new buildings proposed to be erected within burgh to be laid before his Court, although such buildings may be entirely within the enclosed property of the person who is erecting them, and at such a distance from the outside boundaries of it as not to threaten any encroachment on neighbouring properties or danger to persons using the public thoroughfares.

2D DIVISION. Ld. Wellwood. M.

THE facts of this case were thus stated by the Lord Ordinary in his opinion, viz.:—

"Under ancient royal charters, and, in particular, under a charter by Robert II., of date about 1373, there is conferred upon the royal burgh of Irvine and the burgesses thereof,—'The liberty of guild as other burghs

and burgesses of our kingdom have and were wont to have that liberty, and that they may appoint guild brethren in the said burgh of Irvine who shall enjoy, and shall be reckoned to enjoy, every liberty of guild that others whatsoever burgesses of our kingdom hitherto have enjoyed.'

"Under the Irvine Burgh Act, 1881, 44 and 45 Vict. c. lxxi., it is provided, section 53,—'The Dean of Guild shall, subject to the provisions of this Act, have and exercise within the extended burgh all the jurisdiction, powers, and privileges possessed or exercised by the Dean of Guild in any royal burgh in Scotland, and all the jurisdiction, powers, and privileges conferred on him by this Act.'

"The Act contains, in sections 53-65, various regulations and provisions as to the powers of the Dean of Guild, some of them being simply declaratory of powers inherent in the Dean of Guild of a royal burgh, and others being conferred on him by the statute. In the latter class are some of the powers conferred by the 54th section of the statute, which provides that all proceedings under the General Police Act, as modified by the Irvine Burgh Act, with respect to improving streets, removing obstructions, public sewers, &c., may be taken either before the magistrates or before the Dean of Guild. See in particular sections 158-168, 190-194, and 348 and 349 of the General Police Act, 1862.

"Under section 59 of the Burgh of Irvine Act it is provided that proceedings before the Dean of Guild in pursuance of the Act shall commence by an application in writing or in print, or partly in writing and partly in print, and, except when otherwise specially directed, the subsequent steps may be in writing or *viva voce*, as shall be ordered by the Dean of Guild. 'In all other respects the procedure before the Dean of Guild in pursuance of this Act shall be in the form and subject to the regulations applying to the proceedings before the Dean of Guild in royal burghs in Scotland.'

"By section 65 it is provided that the Dean of Guild may from time to time frame rules for the procedure before the Dean of Guild Court, and tables of fees to be exacted in that Court, and bye-laws for the enforcement of such rules by penalties or otherwise, and the recovery of such fees; provided always that none of such rules, table of fees, or bye-laws shall have any force until approved of by the corporation and confirmed by the Sheriff.

"In virtue of the powers conferred by section 65 of the Act, the Dean of Guild framed bye-laws, rules, regulations, and forms of procedure, a copy of which is No. 12 of process, which were duly approved of by the provost, magistrates, and councillors of the burgh on 4th May 1886, and by the Sheriff of the county on 2d July of the same year.

"Those rules and regulations are supplementary to the statutory provisions as to the mode in which the jurisdiction, powers, and authority of the Dean of Guild are to be exercised and enforced.

"The second rule is as follows:—'No building operations of any kind shall be allowed to be erected, added to, or altered within the burgh, unless plans thereof have previously been submitted to and approved of by the Dean of Guild's Court of the burgh.'

"The present process of suspension is brought by the complainers, the Eglinton Chemical Company, Limited, for the purpose of having set aside a conviction or judgment pronounced by the Dean of Guild of the burgh of Irvine on the 27th December 1888, by which the Dean of Guild convicted the complainers of having contravened the rule just quoted, in so far as they erected a tannery or other building without plans thereof having been previously submitted to and approved of by the Dean of Guild Court of the said burgh, or having applied for or obtained the sanction

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of the Dean of Guild of the said royal burgh of Irvine to the said operations, and accordingly fined the complainers in the sum of £5 sterling of penalty."

The complainers pleaded;—(1) The said Court having no jurisdiction over the complainers in reference to the buildings in question, the said decree was *ultra vires*, and the complainers are therefore entitled to suspension and interdict as prayed for.

The respondent pleaded;—(3) The proceedings in the Dean of Guild Court having been regular, and within its jurisdiction and powers, the note should be refused with expenses.

It appeared that in 1888 the complainers, who had large chemical works within the burgh of Irvine, were desirous of making an addition to them in the shape of a tannery. This involved the alteration of an existing building, which had previously been used as a store, and the erection of a new building in continuation of it. The main part of the new building as subsequently erected was 55 feet in length, 17 feet 6 inches to the top of the walls, and 31 feet from the floor to the ridge of the roof. In addition to this building there was what is called a lean-to, extending 40 feet further in length. In addition to the erection of the new building, the walls of an old building against which it was erected had to be underbuilt to a certain extent, an operation requiring some care. The new building was at the nearest point 65 feet distant from the nearest boundary of the complainers' property. The total cost of erecting and fitting up the tannery amounted to £405. The roof of the tannery was a distinct ridge from the roofs covering the complainers' other buildings.

The Lord Ordinary (Wellwood), on 10th April 1890, after a proof in explanation of the plans produced, sustained the third plea for the respondent, and repelled the reasons of suspension.*

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* "OPINION.— . . . It will thus be seen that the building operations contemplated and carried out were considerable, and during the argument I did not understand it to be disputed that if those building operations had been conducted on the verge of the complainers' property, the complainers would have required to obtain the sanction of the Dean of Guild. But they maintain that his sanction was not required in the circumstances, in respect that the buildings erected were not only entirely within their own property, but at such a distance from the boundaries that they could not possibly be regarded as encroaching upon the properties of neighbouring proprietors, or as threatening danger to the public—that is to say, the outside public as distinguished from the workmen employed in the complainers' works.

"Now, the proceedings of the complainers were undoubtedly in the teeth of the letter of the rules and regulations framed by the Dean of Guild, and approved of by the corporation and by the Sheriff; and it may be doubted whether these rules and regulations can be challenged while standing unreduced. But assuming that the complainers could, without bringing a reduction of the rules and regulations, impugn them as being *ultra vires* of the Dean of Guild, they would have to shew clearly and conclusively that it was not within the powers of the Dean of Guild of any royal burgh to insist that in the case of new buildings plans must be lodged, and approved by him. This, I think, they have failed to do.

"The limits of the common law jurisdiction of the Dean of Guild of a royal burgh are not exhaustively defined by authority or decision. The statements of the institutional writers on the subject are scant, and the decisions of the law Courts are comparatively few. Moreover, some of the later decisions are difficult of application, because they turn upon the construction of local statutes, under which, no doubt, to a certain extent the Dean of Guild's jurisdiction at common law is declared and defined, but which also contain supplementary provisions conferring powers which he does not possess at common law; and in

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The complainers reclaimed, and argued;—Their interest to object was plain, for they were frequently making alterations and improvements

some cases the questions raised were complicated by the Dean of Guild's powers and duties being divided between the Dean of Guild and Police Commissioners.

"Dealing with the authorities as they stand, I do not find grounds sufficient to support the complainers' contention. The tendency of decision has no doubt been to confine the Dean of Guild's jurisdiction to matters strictly within his own province. For instance, it has been held that he has no jurisdiction at common law in regard to obstructions in public streets or simple questions of nuisance. But the regulation of all buildings within burgh, both as to their erection and their maintenance, is peculiarly his function. I know of no authority for the contention that his sanction is not required for the erection of new buildings within burgh, wherever situated. No dictum or decision to that effect was cited to me. According to general understanding, the Dean of Guild has *prima facie* jurisdiction in regard to all buildings within burgh, and if any grounds for restricting his powers as to them had been supposed to exist, I should have expected to have found some traces of the question having at least been raised before this.

"The complainers founded strongly upon those cases in which it was decided that the Dean of Guild's sanction is not required for internal operations; and they argued that if such operations, however dangerous, might be carried on without his sanction, new buildings erected at a distance from the boundaries of a property should equally be regarded as internal operations, and as such exempted from his supervision. There is a great deal of force in this argument, because there is no doubt that alterations upon the internal structure of a house may be attended with as much danger as the erection of a new house; but I think that the complainers' contention carries them too far. It was not disputed in the cases referred to that if, instead of altering existing buildings, the proprietor had been erecting them for the first time, he would have required the sanction of the Dean of Guild, although the erection of new buildings might not be so dangerous as the proposed alteration of existing buildings. And this, I think, shews that the reason why the Dean of Guild's sanction is not required in the case of internal alterations is because, the original building having presumably been erected with his sanction and on lines proposed by him, internal alterations are considered to be subsidiary matters with which it would be unnecessary and vexatious for him to interfere in ordinary circumstances.

"The passage from Bankton (iv. 20, 2) quoted by the complainers does not appear to me to assist them much. No doubt the main reasons given for the interference of the Dean of Guild are the prevention of encroachments on neighbouring properties, danger to the public, or the preservation of the amenity of the burgh. But I think that if the whole of the section is read it will be seen that there is no limitation as to the character or position of the buildings with which he is empowered to interfere; and his powers are certainly not expressly confined to buildings erected on the verge of a property. For instance—'This Court has likewise the sole jurisdiction in regulating buildings within borows, whether in repairing or taking down and rebuilding old buildings or erecting new ones.' And again—'Without their warrant, obtained upon citation of all parties having interest, no houses within borow can be built or demolished in whole or in part.'

"It must be kept in view that the question to be here decided is not whether the Dean of Guild would have been justified in refusing to sanction the erection of the building in question after seeing the plans proposed, but simply whether he was entitled as a preliminary to insist on having the plans submitted to him. Now, unless plans are submitted in the case of all new buildings proposed to be erected, it cannot be seen whether their erection will or will not result in encroachment on the property of the neighbours or danger to the lieges. The danger of a new building to the neighbours or to the public is a question of degree. A building erected fifty feet from the boundary might be safe in so far as neighbours or passers-by were concerned, while a building erected only at

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within their works, in which processes which they desired to keep secret were carried on. The Dean had no jurisdiction except when the public safety, *i.e.*, the safety of persons in public places, or the private interests of neighbouring proprietors were threatened.[1] The operations here proposed were more like internal alterations on the fittings of a house, which authority had pronounced to be beyond the Dean's jurisdiction,[2] if they were not attended with danger to the lieges.

The respondent argued;—There was here a large community within the works, for about 500 or 600 workpeople were employed, and it

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a distance of twenty feet might be dangerous. Much, again, would depend upon the height of the building, or in the case of manufactories, on the height of the chimney. Now, all those things cannot be judged of properly without the production of plans, and I think it would seriously impair the utility of the Dean of Guild's Court if in each case a proprietor intending to build were allowed to judge for himself whether he should be required to lodge plans or not. As a matter of regulation and procedure, it is right that such a Court should have power to order plans to be lodged in all such cases.

"Further, although this question is attended with greater difficulty, I am not prepared to assent to the proposition that, where it is proposed within burgh to erect large public works, in which, as here, hundreds of the inhabitants will be employed, the Dean of Guild has no jurisdiction or right and duty of supervision in the interests and for the protection of the workmen employed. If the complainers' argument is to be carried to its logical conclusion, they would have been entitled to erect the whole of their works, excepting in so far as they abut upon neighbouring properties or public streets, without the sanction of the Dean of Guild.

"In the present case, so far as I can judge from the evidence, the tannery in question seems to have been properly and safely erected, and no danger to the public is to be anticipated; but this is judging *ex post facto*, and I do not think that this consideration affects the question which I have to decide.

"So far I have spoken solely of the Dean of Guild's powers at common law. But it is not immaterial to note that by the imported sections of the General Police Act he is given powers which might not be held to belong to him at common law.

"Another matter was referred to by the respondent in the course of the discussion as giving the Dean of Guild an interest and right to call for plans, viz., —the drainage of the new tannery. The complainers contended that that was a matter with which the Dean of Guild had nothing to do. Now, it is quite true that at common law the Dean of Guild is not entitled to interfere on the ground of nuisance alone. But I am disposed to think, in the first place, that where new buildings are to be erected it is a customary part of the Dean of Guild's duties and powers to satisfy himself as to the mode in which it is proposed to drain such buildings. In the present case it is not disputed that the drain from the tannery ultimately joins one of the public drains of the burgh; and this being so the Dean of Guild might, in the interest of the public, be entitled to insist upon seeing the mode in which the tannery was to be drained, and in insisting that notice should be given to any of the inhabitants who might be injuriously affected by the discharges.

"Further, under the 54th section of the Irvine Burgh Act the Dean of Guild possesses wider powers than those which he possesses at common law in regard to such matters. See in particular sections 190-194 of the General Police Act, 1862; and the 8th of the Rules and Regulations contains directions upon this very point.

"On the whole matter, I am of opinion that the reasons of suspension are not well founded, and that the note must be refused."

[1] Erskine, i. 424; Bankton, iv. 20, 2.

[2] Speed v. Philip, March 16, 1883, 10 R. 795; Somerville v. M'Gregor, Nov. 7, 1889, 17 R. 46.

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was well that the Dean should be consulted as to the stability of buildings where the lives or limbs of so many persons were exposed to risk. The point taken by the Lord Ordinary as to the drainage of the new buildings was also of importance. The case of the tunnel under the Mound[1] was an example of an extension of the Dean's jurisdiction beyond mere building operations. There was authority for the proposition that a house, the method of construction of which made it a nuisance, might be removed by the Dean of Guild.[2] Besides, it might very well be that there was a duty on the complainer to lodge his plans, even if on a simple inspection of these it was apparent that the Dean had no jurisdiction.[3] Otherwise the person building would be allowed to determine for himself the extent of the Dean's jurisdiction. *Buchanan's* case[4] was a case where no such plea as the complainers now took was taken, although it was plain that there was ground for it.

The Court having desired some information as to the practice in the Edinburgh Dean of Guild Court, they were informed from the bar that the Lord Dean was in use to exercise jurisdiction over all buildings within burgh, even although within private enclosures, excepting only the Castle buildings.

At advising,—

LORD JUSTICE-CLERK.—This case relates to the powers of the Dean of Guild Court in the burgh of Irvine, and the exact question as raised by this suspension is whether or not the Dean of Guild has a right to require that any person within the burgh desiring to build a new building or to alter an existing building shall lay the plans before the Dean of Guild Court and get the Dean of Guild's warrant and authority.

Now, the Dean of Guild Court of Irvine is undoubtedly a Court properly constituted, because by an early royal charter the liberty of guild is given to the burgh of Irvine as to any other burgh in the kingdom, and that Dean of Guild Court so constituted is recognised by 44 and 45 Vict. cap. lxxi., which is the Irvine Burgh Act, by which it is enacted "that the Dean of Guild shall, subject to the provisions of this Act, have and exercise within the extended burgh all the jurisdiction, powers, and privileges possessed or exercised by any Dean of Guild in any royal burgh in Scotland, and all the jurisdiction, powers, and privileges conferred upon him by this Act." Therefore most undoubtedly the Dean of Guild Court of Irvine is a duly constituted Court of Guild.

The extent of the jurisdiction of the Dean of Guild is of course a different question. It is not disputed by the complainers here that he has a duty of protection of the bounds of property to see that buildings that are about to be erected do not encroach beyond their own proper limits. The complainers say that in this case there was no need to have his warrant on that matter, because the outmost line of the buildings which they were erecting is 65 feet or thereby from the edge of their property. I do not see how that affects the question of whether they should have gone to the Dean of Guild Court at all. If they

[1] Edinburgh and Glasgow Railway Co. v. Dymock, Nov. 27, 1847, 10 D. 158, 20 Scot. Jur. 46.

[2] Proprietors in Carrubbers Close v. Reoch, 1762, M. 13,175; Vary v. Thomson and Another, 1805, M. App. *voce* Public Police, No. 4; see also Lord Mackenzie in Donaldson v. Pattison, Nov. 14, 1834, 13 S. 27, 7 Scot. Jur. 43.

[3] Moss v. Bradford, Nov. 22, 1873, 1 R. 208.

[4] Paisley Provident Co-operative Society, Limited, v. Buchanan, Nov. 12, 1889, 17 R. 66.

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were able to shew to the Dean of Guild Court at once that the boundary within which they proposed to erect did not encroach, they would be entitled to a judgment from the Dean of Guild as a matter of course, so far as that matter was concerned. But if parties are to judge for themselves in that matter, one would like to know where the line is to be drawn at which they are to judge. They are first to settle where the boundary of their own property is, and then say how far they are going back from what they say is the boundary of their own property, and when they think it is far enough, and that the Dean of Guild could not possibly give a judgment against them, they are to be entitled to judge for themselves, and not apply for his warrant.

I do not think that is a sound way of dealing with a matter of this kind at all. The principle of the Court is that parties must lay their plans before the Dean of Guild Court. In many cases that may be a mere matter of form, but the question whether it is to be dealt with as a mere matter of form is a question for the Dean of Guild and not for the party; he is not to be a judge in his own case.

But taking it as a fact that there was no question here of encroachment, it certainly would not settle the question in this case, because a jurisdiction of this kind cannot possibly be satisfactorily exercised unless it is exercised before works are commenced. It would be very unsatisfactory for people who desired to object to works, or for the Dean of Guild himself who thought it his duty as a public official to object to works, or for the Police Commissioners who might think proper to object for other grounds in the public interest, and it would be most unsatisfactory for the people who proposed to execute buildings themselves, if the Dean of Guild's jurisdiction and authority were only to be invoked, after the buildings had been commenced, at the complaint of someone who had an interest or a right to object. It is in the interests of all parties that every such question that can be settled before buildings are commenced should be settled, and it would cause the greatest possible public inconvenience and the greatest possible private inconvenience if any other course were followed.

But that is true upon the footing that the question is one merely of lining, and it was argued to us on behalf of the complainers that as what the Dean of Guild had to give was a decree of lining, that was the whole question which was involved before him. I do not think so. Although the Dean of Guild may be perfectly satisfied that the boundaries are all correct, and that there is to be no encroachment either upon public or private property, and that therefore he could give a lining so far as the outside walls of the building are concerned, I think it is not his duty to issue that decree of lining and give authority to proceed merely on that ground. If there are other circumstances connected with the building which is proposed to be erected which make it improper that the person should be allowed to build the buildings as he proposes to build them, even though they are to be entirely within his own ground, the Dean of Guild may have an absolute duty to withhold his decree. Because it is quite plain, from the history of the matter, which the Lord Ordinary has given us with great care and elaboration in his note, that the Dean of Guild's jurisdiction does not extend merely to lining, but extends to the public safety and the other public interests, including in public safety the safety of the individuals on either side of the place at which the buildings are proposed to be erected. But not only so,—not only is it at common law so, according to our old customary

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law, that the Dean of Guild has that jurisdiction,—but by this Irvine General Burgh Act, by which the Dean of Guild of that burgh gets the powers of any Dean of Guild of a royal burgh, it is enacted that, under certain clauses of the General Police Act, which has been adopted by the burgh of Irvine, which relate to those matters which generally come under the cognisance of the Dean of Guild,—the jurisdiction of the Dean of Guild or of the Magistrates, as defined in that Act, shall be applicable in the burgh. Now, those clauses of the General Police Act are very numerous, but there are a considerable number of them which plainly relate to such matters. There are clauses in reference to the setting forward or setting back of buildings for the general interest of the burgh; there are clauses relating to the drainage with a view to the health and comfort of the burgh; and there are clauses relating to the safety of party walls of buildings and to the arrangements for the ventilation of buildings.

Now, it appears to me that if all these matters are matters truly within the cognisance of the Dean of Guild of the burgh of Irvine, it is quite plain that it must be part of his duty to see the plans of buildings before they are erected, because nothing could be more inconvenient to all parties than that the intervention of the Dean of Guild should arise in matters of drainage and matters of ventilation only after the evil has been done; and of course as regards party walls for the purpose of making the buildings safe, that also is a matter which plainly ought to be attended to as a matter of plan originally—in the interests probably most of the person who is going to erect the buildings. Therefore, in my judgment, the Dean of Guild Court has a duty to act in every case, and having a duty to act, is entitled to warn the inhabitants, as is done by the regulations issued in the burgh of Irvine, which have not been in any way attacked as illegal, or reduced,—to warn them that his jurisdiction must be invoked by application to him for a warrant upon all occasions when it is proposed to erect a new building or to make alterations on an old building.

The case was treated by the complainers very much as if the Dean of Guild in these matters was a kind of irresponsible tyrant who could do what he pleased, and that if they were obliged to go to the Dean of Guild they might be subjected to any sort of injustice or unreasonable interference with the works they proposed to execute, but that is not the state of the law at all. The Dean of Guild has a responsibility to fulfil, and if he fulfils that responsibility justly and fairly, then of course all is well, but if the Dean of Guild does anything capricious or contrary to law, and does not carry out his functions according to the powers which he possesses, his judgment can be brought under review—and is constantly brought under review in this Court—and any injustice or illegality which he may commit can be put right; and, therefore, that ground on which the complainers endeavoured to maintain their case was entirely fallacious. It was suggested in the course of the debate,—I put it to the counsel for the Eglinton Chemical Company quite distinctly, and practically got the answer,—that the Dean of Guild was merely a sort of detective-officer going about seeing what was being done in the burgh, and whenever he saw something wrong, interfering and stopping the proceeding and trying to get it put right. I do not think that is the function of the Dean of Guild Court at all. The function of the Dean of Guild Court is to see and approve of all plans of buildings to be erected or altered in the burgh before these are proceeded with, and it is the duty of all citizens, under the law in the burgh of Irvine, as I believe it to be their duty

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practically in all the burghs in Scotland, to lay their plans before the Dean of Guild and ask for his warrant.

The only law which was quoted by the complainers against that view is contained in two cases, but I do not think that either of these cases has the slightest bearing upon this. In the first place, they were cases of a totally different kind. They did not relate to any building at all. They related entirely to certain operations which had taken place within the walls of the old building, or which were about to take place there. If the case in Dundee could be held to lay down the principle that a person without any authority could take down all the internal structure of his house and only leave the four bare walls outside without any municipal sanction, then that would be a judgment with which I could not agree, because, of course, in every building of any size a good proportion of the internal walls of the building are not merely partition walls in the strict sense, but are structural supports to the building itself. But, in that case—*Speed* v. *Philip*—there was not a failure to apply to the municipal authority. It appears that in Dundee there has been for a considerable time some conflict of jurisdiction as between the Dean of Guild Court and the Police Commissioners, and in that particular case the person who had pulled down the inside of his house had applied to the Police Commissioners and got their sanction for what he had done. He may have applied to the wrong Court, but he was certainly not in the contumacious position of having passed by the municipal authority in the matter, and further than that, he had given distinct intimation that whenever he proposed to proceed to build on the ground where he had taken down the internal part of the house, he did intend to get the Dean of Guild's warrant for his new buildings. The Court thought that in those special circumstances they were not called upon to hold that the party who owned the building was in any way in fault for what he had done, and was therefore not to be dealt with by way of punishment for what he had done. If the case went any further than that, I say again that I could not agree with the decision, but I do not think it does.

The only other case is one which occurred in this Court last year (*Somerville* v. *M'Gregor*, 17 R. 46), in which the Dean of Guild Court endeavoured to assert its jurisdiction to interfere with certain changes made in the internal arrangements of a house in London Street. These internal alterations consisted in no way of interference with the structure at all, but were simply of the nature of lath and plaster partitions—or lath and standard partitions probably—dividing off the rooms in a different way from that in which they had been divided off before. They made no difference whatever upon the strength of the structure, and could make no difference. They made no structural alteration in any respect, and on that ground we held that it was not necessary in such circumstances to invoke the jurisdiction of the Dean of Guild and obtain his warrant.

It appears to me that neither of these cases—which were the only authorities cited to us on behalf of the complainers—have the slightest bearing upon this case, which is the case of an entirely new building proposed to be constructed by these complainers, and for which they did not apply for a warrant to the municipal authority at all. In my judgment, they were bound to apply to the Dean of Guild, and lay their plans before him before proceeding with the buildings, and on these grounds I have not the slightest hesitation in concurring in the judgment given by the Lord Ordinary, and in the very careful and elaborate and excellent statement he has made in his note as to the law on the subject.

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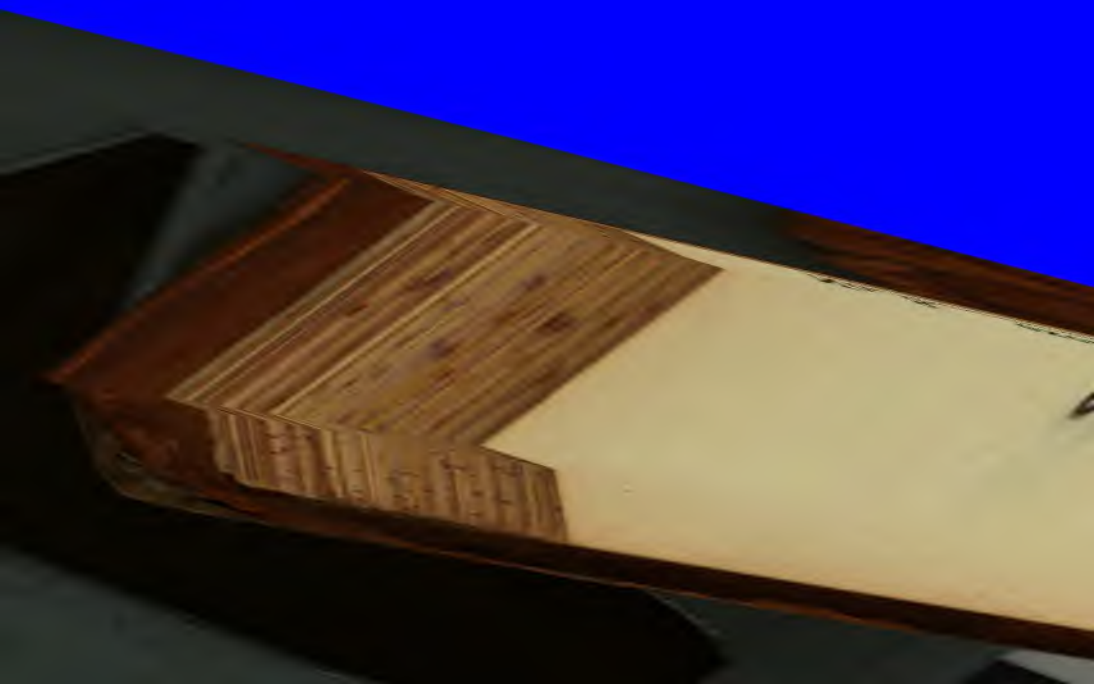
Oct. 30, 1890. Eglinton Chemical Co., Limited, v. M'Jannet.

LORD YOUNG.—I must say that I think this case is attended with grave and serious difficulty, and it is with hesitation that I concur in the judgment which is about to be pronounced. The Dean of Guild's jurisdiction is, generally speaking, a common law jurisdiction, and it is, in many respects, a little vague; and I think all Deans of Guild had better take into consideration when their services are likely to be useful in the public interest, for they have no other interest, and where their interference would be merely mischievous and troublesome.

The Lord Ordinary says in his note here that he knows of no authority for the contention that his,—that is, the Dean of Guild's—sanction is not required for the erection of new buildings within burgh wherever situated. Now, I must say that I cannot affirm the proposition that the Dean of Guild's sanction is required for the erection of any building within burgh, wherever situated. One may possess a villa within burgh situated in a park of 20, 50, or 100 acres—all within burgh and with a park wall. The proposition that the proprietor could not build a cart-shed or an addition to his stable or his coach-house without resorting to the Dean of Guild—it may be a tradesman from the adjacent town who has been disappointed in his offer for the work—to sanction the plans is a proposition which does not commend itself to my mind; and I am not prepared to say that merely because this villa with the 100 acre park round it is within burgh, therefore the common law requires that the Dean of Guild should be called in to sanction any addition to the house or to the stables, or anything of the like. I do not know how he is to know—unless he happens accidentally to have been applied to as a tradesman to give an estimate for the work—what is going on within the park wall. There is no neighbouring proprietor. There is nobody complaining to him, and unless he or some other person is going about as a detective to see whether there are any buildings of that kind going on, I do not know how he is to ascertain the fact.

Now, that is not according to our practice. I think our practice—the practice which is really the common law—is that an application to the Dean of Guild is necessary where the intended erections are in the immediate vicinity of a public place or of neighbours who may have an interest to object. I think in all these cases judgment and discretion require to be exercised, and ought to be exercised, by the Dean of Guild to begin with, and by us on appeal, if recourse is taken here to know whether he has acted reasonably and sensibly, or has gone out of his way. The Dean of Guild will generally be considerably under the influence of the permanent officials of such an establishment; I think there is judgment and discretion required of him and his officials to begin with, and that we must exercise it upon appeal to us in any particular case.

Now, I have put by way of illustration a case within burgh, and technically and really within the jurisdiction of the Dean of Guild, in which I think his interference would be outrageous, that he would be making himself a perfect nuisance, and ought to be restrained in continuing any such course of conduct. I put a case illustrative of that. Here the circumstances are different, but I think we have, as a matter of judgment and discretion, to consider whether the Dean of Guild exercised a just judgment which involves a just discretion in interfering here, and it is there that I have very grave doubts indeed, although I have come in the end to the conclusion that I ought not to state a dissent to what I understand will be the judgment, concurring with the Lord Ordinary.



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declare, that if, in any year from Whitsunday to Whitsunday, the said annual income or produce shall not amount to £250 sterling, then, and in that event, I direct my trustees to make payment to my said wife of such a sum out of the capital of my estate as will, when added to said annual income or produce for said year, make the sum paid to my said wife during said year £250 sterling."

He disposed of the fee after the death or second marriage of his wife, and then gave his trustees powers of investment in these terms, viz., "to invest the trust-funds in the purchase or on the security of lands, houses, feu-duties, or ground-annuals, or other heritable property, or in the shares or stock or bonds or mortgages of any incorporated companies, or public trusts in Great Britain or Ireland, or in the preference stock of any railway company in Great Britain or Ireland where the ordinary stock of such railway company has on the average of three years preceding the date of such investment paid not less than two per centum per annum, and to call up, realize, and change the said investments from time to time, to continue any investments I may have made, even although such investments may not be such as my trustees would, under the provisions hereof, be entitled to make."

The widow on 11th February 1890 raised an action against the trustees in the Sheriff Court of Lanarkshire for two sums of £25, 8s. 6d. and £11, 9s. 4d., being the amounts of two accounts paid by the trustees to their law-agents from the gross revenue in May 1887 and in May 1888.

The pursuer averred that these accounts were for professional work done by the defenders' agents "in connection with the management of the trust and the investment of the funds thereof," and had been wrongfully deducted from the revenue instead of from the capital of the estate.

The defenders stated;—"The law expenses incurred in executing the trust up to the time when the residue was ascertained and invested were paid by the defenders out of the gross capital of the estate.. The two accounts in process—the amounts of which are sued for—are the law-agent's accounts for the subsequent ordinary management of the trust affairs."

The pursuer pleaded that the sums had been retained from revenue in violation of the terms of the trust-deed.

The defenders pleaded;—(2) The accounts in question being for ordinary trust management, formed proper charges against the revenue of the estate.

It appeared from the accounts that the material portions had been incurred with reference to changes in investments.

The Sheriff-substitute (Guthrie), on 20th March 1890, after findings as to the terms of the deed, found "that these directions import that the residue is to be ascertained after payment of the whole expenses of the trust of every kind, including such outlays as those connected with the renewal of investments from time to time; and that the pursuer is therefore not bound to suffer deduction from her liferent of the accounts condescended on, but that the same fall to be paid from the capital held by the trustees: Therefore decerns as craved."*

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* "NOTE.—It would perhaps be more convenient, as a question of accounting, if the opposite view to that embodied in the interlocutor were taken. But it is not, I think, authorised by the terms of the trust-deed, which gives the law of the case. The pursuer is made liferentrix of the residue, and is to receive at once the free annual proceeds of it. And the residue is by the clear intention of the deed what remains 'after fulfilling the foregoing purposes,' one of which is payment of 'the expenses of every kind connected with the execution of the

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The trustees appealed, and argued;—The directions in the first purpose of the deed had reference merely to the initial expenses of the trust. The direction to pay the "free" annual proceeds to the widow implied that some deductions were to be made from the gross annual income, and no deductions were more reasonable than those necessary to secure a proper return from the trust-estate. A change of investment was in the interest of the liferenter, for the fiar would be content to leave the money in consols. The trust, indeed, existed for the liferenter only, in proof of which it was certain that when her liferent was over the trust would come to an end.

Argued for the widow;—By the terms of the deed these expenses fell upon the capital. The language of the first purpose was very wide, and "free" proceeds contemplated nothing more than the deduction of the expense of collecting the income. The trust existed for the fiars and not for the liferenter; to keep the estate safe from the possibility of dilapidation by the liferenter. Besides, the fiars as well as the liferenter were interested in a good return being obtained for the money, for if the income fell short of £250 in any year the deficiency was to be made good to the widow out of capital.

At advising,—

Lord Justice-Clerk.—In this case the question arises whether certain expenses incurred, for the most part, in so far as at all material, with reference

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trust hereby created.' I can put no other meaning on these words than that the pursuer's right to the free annual proceeds of the residue is not to be burdened with the expenses of management, which are expenses connected with the execution of the trust—except in so far as the residue of the capital sum is from time to time diminished by the payment of such expenses.

"The two cases cited by both parties as bearing on this question do not appear to be decisive. In the later case, *Baxter & Mitchell* v. *Wood*, 2 Macph. 915, 36 Scot. Jur. 460, there is no statement of the terms of the trust; and indeed the case rather turns upon general principles applying to circumstances different from those of the present case. In the other, *Pearson* v. *Casamajor*, 2 D. 1020, 12 Scot. Jur. 494, principles are laid down which are referred to by Professor Montgomerie Bell (Conveyancing, 943, second edn., 950 third edn.), as 'useful in general practice.' But it rather seems that Professor Bell regarded them as referring to the case where the trust-deed is silent on the subject. I am not sure that in the case of *Pearson* the trust-deed was silent; for its terms are more fully given in the House of Lords Report in 2 Rob. 218, than in either of the Court of Session Reports (15 S. and 2 D.), and seem to have been not unlike the first purpose of the deed now before me. But the clauses disposing of residue were there entirely different from the present deed, and afforded no such distinct indication of intention as we find in the terms and collocation of its directions.

"No distinction was made in argument between the various charges in the accounts in process; and I have dealt with the accounts on the footing that they apply entirely to work connected with changes in investments. According to the usual and proper practice in the management of trust-estates where the trust-deed is silent or less distinct than it is here, such expenses, as I have always understood, are charged against capital; and if that course—as explained by Professor Montgomerie Bell and the Lord Ordinary (Moncreiff) in *Pearson* v. *Casamajor*—had been followed, the pursuer would very probably have raised no question as to minor and ordinary charges, if there be any such. But the trustees' directions are here so special that it would be difficult to allow even expenses of ordinary management, such as factor's commission, to be deducted from the annual proceeds of the residue in the event of that smaller question being raised."

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to changes in trust investments, fall on the liferent of the widow, or are to be deducted from the capital of the estate.

Of course trust expenses may fall into two or, perhaps, three categories. They may distinctly be expenses falling on the capital, or they may be mere expenses of collecting the income, or they may be such expenses as are involved in calling and holding the meetings of the trustees, which will in all likelihood fall, if strictly examined, partly under one and partly under the other of the two former heads.

But, as I have said, the main expense we have to deal with here is the expense incurred in uplifting investments, and in finding new investments for the funds so uplifted, and in investing the funds when suitable opportunities present themselves.

For some time the trustees here have been in the habit, in perfect *bona fides*, of deducting those expenses from the income of the widow, but she now demands that they should be repaid to her.

It is important to see what the powers of the trustees as to expenses are. Now, the first purpose of the trust is in these words, viz. :—"I direct my trustees to pay all my just and lawful debts, sick-bed and funeral expenses, and the expenses of every kind connected with the execution of the trust hereby created."

Occurring in that place, these words might be read as referring merely to the expense of putting the trust into operation. That is a possible reading of them, but, looking at the whole terms of the deed, I am of opinion that they cover all the expenses of the trustees in performing their trust duty. The trust contemplates a tract of time. There is a liferent provided to the widow, and the subsistence of that liferent may involve a continuance of the trust for a long time. The expense incurred in the discharge of the trust duty of seeing to the safety of investments, and of improving them from time to time, is therefore as much an expense of the trust as the initial expense of setting it in operation.

Then the widow is to receive "the free annual produce of the" residue, and it was argued that "free" means "whole"—that the income is not to be diminished in any way. I am not clear that that is so; I think it may very fairly mean what remains after deducting the expense of collection. That, however, is a trifling matter. The expense which raises the question here is the expense of considering the state of the investments from time to time, and of making such alterations on them as the trustees may consider expedient.

If these expenses are deducted from the capital the burden of them, it is obvious, will affect the interests both of fiar and liferenter. I find nothing inequitable in that.

Dealing, then, with this case on the words of the deed, I think that the interlocutor of the Sheriff-substitute is sound.

LORD YOUNG.—I concur, but I wish to say a word or two with reference to the future administration of this trust as well as to the past. I should also like to say that I should have arrived at the same conclusion irrespective of the words of the deed.

After the trustees realised the truster's property they got £12,000, and their duty was to invest that for behoof of the truster's widow in liferent, and certain parties in fee.

Irrespective of any words in the trust-deed about paying expenses, I should have held it clear on the rules of common law that the charge of realising the

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estate—turning it into money to begin with, and then investing that money suitably—was a proper charge upon capital. I do not know that that was disputed. The original investment of £12,000 cannot last. It frequently is the duty of trustees in the interest of all the beneficiaries, fiars as well as liferenters, to change the investment. Sometimes they cannot help it. The debtors pay up, and the investment must be changed. But on the rules of the common law, irrespective of any special provision on the subject, when trustees require to change investments of trust funds held by them for fiars and liferenters, the charges are charges on the capital—not only the original investment, but all proper changes by the trustees in the discharge of their duty.

We were told that the trustees had been frequently assailed by the widow, and requested by her to get more profitable investments with a view to increasing her liferent, and that they exerted themselves for that purpose, and changed the investments frequently, and that at an expense of, I think, £30 in seven years. I think their duty was this: With respect to all investments which they thought proper to make, and which were not solely for the widow's own immediate interest, but for that of the fiar as well, they ought to have paid the charges out of capital. If, on the other hand, they changed the investments for behoof of the widow exclusively, without prejudice to the fiar, they should have stipulated beforehand with the widow that she should pay the expense in connection with the investments. As I said in the course of the argument, there was nothing to prevent the trustees from investing the trust-estate in the Funds and giving her only the interest of it. I must say that if this expense was really incurred by the changing of investments at the request of the widow, I cannot commend the good taste of the action. But nothing is stated of the kind on record. I agree in the view that the investments must be taken as having been made unavoidably, or in discharge of the duty of the trustees, in the interest of both parties, and therefore that the charges in connection with the investments must be charges against capital.

LORD RUTHERFURD CLARK concurred.

THE COURT refused the appeal.

MACPHERSON & MACKAY, W.S.—JAMES DRUMMOND, W.S.—Agents.

No. 11.

Oct. 30, 1890. Calder v. Local Authority of Linlithgow.

JAMES CALDER, Pursuer (Reclaimer).—*Asher—Ure.*

LOCAL AUTHORITY OF LINLITHGOW, Defenders (Respondents).—*Low—G. R. Gillespie.*

Jurisdiction—Review—Contagious Diseases (Animals) Act, 1878 (41 *and* 42 *Vict. cap.* 74), *sec.* 30 (7)—*Animals Order*, 1886, *sec.* 179—*Compensation for slaughtered animals—Local Authority.*—By the Contagious Diseases (Animals) Act, 1878, the Local Authority may, in the case of an outbreak of disease, slaughter the whole cattle composing the herd, whether infected or not, giving the owner compensation as therein provided.

The 30th section of the Act enacts that the Local Authority may, if they think fit, withhold compensation either wholly or partially "in respect of an animal slaughtered . . . by their . . . order, where the owner . . . has, in their . . . judgment, been guilty, in relation to the animal, of an offence," as defined in section 61 (1) of the Act.

Held that to justify a Local Authority in withholding compensation for an animal slaughtered it is necessary that they should ascertain and determine that the offence has been committed, and that such determination should be recorded in the minutes, and that it is not necessary that the outbreak of disease should be traceable to the offence.

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In an action against a Local Authority, by the owner of cattle slaughtered by their order, for compensation, the Local Authority founded on a minute of meeting after the date of the action in which they stated their opinion "that the pursuer had not adduced any reason to induce the Authority to pay compensation for these animals in regard to which it is alleged that an offence had been committed" and resolved to withhold compensation, and pleaded that the jurisdiction of the Court was excluded.

The Court, in respect that the minute did not state that the defenders had ascertained and determined that the offences had been committed, *adjourned* the case to allow them to supply this defect in their determination, and on a subsequent minute of meeting being produced, setting forth a finding by them that the offences had been committed and their resolution to withhold compensation, the Court *sustained* the plea of no jurisdiction.

1ST DIVISION.
Lord Trayner.
C.

JAMES CALDER, distiller, Bo'ness, kept a large stock of cows, one of which, in the beginning of September 1889, was seized with pleuro-pneumonia. It was accordingly slaughtered, along with all the other cows in the same herd,—numbering forty-six,—by orders of the Local Authority of the district of the county of Linlithgow, in terms of the provisions of the Contagious Diseases (Animals) Acts, 1878 to 1886, and the Order in Council of 1888.*

The forty-six cows were valued by the Local Authority for the purposes of compensation under the same Acts † at £736, 10s., and this sum, along with £10, 10s. compensation for the slaughter of the diseased animal and £7, 14s. 9d. expenses incurred in connection with the disinfection of the premises, burial of carcases, &c., was now sued for by Calder in an action at his instance against the Local Authority—the summons in which was dated 16th January 1890.

The defenders offered to pay the pursuer £377, 10s. in respect of the cattle slaughtered, and £4, 6s. 8d. of expenses. The £377, 10s. was made up of payment in full for fifteen healthy cows slaughtered, and of three-fourths of the value of eleven which were said to be diseased (including the £10, 10s. claimed for the first one slaughtered). With regard to the remaining twenty-one, which went to make up the forty-seven, the defenders stated that the pursuer, or the person having charge of them on the pursuer's behalf, had committed offences either against the Act itself or against regulations framed by them under section 20 of the Animals Order of

* The Contagious Diseases (Animals) Act, 1878, sec. 21 (1), enacts,—"A Local Authority shall cause all cattle affected with pleuro-pneumonia to be slaughtered within two days after the existence of the disease is known to them."

The Pleuro-Pneumonia Slaughter Order of 1888, sec. 1 (1), provides,—"A Local Authority shall cause all cattle being, or having been, in the same field, shed, or other place, or in the same herd, or otherwise in contact with cattle affected with pleuro-pneumonia, to be slaughtered within ten days after the fact of their having been so in contact has been ascertained, or within such further period as the Privy Council may in any case direct."

† The Contagious Diseases (Animals) Act, 1878, sec. 21 (3), enacts,—"The Local Authority shall, out of the local rate, pay compensation as follows:—For cattle slaughtered under this section (1) where the animal slaughtered was affected with pleuro-pneumonia, the compensation shall be three-fourths of its value immediately before it became so affected, but so that the compensation do not in any such case exceed £30."

The Slaughter Order of 1888, sec. 2 (1), provides,—"The Local Authority shall, out of the local rate, pay compensation as follows for cattle slaughtered under the authority of this order:—The compensation shall be the value of the animal immediately before it was slaughtered, but so that the compensation do not in any case exceed £40."

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1886, breaches of which were by the provisions of section 61 (1) of the Act of 1878 declared to be offences against that Act. These offences consisted (1) in moving cows from places outside the defenders' district into their district without declarations required by the defenders' regulations, or under false declarations; or (2) under declarations imperfectly attested. Accordingly they withheld compensation, in terms of the subjoined provisions of the statute,* but gave the pursuer an opportunity of making representations respecting the circumstances alleged.†

The pursuer stated in reference to these alleged offences,—"The cows with regard to which the offences were charged were not said by the defenders to be, and in point of fact were not, the same cows as those for the slaughter of which compensation is now refused. The said charges, which are referred to, were in themselves frivolous and purely technical, and it was not even pretended by the defenders that these alleged offences had any connection whatever with the outbreak of pleuro-pneumonia. The pursuer did not know, and the defenders did not suggest that he knew, that there was any pleuro-pneumonia among his cows until the beginning of September 1889, when he at once sent information to the Local Authority." And he further averred that in rejecting the pursuer's claim for compensation, "the defenders were acting outwith the statute, and their conduct was characterised by malice and oppression."

* The Contagious Diseases (Animals) Act, 1878, sec. 30, parag. 7, enacts,—"Notwithstanding anything in this Act, the Privy Council or a Local Authority, as the case may be, may, if they think fit, withhold, either wholly or partially, compensation or other payment in respect of an animal slaughtered under this Act by their respective order, where the owner or the person having charge thereof has, in their respective judgment, been guilty in relation to the animal of an offence against this Act, or where the animal, being a foreign animal, was, in their respective judgment, diseased at the time of its landing."

The Animals Order of 1886, sec. 179, provides,—"A Local Authority before determining, under paragraph 7 of section 30 of the Act of 1878, to withhold, either wholly or partially, compensation or other payment in respect of an animal slaughtered by their order, shall give to the owner of the animal an opportunity of making representations to them respecting the facts and circumstances of the case, and shall consider the same."

† The statement which Mr Calder had been called upon to answer was dated 31st January 1890, and contained details of the alleged "offences,"—nine in number,—applicable to thirty cows, the majority of which were committed between 9th January and 27th June 1889.

In his answers to the statement the pursuer pointed out that the first complaint was dated 21st November 1889, and was only intimated after the claim for compensation had been made, and more than six months subsequent to 9th January when the alleged offence was committed; that the outbreak of disease in September 1889 could not be connected with the movement of cattle some months previously; that the attestations had probably been regarded by his servants as mere formalities, or that they occurred in cases where attestors could not conveniently be got, and were therefore to be regarded as mere inadvertencies. He further pointed out that it had not been shewn that the cows, or any of them, were the cows with reference to which the Local Authority were refusing to pay compensation.

The following was the minute of meeting of the Local Authority, held on 5th May 1890, so far as regarded the statement and answers:—"The meeting having considered the answers for Mr Calder to the queries put to him by the Local Authority, along with the report of the Bo'ness Committee thereanent, were of opinion that Mr Calder had not adduced any reason to induce the Authority to pay compensation for those animals in regard to which it is alleged that an offence had been committed, and resolved to withhold compensation for the following animals accordingly" (twenty-one in number).

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The defenders' answer to this statement was,—(Ans. 8) "The defenders, by their clerk, examined on several occasions the byre-book of the pursuer, and made other inquiries as to the identity of the cows for which compensation is refused with those with regard to which offences were committed. The pursuer in his answer to the defenders' statement does not deny their identity. In the judgment of the defenders the pursuer was guilty of offences against the statute, or against regulations framed by the defenders under the Animals Acts aforesaid, with reference to the twenty-one cows slaughtered by them, for which compensation is now refused, and it is on account of their opinion to that effect that compensation is withheld. This judgment and determination was arrived at after the defenders had given the pursuer an opportunity of making representations to them respecting the facts and circumstances of each case, and after they had considered the same."

The pursuer pleaded, *inter alia;*—(5) The defenders' actings having been outwith the said Act, and having been characterised by malice and oppression, the jurisdiction of the Court is not excluded.

The defenders pleaded;—(3) The jurisdiction of the Court being excluded by the provisions of the said Act, the present action is incompetent.

The Lord Ordinary (Trayner), on 19th June 1890, pronounced this interlocutor:—"Finds that in exercise of their statutory powers the defenders have determined that as regards the twenty-one cows for which they have refused compensation the pursuers have been guilty of offences against the Contagious Diseases (Animals) Act, 1878, and that such determination is conclusive: Finds that in consequence of said determination the pursuer has no claim for compensation for said twenty-one cows which can be enforced in this action: Assoilzies the defenders from the conclusions of the summons in so far as concerns compensation sought for said twenty-one cows, and decerns: *Quoad ultra* allows the parties a proof of their respective averments," &c.*

The pursuer reclaimed, and argued;—The statute, sec. 21 (3), gave an absolute right to compensation for cattle slaughtered in terms of its provisions. It was true, sec. 30 (7), that there was an exception in the case of an animal where the owner had been guilty "in relation to it of an offence" against the Act. Nothing of this kind had been proved here. The cattle, in regard to which it had been stated by the Local Authority that offences had been committed, had not been identified as the same cattle as those

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* "OPINION.—The pursuer sues, *inter alia*, for compensation on account of forty-six cows belonging to him which were slaughtered by order of the defenders under the powers and provisions of the Contagious Diseases (Animals) Act, 1878. The defenders offer payment of a certain amount as compensation for twenty-five of said cows; but refuse compensation in respect of the remaining twenty-one, on the ground that, in their judgment, the pursuer has been guilty, in relation to the said twenty-one cows, of offences against the foresaid Act. I think this determination by the defenders is *vi statuti* final and conclusive, and one which I cannot review or alter.

"The pursuer contends that the defenders have acted outwith the statute, and with malice and oppression, in reaching the judgment which they have expressed. So far as I can see the defenders' proceedings have been in conformity with the statutory provisions, and there is no relevant averment on record to the contrary. I do not understand how, if acting within their statutory powers, the defenders can be guilty of malice or oppression.

"The parties are not agreed as to the amount of the compensation payable in respect of the twenty-five cows, and I shall allow a proof as regards this part of the case."

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for which it was proposed to withhold compensation. The resolution of the Local Authority failed to shew this. The defenders had therefore acted oppressively in rejecting the pursuer's claim, and there had been no honest exercise of the powers given them by the 7th head of the 30th section of the statute. Further, it was necessary for the defenders to shew a connection between the offences charged and the outbreak of the disease, otherwise they could not withhold compensation. This they had not attempted to do, and it was clearly impossible for them to do so, looking to the lapse of time—in some cases eight months—between the offences and the outbreak. On both these grounds, the defenders' resolution could not be held to be in conformity with the provisions of the statute, or to be a *bona fide* judgment in execution of the powers committed to them, as there were really no sufficient materials before them. It was therefore not excluded from the review of the Court.[1]

Argued for the respondents;—It was admitted that the resolution of the Local Authority was not artistically expressed, and that the minute ought to have borne that the pursuer had been guilty of an offence in regard to each of the cows. But it was clear that they had applied their minds to a consideration of the facts, and that they had properly identified the cows in question as the same as those in respect of which compensation was withheld. Accordingly, they had quite complied with the provisions of the statute, and the objection was at best a technical one, which could be obviated if that was thought right. It was not necessary that there should be any connection established between the offences and the outbreak of the disease; if this had been intended, the Act would not have been silent in regard to it. The widest powers were given to the Local Authority, and their resolution, in the exercise of the discretionary power given to them by the statute, was not subject to review.[2]

At advising, on 12th July 1890,—

Lord President.—I do not think there is any real difficulty about the construction of section 30 of the statute in so far as regards this case. The seventh head is this—"Notwithstanding anything in this Act, the Privy Council or a Local Authority, as the case may be, may, if they think fit, withhold either wholly or partially compensation or other payment in respect of an animal slaughtered under this Act by their respective order where the owner or the person having charge thereof has in their respective judgment been guilty in relation to the animal of an offence against this Act, or where the animal, being a foreign animal, was in their respective judgment diseased at the time of its landing."

Now, the duty and right of the Local Authority under that head of the section seems to be to refuse compensation if in the case of any animal which has been slaughtered under an order of the Authority, they are satisfied that the owner or the person in charge of the animal was guilty of an offence against the Act in relation to that animal, or that the animal being a foreign animal was diseased at the time of its landing, and if they have formed a judgment to that effect. But that of course implies that the Local Authority must take the proper means of satisfying themselves of the matter of fact upon which they proceed. They must inquire and satisfy themselves in the first place that the

[1] Macdonald v. Campbell, Feb. 27, 1889, 16 R. 540.

[2] Brand v. Police Commissioners of Arbroath, May 23, 1890, 17 R. 790; Strain v. Strain, June 23, 1886, 13 R. 1029; Macfarlane v. School Board of Mochrum, Nov. 9, 1875, 3 R. 88.

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owner or person in charge of the slaughtered animal has committed some offence against the statute in respect of that animal, or secondly, that the animal being a foreign animal was diseased at the time of its landing. Still, where a collective body like a Local Authority have such a power and have to exercise it after forming a judgment as to the grounds upon which they refuse compensation, I do not see how they can proceed otherwise than by recording in a minute the determination at which they have arrived, and accordingly the Lord Ordinary has proceeded upon that view in the present case, because he finds that in the exercise of their statutory powers the defenders have determined that as regards the twenty-one cows for which they have refused compensation the owner or person in charge has committed some offence against the Act, and that that determination is conclusive.

Now, if that determination had been recorded in a minute I should have agreed with the result at which the Lord Ordinary has arrived. I think that the Local Authority are now quite sensible of the duty devolving upon them, because they have averred in this record that in their judgment "the pursuer was guilty of offences against the statute, or against regulations framed by the defenders under the Animals Act aforesaid, with reference to the twenty-one cows slaughtered by them, for which compensation is now refused." Now if they had embodied that statement in a minute, I think the case would have been quite in shape under the statute, and we could not have listened to any challenge, but unfortunately they have not done so. They have put their minute, dated 5th May 1890, in such a shape that it really does not record this. *It says*—"The meeting having considered the answers for Mr Calder to the queries put to him by the Local Authority, along with the report of the Bo'ness Committee thereanent, were of opinion that Mr Calder had not adduced any reason to induce the Authority to pay compensation for those animals in regard to which it is alleged that an offence had been committed, and resolved to withhold compensation for the following animals accordingly." Now, that is not a determination on the point at all. Mr Calder was not required to adduce any reasons at all to induce the Local Authority to pay compensation. What the Local Authority required to do, and what they have not done, is to determine according to their own judgment whether such an offence has been committed in point of fact in regard to the animals in question. I do not see that any reason could be stated to induce the Authority to pay compensation if offences had been committed in regard to the animals in question. But they do not find that offences were committed. They find only that Mr Calder has not adduced any reason to induce them to pay compensation for animals which some one alleges have been the subjects of offences. I daresay this is mere looseness of expression or want of attention to the terms of the Act of Parliament, but it is necessary where such large powers are conferred by the Legislature for the Authority to proceed very strictly in accordance with the statute.

While, therefore, I cannot sustain this as an expression of the determination of the Commissioners, which is protected from all challenge, I see that the state of the fact may be that they have formed a judgment although they have not adequately expressed it, and that being so I think it is right that they should still have an opportunity of expressing the judgment at which they have arrived. Therefore, I suggest that we should continue this case to give the defenders an opportunity of shewing that the statement they have made upon record is the finding of the meeting, that they have applied their minds to

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this question of fact, and have come to a determination. I think that could be done by a minute of a subsequent meeting, an excerpt from which might be lodged in process.

LORD SHAND.—I agree with your Lordship in thinking that if the defenders had in substance by minute stated what is contained in answer 8, the interlocutor of the Lord Ordinary ought to have been adhered to. In that answer it is said that in the judgment of the defenders "the pursuer was guilty of offences against the statute or against regulations framed by the defenders, with reference to the twenty-one cows slaughtered by them." That as I understand it means that in the judgment of the defenders the pursuer has been guilty of an offence with reference to each of the twenty-one cows, and these cows have been identified as cows with reference to which an offence has been committed. Your Lordship is of opinion that the minutes do not shew that that judgment has been formed. I confess, although I think the minute is rather loose in its expression, I should not have been indisposed to hold that we have enough here to satisfy the statute, for although there is not a formal minute I rather think there is enough to shew that the Local Authority have formed an opinion that offences were committed in respect of all the animals for which compensation was refused. In the first place, they agreed to pay compensation for certain of the cattle, and "before coming to any determination with reference to those animals in respect to which it is alleged that an offence had been committed," they allow Mr Calder an opportunity of making explanations and representations on certain points, and after receiving his answers they find by a subsequent minute that "Mr Calder had not adduced any reason to induce the Authority to pay compensation for those animals in regard to which it is alleged that an offence had been committed," and they accordingly resolved to withhold compensation. That being so, I would be disposed to read the minute of meeting as sufficient, but it may have a salutary effect to send it back to the Local Authority that they may have an opportunity of putting their determination into a better form.

In regard to the argument which has been submitted, in the first place, I think it is clear that the question of withholding or granting compensation is a matter for the judgment of the Local Authority that cannot be reviewed. I do not say that if they form a judgment without inquiry, or without giving an opportunity to the person whose animals were slaughtered to be heard, that we might not interfere, or that the Local Authority would be protected. But if after making inquiry, and after giving the owner of the animals slaughtered an opportunity to make representations, they then form a judgment that the cattle in regard to which they decline to make compensation are cattle in regard to each of which an offence has been committed, that is, in my opinion, a final decision with regard to which this Court cannot interfere.

The other point which was urged was that the offences alleged with regard to several of these cattle were offences said to have been committed eight, nine, ten, and eleven months before their slaughter took place, and it was said that we must read into this statute something of this kind, that the offence in respect of which compensation was refused must have some relation to the disease which subsequently broke out, and led to the resolution to slaughter, and that it would not do to take a case in which the offence was at such a distance in point of time that it could have no relation to the disease. I am not prepared to take that reading of the statute. It is in very general terms enacted that "where the

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owner or the person in charge" of the animal has, "in their respective judgment, been guilty in relation to the animal of an offence against the Act," the Authority may, if they see fit, withhold compensation. It is not said that the offence must be within three months or six months or nine months of the slaughter, nor that it must be an offence which has relation to the outbreak of the disease. The clause is in absolutely general terms, and that being so, I do not think that we can add words which would have a limiting effect to it. It may well be that the statute was intended to meet any case of loose practice. At anyrate it is for the Local Authority to judge whether the particular offences, looking to the distance of time between the offence and the outbreak, and the fact that the one bears no relation to the other, are to bar a claim, but I think the matter is one entirely within their discretion. Accordingly, I am of opinion that if they produce a minute which, firstly, clearly and distinctly identifies the cows in regard to which offences have been charged, and, secondly, expresses the decision of the Local Authority that, with reference to these cows, there have been offences committed, the claim for compensation ought to be refused.

LORD M'LAREN.—Without entering on the terms of the clause, I may say that, as I understand the Act of Parliament and the Orders of Council following upon it, their aim is twofold—first, to prevent the spread of contagious diseases among animals, by putting restrictions on the movement of animals from one market to another when the disease is in a latent state; and second, to extirpate it by endeavouring to slaughter all infected animals and those which have come in contact with them. In order to effect the first object herds are placed under quarantine, and any new animals which may be introduced are not allowed to be removed till the lapse of fifty-six days, which is the period of development of the disease, and it is plain that the accomplishment of the object of the Act depends very much on the strict observance of both the requirements which I have mentioned.

Then provision is made for the compensation of the owners of animals which are slaughtered, on the ground doubtless that the slaughter of such animals is for the benefit of the locality, and partly also because it was recognised that there would be an inducement to the owners of infected animals to make the outbreak of the disease known to the Local Authority if they were fairly dealt with. The right to compensation, however, is qualified in an important way. If any owner has not observed the requirements of the first part of the Act, and has been guilty of an offence with regard to the removal of animals, he is not to receive compensation for any animals which have been removed contrary to the Act, or in respect of which an offence has been committed. The statute does not lay on the Local Authority the duty—impossible for it to fulfil—of tracing a connection between the outbreak of the disease and the offence committed, but aims at distributing average justice by proportioning the stoppage of compensation to the degree of negligence. The power of determining whether an offence has been committed rests with the Local Authority, and, in order to guard against any harsh or inconsiderate exercise of discretion, it is provided that no order for stoppage of compensation shall be final till an opportunity has been given to the owner to make an explanation of his conduct. In such cases, therefore, the duty of the Local Authority is, first, to inquire into the facts connected with the alleged contravention of the Act; second, if they have established a *prima facie* case against the owner, to give him an opportunity to

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answer it; third, to consider his answer, inquiring certainly into any additional facts alleged to have a bearing on the case; and lastly, to express the determination at which they arrive. Up to the last part of their duty the Local Authority acted with perfect fairness and justice, but they omitted to apply their special finding of facts, and to express their ultimate determination on the whole case. The question then is, whether that omission can be supplied, the Local Authority having acted with substantial justice. The Act does not specify a time within which a determination must be arrived at or the form in which it is to be expressed. Evidently, therefore, if a claim for compensation is made, it may be met by a judgment contrary to it, and this indeed has been recognised in the present case in the lodging of the minutes, which have been a subject of argument, subsequent to the closing of the record.

I agree in thinking that if there has been any omission there is no obstacle to its being remedied, because any time before a proof is allowed on the question of compensation a claim may always be met by a determination of the Local Authority in terms of the Act of Parliament.

I therefore agree that the case should be continued in order to enable the Local Authority to remedy what I consider to be merely a defect in form of their determination.

LORD ADAM was absent.

The Court accordingly continued the cause to allow the defenders an opportunity of remedying the defects of the previous resolution.

The Local Authority held another meeting on 17th October 1890, an excerpt from the minute of which was produced, and is subjoined.*

Parties were again heard, reclaimer's counsel contending that the cattle were not yet sufficiently identified, and that the provision of the statute that the Local Authority was to inquire into and consider the circumstances of the case would be meaningless if it was not intended that some connection should be shewn between the cattle in regard to which "offences" had been committed and the subsequent outbreak.

LORD PRESIDENT.—The Lord Ordinary has found that "in exercise of their statutory powers the defenders have determined that as regards the twenty-one

* "The Local Authority having communicated to Mr Calder their minute of 31st January 1890 and considered his written answers thereto; and having at the request of Mr Calder's agent met Mr Calder on 25th April last, and afforded him an opportunity of submitting to it any further representations and explanations that he thought necessary; and having on 3d October current again met with Mr Calder and Mr Alexander Ure, advocate, Edinburgh, his counsel, and heard Mr Ure upon the case; and having subsequently again got access to Mr Calder's byre-book; and having again identified the cattle numbered therein with those enumerated in Mr Kerr's valuation; and having again referred to the various declarations which were formerly before the Local Authority; and having fully considered the representations of Mr Calder, and the whole facts and circumstances of the case; and having fully inquired and informed themselves as to the offences against the Contagious Diseases (Animals) Acts, and against the regulations made by this Local Authority in terms thereof: Find and determine that Mr Calder, or the person in charge on his behalf or by his instructions of the cattle after mentioned, was guilty of an offence or offences against the said Acts and regulations in regard to each of the twenty-one cows slaughtered by them, and numbered 2, 19, 20, 21, 22, 23, 24, 30, 35, 36, 39, 40, 41, 42, 44, 47, 48, 50, 51, 52, and 54 in Mr Kerr's valuation; and they accordingly resolve to withhold compensation for all the said cows."

cows for which they have refused compensation the pursuers have been guilty of offences against the Contagious Diseases (Animals) Act, 1878, and that such determination is conclusive." That is in effect to sustain the third plea in law for the defenders, that "the jurisdiction of the Court being excluded by the provisions of the said Act" (*i.e.*, the Contagious Diseases (Animals) Act, 1878), "the present action is incompetent." I entirely agree in that ground of judgment. I think a large discretion has been committed to the Local Authority, and that their deliverance, if made in terms of the statute, is not subject to review of any kind. In the state of the case as it stood formerly, there certainly was a considerable defect in the deliverance of the Local Authority, which was clearly not in terms of the statute or protected by the statute. Accordingly, we gave them an opportunity of amending their deliverance, and the amended deliverance is now before us.

It is certainly not a sufficient ground for refusing compensation that the owner of cattle is alleged to have committed an offence under the Act. It must be proved to the satisfaction of the Local Authority, and there must in their judgment be a statement that the owner has been guilty of such an offence.

How does the case stand upon the amended deliverance? It appears to me that the defects of the former deliverance are supplied, and it is clearly shewn to my mind that the Local Authority had before them the sort of evidence and the amount of information which is contemplated by the statute. The amended deliverance bears that the Local Authority had their minute of 31st January 1890 and Mr Calder's answers before them, and then proceeds,—"Having at the request of Mr Calder's agent met Mr Calder on 25th April last, and afforded him an opportunity of submitting to it any further representations and explanations that he thought necessary,"—that is quite in accordance with the regulations,—"and having on 3d October current again met with Mr Calder and Mr Alexander Ure, advocate, Edinburgh, his counsel, and heard Mr Ure upon the case; and having subsequently again got access to Mr Calder's byre-book; and having again identified the cattle numbered therein with those enumerated in Mr Kerr's valuation; and having again referred to the various declarations which were formerly before the Local Authority; and having fully considered the representations of Mr Calder, and the whole facts and circumstances of the case; and having fully inquired and informed themselves as to the offences against the Contagious Diseases (Animals) Acts, and against the regulations made by this Local Authority in terms thereof,"—they proceed to find and determine as there set forth.

It is important to observe what according to the minute was the material before the Local Authority in disposing of the matter. They had first of all the explanations by Mr Calder of the charges made against him. They had also his byre-book containing entries in regard to each cow, and as to the date at which it was brought to the byre. Each cow has a particular number and history, and they are enabled thereby to compare with the details in the byre-book the faulty declaration emitted in regard to each case, and in that way they can say which cow has been the subject of offences against the statute. The conclusion at which they arrive is that they "find and determine that Mr Calder, or the person in charge on his behalf or by his instructions of the cattle after mentioned, was guilty of an offence or offences against the said Acts and regulations in regard to each of the twenty-one cows slaughtered by them,"—the number of the cows being then given,—and accordingly they resolve to withhold

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compensation. That minute is, I think, precisely in terms of the statute, and we cannot get behind it in any way, unless upon allegations of fraud or corruption. There is nothing of that kind on record here.

An attempt was made by Mr Asher so to construe the statute as to shew that the facts of the case as set forth in the deliverance are not within the statute. In the first place, it was contended that the statute contemplated—not expressly but by implication—that the offence disabling a cow or other animal from being a subject for compensation must have some connection with the outbreak of the disease. There is nothing to that effect in the statute, and I have difficulty in seeing how such a provision could be introduced so as to be made workable. How could any Court apply such a provision, or what is to be the extent of the connection between the offence and the disease? I accordingly disregard that argument as founded upon a misreading of the statute. I think the offences contemplated by the statute are just the kind of offences treated by the Local Authority in their last deliverance.

Mr Asher's next argument was that there was not sufficient information of the grounds of decision given in the deliverance. But I do not see that the statute requires that such information should be given. The Local Authority are required to pay compensation, or if they think fit they may withhold it, either wholly or partially, if the animal slaughtered is one in connection with which an offence has been committed. It was said that they were bound to let the pursuer know what offence applied to each individual cow, and not only to communicate this information in the course of their inquiries, but also to embody it in their final deliverance. I do not think that the Local Authority had any such duty. It appears to me that having satisfied themselves upon the evidence, which appears very complete, that an offence had been committed in respect of each of the twenty-one cows, they were entitled to find the owner precluded from claiming compensation. That deliverance is I think final, and cannot now be disputed.

Lord Adam.—The pursuer, Mr Calder, was the proprietor of a number of cows, one of which was seized with pleuro-pneumonia, in the beginning of September 1889. The Local Authority, under the Slaughter Order of 1888, issued by virtue of the Contagious Diseases (Animals) Acts, 1878 to 1886, ordered the slaughter of about fifty of the pursuer's cows, which was carried out, and with reference to a portion of these the Local Authority has admitted their liability to pay compensation, but with reference to the remaining twenty-one they have refused it. In so refusing compensation, the Local Authority has proceeded under the powers conferred upon them by the 7th subsection of section 30 of the Act of 1878, and in pursuance of these powers they have thought it fit to withhold it. In the minute of meeting of the Local Authority held on 17th October 1890, they found and declared that "Mr Calder, or the person in charge on his behalf or by his instructions of the cattle after mentioned was guilty of an offence or offences against the said Acts and regulations in regard to each of the twenty-one cows slaughtered by them, . . . and they accordingly resolve to withhold compensation for all the said cows." There can be no doubt whatever that the Local Authority has complied with the terms of the statute, and in the exercise of the discretion which is vested in them they have seen fit to withhold compensation. I think that determination is conclusive, and that no appeal against it can be entertained by us.

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It is said, however, that the Local Authority have gone beyond the powers which are vested in them, and this upon the ground that under the statute "the offences or offence against the Act" must have reference to the illness or disease which led to the slaughter of the cattle. This is, it appears to me, a very vague argument. I suppose it amounts to this, that to justify the action of the Local Authority in the present case it must be shewn that the pleuro-pneumonia which led to the slaughter of the cattle is traceable to a prior offence of which the owner or the person in charge of the cattle was guilty. I agree with the opinions of your Lordship in the chair and of Lord Shand and Lord M'Laren when the case was formerly before the Court that the Act is wholly silent as to its being necessary that there shall be any relation between the nature of the offence and the subsequent disease leading to the slaughter of the cattle. The reason may be that, although the disease may have been due to the previous violation of the provisions of the Act which amounted to the offence, still it might not be very easy to prove this. The Act says, that if there are offences against the Act, and if disease breaks out afterwards, the owner must take the responsibility and will not be entitled to get compensation. The determination of the Local Authority is not therefore open to this objection.

But Mr Asher maintained further that he was entitled to get behind the deliverance of the Local Authority, because he has no sufficient information in regard to the offences alleged, and when and how they were committed. There is no provision in the statute that the Local Authority must give any information of that kind, or at all, upon the subject before coming to a determination. But, after a period of eight years, that provision was apparently found to work hardly, and the Privy Council in 1886 issued an order to the effect that a Local Authority, before determining to withhold compensation for animals slaughtered by their order, should give the owner an opportunity of making representations respecting the facts of the case, and should consider them. It is, however, upon the owner that the *onus* is laid. There is no obligation upon the Local Authority, although in this case they did give a great deal of information, and in his answer the pursuer does not ask for more. What he says is—"That it is not attempted to be shewn that the cows, or any of them, referred to in the statement, are the cows with reference to which the Local Authority are refusing to pay compensation, and the present answers are made without prejudice to Mr Calder's plea that the statements are entirely irrelevant."

I see no reason why the pursuer should be allowed to get behind this deliverance, and I agree with your Lordship that we ought to adhere to the Lord Ordinary's interlocutor.

Lord M'Laren.—I have already had an opportunity of expressing my view of the policy and construction of the Contagious Diseases (Animals) Act and of the relative Orders of Council, and the proceedings under these enactments in the present case. I have also given my best attention to the arguments of counsel, and they have certainly shewn in my judgment that strict justice has not been done in the way of apportioning the penalties to the offences committed. But I think the answer is that the award of compensation is not a judicial proceeding at all, but that the policy of the Act is to leave the distribution of compensation to a popularly constituted body consisting of persons in the locality, and if they have arrived at a judgment on the matter to hold it conclusive, and I agree that

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they have arrived at a judgment in this case. If the matter was to be considered judicially the Legislature would not have left its consideration to a body consisting of people out of whose pockets the compensation had to be paid.

It appears to me that the Local Authority have not deviated from the statute, and I am of opinion that the determination of the Local Authority is not subject to review.

LORD KINNEAR concurred.

THE COURT adhered.

ALEX. MORISON, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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Lundie v. Magistrates of Falkirk.

DENIS LUNDIE, Pursuer (Respondent).—*R. V. Campbell—Hay.*
PROVOST AND MAGISTRATES OF FALKIRK, Defenders (Reclaimers).—*Asher—John Wilson.*

Public-house—Licensing Courts—Certificate—Statutes 9 *Geo. IV. cap.* 58 (*Home Drummond Act*), 25 *and* 26 *Vict. cap.* 35 (*Public-Houses Acts Amendment Act*, 1862), *sec.* 34.*—The only appeal from a decision of the Justices of the Peace granting or refusing a public-house licence is to Quarter Sessions, and it is incompetent to bring a reduction of a decision of the Justices refusing a licence on the ground that evidence was improperly admitted or refused, or on any ground except that of excess of jurisdiction.

Administration of justice—Justice of Peace—Licensing Court—Statute 9 *Geo. IV. cap.* 58 (*Home Drummond Act*), *sec.* 13.—*Held* that a Justice of the Peace was not disqualified from sitting on the bench of Justices for the granting of licences under the 13th section of the Home Drummond Act, 1828,† by reason of the fact that he was trustee upon a sequestrated estate, part of which consisted of a public-house business.

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* The 34th section of the Public-Houses Acts Amendment Act, 1862, enacted,—"No warrant, sentence, order, decree, judgment, or decision made or given by any Quarter Sessions, Sheriff, Justice or Justices of the Peace, or Magistrate in any cause, prosecution or complaint, or in any other matter under the authority of the said recited Acts or of this Act, shall be subject to reduction, advocation, suspension or appeal, or any other form of review, or stay of execution on any ground, or for any reason whatever, other than by this Act provided."

The previous section—the 33d—had allowed an appeal to the Circuit Courts or the High Court of Justiciary "in any cause, prosecution or complaint . . . for breach of certificate, or for trafficking in spirits . . . without a certificate . . . on the ground of corruption or malice and oppression on the part of the Sheriff, Justice or Justices of the Peace, or Magistrate, as the case may be, or on such deviations in point of form from the statutory enactments as the Court shall think have prevented substantial justice from having been done, . . ." provided "always that nothing herein contained shall be held to exclude or interfere with the right of appeal to Quarter Sessions which at present exists, . . ." which is conferred by the 14th section of the Home Drummond Act, 1828.

† The 13th section of the Home Drummond Act, 1828, enacted,—"That no Justice of the Peace or Magistrate in any county or royal burgh who is a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other excise-able liquors, shall act as such Justice of the Peace or Magistrate respectively in the execution of this Act, nor shall any Justice of the Peace or Magistrate act in the granting of any certificate when he shall be the proprietor or tenant of the house or premises for which such certificate shall be applied for; and everything done by a Justice of the Peace or Magistrate respectively in any case in which he is so disqualified to act shall be null and void."

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1ST DIVISION.
Ld. Kyllachy.
M.

DENIS LUNDIE was tenant and occupier of public-house premises in Kirk Wynd, Falkirk, on a lease for seven years from Whitsunday 1882, and on the expiration of that lease he entered into an agreement for another lease with the proprietors for another period of seven years.

He obtained a transfer of the current certificate of the premises in December 1881, and thereafter his certificate was renewed each year. In April 1889 it was renewed for the year from Whitsunday following, on condition of certain alterations being made upon the premises, which were afterwards executed.

Lundie duly lodged an application for renewal of his certificate before the holding of the Court for granting and renewing certificates on 8th April 1890. He was asked by the magistrates to attend the Court himself, and did so. A report was read to the Court by the superintendent of police, to the effect that the pursuer had been reported in terms of the 14th section of the Public-Houses Acts Amendment Act, 1862, in consequence of drunk persons being seen coming out of his house, and his case was continued till an adjourned Court, which was held nine days afterwards. At this meeting on 17th April, the adjourned application was refused, the provost and two magistrates voting for the refusal, and one magistrate dissenting.

Lundie thereafter brought an action against the provost and magistrates and their clerk, the summons in which concluded for reduction of the deliverance of 17th April 1890, and for declarator that the defenders had failed to perform their duty as magistrates, and that the pursuer was entitled to have decree against them, to the effect of enforcing specific performance of that duty, and that they ought therefore to be ordained to hold a Court to determine the matter raised by the pursuer's application for renewal of his certificate. There was also a conclusion for damages against the provost and two magistrates who had refused the licence.

The pursuer averred, *inter alia*, that no objections to the renewal of his certificate were lodged, and that he had no intimation of any objection prior to the sitting of the Court on 8th April:—(Cond. 5) "The pursuer, as applicant for a renewal of a certificate in premises 'licensed' or 'certificated' at the time of the application (sec. 8, 25 and 26 Vict. cap. 35, sec. 4, 39 and 40 Vict. cap. 26), was entitled to the protection of the following statutory provisions, which the defenders, the Magistrates of Falkirk, were under the duty and obligation to follow in their last April licensing Court. His application not being for 'a new certificate,' *i.e.* for premises not certificated at the time of the application, it could not competently be refused without objection laid in the appointed form before the Court, and properly heard and determined. It was not competent to refuse a renewal of his certificate without hearing him in support of the application in 'open Court,' sec. 7, 9 Geo. IV. cap. 58. He did not require to appear in support of his application unless required to attend by the Magistrates (sec. 15, 39 and 40 Vict. cap. 26), and his certificate would without such requisition fall to be renewed as of course. If (as was the case) no objection was lodged under sec. 11 of 25 and 26 Vict. cap. 35, then the only competent objection against the renewal was such as might be made verbally or in writing by any magistrate, or by the procurator-fiscal, chief-constable, or superintendent of police in open Court, in terms of sec. 12 of 25 and 26 Vict. cap. 35. Such objection, if duly stated, was not by itself conclusive, but had to be determined judicially upon evidence and hearing of parties. By sec. 27 of the Act last mentioned the pursuer's application for a renewal of his certificate, with any objection thereto, raised a cause or matter which the defenders, the magistrates, were bound to hear and

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determine, in observance of the essential forms of judicial procedure prescribed."* (Cond. 6) "At the Court, on 8th April last, the defenders Mr Borthwick Watson, provost, Mr A. C. Rennie, bailie, and Mr Gavin N. Hamilton, bailie, were present. The procurator-fiscal then stated generally that persons had been seen coming out of the pursuer's premises in a state of intoxication, and the provost stated that about two months previously he had seen a man forcibly ejected from the pursuer's premises. Nothing was offered to shew that the pursuer had supplied these persons with drink after they had become intoxicated, nor that they had got any liquor at all in his premises. . . . He had, if he had been heard at the said Court, a sufficient answer to the objection founded on the above-mentioned statements, to the effect that in his anxiety to obey the conditions of his certificate by maintaining good order and rule in his premises, he had properly turned away men who had entered his premises intoxicated, without supplying them with further liquor, and had on one occasion, to which the provost referred, been obliged to expel by force a person who would not go away quietly when refused liquor. The pursuer was refused a hearing at the said Court on 8th April last, and his application was continued, without his answer being allowed to be stated, to an adjourned Licensing Court, to be held on 17th April last. . . . It is explained that section 14 of the Act of 1862† required notice to be given to the pursuer week by week of every case of an intoxicated person being reported by the police as seen leaving his premises, that no such notice was sent to him, and that accordingly the general statement made by the procurator-fiscal of the reports during the whole year was not authorised by the statute, and put the pursuer to an unfair disadvantage in identifying the particular cases referred to." (Cond. 7) "Believing that if the statements by the procurator-fiscal and the provost were to be dealt with as objections to the renewal of his certificate, the same should be heard and determined judicially upon evidence of the whole circumstances, the pursuer applied personally to the provost, on 15th April last, as a magistrate of the burgh competent under section 27 of the Act above mentioned to grant warrant to summon witnesses, to know whether he

* The 27th section of the Act 25 and 26 Vict. cap. 35, enacted,—"It shall be lawful for any Justice of the Peace or Magistrate in any application for the granting or renewing of a certificate, under the provisions of the recited Acts or of this Act, or in dealing with any objection to such application, or in any other matter arising under the provisions of the recited Acts and this Act, or any of them, to grant warrant to summon witnesses or havers on behalf of any party interested; and it shall be lawful for the Justice or Justices of the Peace, Magistrate or Magistrates, before whom respectively any such application, objection, or matter shall be depending, to examine all such witnesses or havers on oath or solemn affirmation, and to do and perform all things necessary for the due and proper hearing and determination of the cause or matter."

† The 14th section of the Act 25 and 26 Vict. cap. 35, enacted,—"The chief officer of police of every county, district, place, and burgh in Scotland shall, on the first lawful day of every week, transmit or cause to be transmitted to the procurator-fiscal . . . a written report containing the names of all persons licensed to sell excisable liquors by retail from whose premises persons in a state of intoxication have been frequently seen to issue, . . . and such reports shall be brought by such procurator-fiscal under the consideration of the Justices of the Peace and Magistrates of every such county and burgh respectively when assembled to grant and renew certificates, provided always that, within two days after such report shall have been lodged with such procurator-fiscal, notice in writing by post, with postage prepaid, shall be sent by him addressed to each licensed person at his licensed premises of his having been so reported on. . . ."

was to bring witnesses to the adjourned Court, in order to prove that in ejecting persons entering his premises in a state of intoxication he was only doing his duty under the conditions of his certificate. He was informed by the provost that such evidence was not required, and was accordingly led to think that the statements above mentioned were not regarded as objections to the renewal, or putting his licence in danger."

It was further averred that the provost and magistrates had met privately on the 16th April, and had agreed that the pursuer's adjourned application should be refused. In regard to the proceedings on the 17th, the pursuer stated,—"The hearing on the said day was a mere pretence, the decision against the pursuer having, as now appears, been arranged beforehand. In the absence of evidence, and of any conviction of breach of certificate, the magistrates had no materials for judgment, and they were not entitled to assume that intoxicated persons had been supplied with drink by the pursuer. No proof was offered or given in support of the objection above mentioned, nor was there any trial of the cause. The pursuer was ready, as he intimated to the provost, to bring witnesses in defence. The defender the Provost of Falkirk, nevertheless, in utter disregard of the statutes and of all fair judicial procedure, and in pursuance of the secret agreement made on the previous day, as above mentioned, refused all opportunity for inquiry, and announced the deliverance or judgment of himself and the defenders Bailies Rennie and Hamilton, then present, to be, in respect of the unproved objections above mentioned, that the pursuer's application for a certificate should be refused."

There was a further averment to the effect that the provost was disqualified under the 13th section of the Act of Geo. IV. cap. 58, and at common law, from judging in the pursuer's application, as he was vested *qua* trustee under a trust-deed in certain public-house premises in the burgh, and thus "not only became himself a dealer in excisable liquors, but had a distinct interest to effect a favourable sale at an enhanced price by shutting up pursuer's public-house."

It was stated for the defenders that the pursuer had appealed against the decision of the magistrates to the Quarter Sessions, but that the appeal had been unanimously dismissed.

The pursuer pleaded;—(1) The refusal of the pursuer's application should be reduced or declared of no effect, in respect the proceedings complained of were outwith the statutes and unlawful, and the provost was disqualified. (2) The pursuer having duly made his statutory application for renewal, and the same not having been duly and properly disposed of within the statutory period for holding licensing Courts, the same should now be held as granted, and the clerk be ordained to issue a renewed certificate. (3) The pursuer is otherwise entitled to redress by having the defenders ordained to hold a Court, and to perform towards him the public duty of duly and properly hearing and determining his cause.

The defenders pleaded;—(1) The action is incompetent. (2) In respect of the appeal taken by the pursuer to the Quarter Sessions, and of the unchallenged judgment of that Court, the present action is excluded. (3) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons.

The Lord Ordinary (Kyllachy), on 19th July 1890, pronounced this interlocutor:—"Allows the parties a proof of their respective averments with respect to the objections stated in the licensing Court against the renewal of the pursuer's certificate, founded on the alleged fact that the pursuer had been reported on during the year, in terms of the 14th section of the Act 25 and 26 Vict. cap. 35, in consequence of drunken persons

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having been seen to issue from the public-house, and with respect to the manner in which the said objections were dealt with by the magistrates," &c.

The defenders reclaimed, and argued;—The Lord Ordinary had restricted the allowance of proof to the averments made by the pursuer in the 6th article of his condescendence. But these were as irrelevant as the rest of the case. Under section 11 of the Public-Houses Acts Amendment Act, 1862, anyone in the neighbourhood of the house which was to be licensed who objected to the granting of a licence had to give notice five days before the holding of the Court. But by the 12th section the requirement of notice did not apply to objections by the procurator-fiscal or the provost, such as had been made here. The magistrates had an absolute discretion, and were entitled to consider all objections and to proceed, according to their discretion, on matters not made the subject of judicial inquiry. The Lord Ordinary had had a difficulty as to whether the want of the notices required by the 14th section of the Act of 1862 to be made to the licensed person where people had been seen to leave his premises in a state of intoxication was not relevant to go to proof. But the answer was that if the pursuer had suffered from that want of notice he had his remedy before the Quarter Sessions, to which a right of appeal was given under the 14th section of the Home Drummond Act, 1828,[1] and he might have led proof before them. It had been held that the magistrates in the licensing Courts had an absolute discretion vested in them in regard to renewals,[2] and there was no appeal except to Quarter Sessions. The reduction was therefore incompetent, and even the limited allowance of proof granted by the Lord Ordinary should be refused.

Argued for the respondent;—The magistrates were bound to try cases in the licensing Courts judicially, and in substance and reality. This case upon the averments was one of abuse. The magistrates had decided to refuse the renewal of the certificate in private before they met in public, and had failed to perform their statutory duty. The present action was competent, there being a conclusion asking that they should be ordained to re-hear the case. It was a procedure analogous to that provided by the 91st section of the Court of Session Act, 1868, where the Court were empowered to order the performance of any statutory duty upon a petition asking them to do so. The magistrates had failed to comply with the provisions of the licensing Courts, as set forth on record, just as in a previous case under the same Acts they had exceeded their statutory powers, with the result that the Court of Session gave redress.[3] The magistrates had acted here as an arbiter sometimes did, where he refused to hear the parties. It had been decided in England that an old licence could not be taken away or a renewal refused except for fault. At least this was so until the recent case of *Sharpe*, in which admittedly the Court of Appeal had held that the Justices had

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[1] Home Drummond Act, 1828 (9 Geo. IV. cap. 58), sec. 14; *cf.* also Publicans' Certificates (Scotland) Act, 1876 (39 and 40 Vict. cap. 26), sec. 16.

[2] Sharpe v. Wakefield, Dec. 15, 1888, L. R., 22 Q. B. D. 239; Crosbie v. M'Minn, June 8, 1866, 4 Macph. 803, 38 Scot. Jur. 427; Robertson v. Pringle, Feb. 5, 1887, 14 R. 474; Public-Houses Acts Amendment Act, 1862 (25 and 26 Vict. cap. 35), sec. 34.

[3] Ashley v. Magistrates of Rothesay, June 20, 1873, 11 Macph. 708, 45 Scot. Jur. 440; *cf.* also The Queen v. Justices of Merthyr Tydvil, March 2, 1885, L. R., 14 Q. B. D. 584; Reg. v. Justices of Walsall, Nov. 23, 1854, 24 L. T. Reps. (old series) 111.

absolute discretion even in the case of a renewal.[1] But the decision in that case was now under appeal to the House of Lords. No doubt there had been an appeal to Quarter Sessions in this case. But they had no power to hear evidence; the only power they had was to receive *de novo* the evidence which had been led before the Justices, where no record of it had been kept.[2] Further, the provost had failed to comply with the provisions of the 27th section of the Act of 1862 in refusing to grant the pursuer a warrant to cite witnesses when asked to do so. He was also himself disqualified from sitting as a licensing magistrate in the circumstances alleged.

LORD PRESIDENT.—I have listened with great attention to the remarks of Mr Vary Campbell, and I feel the full force of his argument as regards the justice of the case, but he has failed to satisfy me that there is anything on record which can be made the subject of inquiry in this Court, and therein I am constrained to differ from the Lord Ordinary.

The subject-matter of the jurisdiction committed to the Justices in regard to the granting of licences under the Public-Houses Acts was never a proper part of the civil jurisdiction of this country; it was never a part of the work of the civil Courts, and it was from the beginning committed to a special tribunal, which the Legislature thought better fitted for the disposal of such questions than the civil Courts. In that respect I think the Legislature has acted very wisely, because the question arising for decision in each case is one of expediency—it is not a question of law or a pure question of fact. It is rather this, whether it is most expedient in the interests of a burgh or of a county that a licence should be granted, and, accordingly, it is not surprising that an appeal from the special tribunal to any Court of civil jurisdiction should be altogether prohibited.

The Court of Quarter Sessions is not in a different position, because it is, in a sense, the same kind of tribunal as the original Court of licensing Justices. It is composed of the same class of men, endowed with the same qualifications, and, accordingly, an appeal to Quarter Sessions is very natural in the circumstances.

But the statutes make it plain that the only appeal is to Quarter Sessions. When an appeal is given to a particular tribunal, that would in ordinary circumstances impliedly exclude any other appeal; but in the present case the statutes do not leave the matter there, for they provide not only that there shall be an appeal to Quarter Sessions, but by the 34th section of the Act 25 and 26 Vict. cap. 35, it is further provided, that "no warrant, sentence, order, decree, judgment, or decision made or given by any Quarter Sessions, Sheriff, Justice or Justices of the Peace, or Magistrate" in any matter under the authority of these Acts shall be subject to reduction, or appeal, or any other form of review, "on any ground or for any reason whatever, other than by this Act provided," thereby referring to the provisions of the preceding section dealing with appeals in cases of breach of certificate.

I cannot comprehend upon what ground we are asked to entertain this reduction. The true nature of the action is not disguised. We are asked to reduce the proceedings of the Justices upon their merits—perhaps not in this sense, that the pursuer of the reduction takes up the position that the Court came to a wrong conclusion upon the evidence before it. It may be that the ground of

[1] Sharpe v. Wakefield, Dec. 15, 1888, L. R., 22 Q. B. D. 239.
[2] Muckersie v. M'Dougall, Dec. 11, 1874, 3 Couper, 54, 2 R. (Just. Cases) 12.

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objection is that the defenders did not take the proper evidence to enable them to decide the question before them, or that they excluded evidence which ought to have been admitted, or allowed evidence which ought to have been excluded. But all these things are within the jurisdiction of the Court to whom is committed a privity of jurisdiction under the statutes, and we have nothing to do with the way in which that Court conducts its inquiry, or with the propriety of its proceedings, any more than we have with the general result at which it may arrive. In short, we are not entitled to touch a judgment of the Justices or of the Quarter Sessions, unless it can be shewn that these tribunals, or either of them, have exceeded their statutory jurisdiction, and I cannot find any relevant averment in the present case that they have done so.

The present is a different case from that of *Ashley* v. *The Magistrates of Rothesay*. In that case the magistrates, while professing to act under the Public-Houses Acts, put their powers to a use never intended by the Legislature, and which was most inexpedient and undesirable. The magistrates were empowered, in terms of the provisions of the Forbes Mackenzie Act, 1853, and the Act of 25 and 26 Vict. cap. 35, to order that, "in any particular locality" within the burgh "requiring other hours for opening and closing," the public-houses should be closed at ten rather than at eleven o'clock. What they did was to provide that the whole of the public-houses within the burgh should be closed at ten o'clock. Not that they made a provision to this effect in so many words. They acted in a more ingenious way, but it appeared that "the particular locality" or district within which they provided that their resolution should apply included the whole burgh of Rothesay, with all the inns and public-houses it contained. That was very plainly in excess of the powers of the magistrates, and amounted to a perversion of the statute to a purpose to which it was not intended to apply.

The only question in the present case is whether it is proper that the pursuer should have his licence renewed. Upon that question the magistrates of the burgh have given judgment, and an appeal was then taken against that judgment to the Court of Quarter Sessions, who affirmed it, and unless we are to go outside of the statute, which excludes our jurisdiction, I do not see how it is possible to get the better of it.

One question was raised, which, at first sight, may create an appearance of a ground of challenge. It is said that the provost was disqualified from sitting on the bench of Justices by the terms of the 13th section of the Home Drummond Act, 1828. That section provides "that no Justice of the Peace or Magistrate in any county or royal burgh, who is a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, or who shall be in partnership with any person as a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, shall act as such Justice of the Peace or Magistrate respectively in the execution of this Act." That is the first part of the clause; and then it proceeds,—"Nor shall any Justice of the Peace or Magistrate act in the granting of any certificate when he shall be the proprietor or tenant of the house or premises for which such certificate shall be applied for; and everything done by a Justice of the Peace or Magistrate respectively in any case in which he is so disqualified to act shall be null and void." The only allegation made against the provost in the present case is that he is trustee on the sequestrated estate, part of which consisted of a public-house business. The trustee did not hold the licence himself, and he was not a retailer, nor was he a dealer in exciseable liquors. Further, he was neither

a proprietor nor tenant of the house in regard to which the application for a licence was made. Accordingly that section does not affect the case. No. 12.

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Putting aside that objection, I cannot see any other ground upon which the Lord Ordinary should have allowed inquiry, and I am therefore of opinion that his Lordship's interlocutor should be recalled, and the action dismissed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT accordingly recalled the Lord Ordinary's interlocutor, sustained the defences, and assoilzied the defenders.

WYLIE, ROBERTSON, & RANKIN, W.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.

POLICE COMMISSIONERS OF KIRKINTILLOCH, First Parties.—*M'Kechnie—Shaw.*
JOHN M'DONALD AND OTHERS (Owners in Kirkintilloch), Second Parties.—*Ure—Younger.*
GEORGE BROWN (Occupier in Kirkintilloch), Third Party.—*M'Kechnie—Shaw.* No. 13.

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Police—Assessment—Construction of Sewers—Purification Works—General Police and Improvement (Scotland) Act, 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 97—*Public Health (Scotland) Act*, 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 94, *subsec.* 2.—In a burgh of under 10,000 inhabitants which had adopted the General Police Act of 1862, the Commissioners of Police introduced a system of public sewers at a cost of over £4000, the proceedings in connection therewith being taken under the Act of 1862.

They were subsequently compelled, in order to dispose of the sewage, to undertake the construction of a system of sewage purification and disposal works, and in order to get compulsory powers to acquire the land for this purpose they had, as the Local Authority, to obtain a Provisional Order and a Provisional Order Confirmation Act, in terms of the Public Health Act, 1867. The cost of obtaining the Act and of purchasing the ground and constructing the works was about £19,000.

The Commissioners having proposed to raise both sums by assessments on owners under the Police Act of 1862,* certain owners contended that the latter sum should be raised, under the Public Health Act, by an assessment upon occupiers.

In a special case *held* that the expenses incurred in the application under the Public Health Act, 1867, fell upon occupiers in terms of sec. 94, subsec. 2, of

* The General Police Act, 1862, provided, sec. 96,—"Whenever the Commissioners shall resolve to make any new sewer, they may charge the owners of all the lands or premises liable to contribute to the rates for making the same, with special sewer rates, over and above any other assessment or rates to which such persons may be liable under this Act, and such rate shall, for the purposes of this Act, be called the 'special sewer rate.'" Sec. 97,—"The Commissioners shall, if necessary, impose a sewer rate, to be called, for the purposes of this Act, the 'general sewer rate,' distinct from any other rate which they are authorised to make under this Act, to be applied in maintaining and clearing the sewers, and all other expenses connected with such sewers not herein otherwise provided for, or which may not be fully defrayed by the special sewer rate, and for securing and paying off any monies which may be borrowed on the security of the special sewer rate under the provisions of this Act, and the interest of such monies which the special sewer rate shall be insufficient to defray." Sec. 98,—"The Commissioners may from time to time make assessments in respect of the said special sewer rate and general sewer rate hereby authorised to be levied on the owners of all lands or premises within the burgh, or within separate and distinct districts, and that in reference to the valuation of such lands or premises as fixed by the Valuation-roll. . . . "

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that Act,* there being a police (but no prison) assessment in the burgh, which was so leviable under sec. 84 of the Police Act of 1862.

In 1870 the Burgh of Kirkintilloch adopted the General Police and Improvement (Scotland) Act, 1862, and the Public Health (Scotland) Act, 1867, having been in force in the burgh before that date, the Police Commissioners thereupon became the Local Authority under that Act.

Thereafter the Police Commissioners proceeded to provide a complete system of public sewers throughout the burgh under the General Police Act of 1862. Subsequently, in consequence of lower proprietors complaining of the pollution of streams, a system of sewage purification and disposal works had to be undertaken, which involved the purchase of land and wayleave rights under "The Kirkintilloch Provisional Order Confirmation Act," obtained in 1884. The total cost of procuring the Act, of purchasing the land, and constructing the works, was £19,575, and of making the sewers under the General Police Act was £4070, in all £23,645.†

The Police Commissioners had been in use to assess only owners of property for sewage purposes in terms of the General Police Act, 1862, secs. 96-100. But an objection having been made that the assessment ought to be levied not upon owners but upon occupiers only, or at least partly, in terms of the Public Health Act, 1867, a special case was presented to the Court by (1) the Police Commissioners, (2) certain owners, and (3) an occupier in the burgh, in which the following questions were put:—"(1) Ought the said assessment to be imposed only upon the owners of heritable

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* Section 94 of the Public Health (Scotland) Act, 1867, provided,—"With respect to burghs having a population of less than ten thousand according to the census last taken, and not having a local Act for police purposes . . . . (2) All charges and expenses incurred by the Local Authority in executing this Act or any of the Acts hereby repealed, and not recovered as herein before or after provided, may be defrayed out of an assessment to be levied by the Local Authority along with but as a separate assessment from any one of the assessments hereinafter mentioned in this section; that is to say, the said assessment shall be assessed, levied, and recovered in like manner, and under like powers (which powers are hereby given and are declared to extend over the whole and every part of the district of the Local Authority) as—The prison assessment or police assessment, as the Local Authority shall resolve, where the Local Authority is a town-council or Police Commissioners, or trustees acting as Police Commissioners; or, if there be no prison or police assessment, an assessment levied in like manner as is hereinafter authorised, where the Local Authority is a parochial board: The assessment for the relief of the poor, where the Local Authority is a parochial board, or, where there is no such assessment, by an assessment levied in such manner as an assessment might have been levied for the relief of the poor.

† This sum was made up of the following items:—

"1. Legal expenses in connection with procuring said Act,	£2,047	0	0
2. Price of land acquired in virtue of said Act, including wayleaves and damages, severance damage, and similar claims, ...	5,522	0	0
3. Cost of arbitration in connection with said acquisition, including legal expenses, ...	1,334	0	0
4. Purification works, ...	4,642	0	0
5. Cost of intercepting sewers in other parts of the burgh to connect with acquired land, ...	5,487	0	0
6. Charge of engineers, applicable to execution of whole works as aforesaid, ...	543	0	0
7. Cost of former public sewers, as already mentioned, .	4,070	0	0
In all,	£23,645	0	0

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property within the said burgh? (2) Ought the said assessment to be imposed only upon the occupiers of heritable property within the burgh? (3) In the event of the two first questions being answered in the negative, ought the assessment, in so far as it is necessary to provide for the cost of procuring the said Provisional Order and Confirmation Act, and of purchasing the land and wayleave rights and constructing the purification works above mentioned, to be levied upon the occupiers of heritable property within the burgh?"

It was stated in the case,—"The provisions as to assessments for sewers under the General Police Act of 1862 are contained in clauses 96 to 100 thereof inclusive. Under that Act the said assessments fall to be paid by the owners of heritable property. No assessment whatever, either for construction or maintenance of sewers, is leviable under said Act upon the occupiers of heritable property.

"Under the Public Health Act of 1867 the assessments for drainage or sewage purposes are leviable under clauses 93 and 94 thereof.

"In the burgh of Kirkintilloch there is no prison assessment leviable. Kirkintilloch is not a burgh as defined by sec. 4 of the Prisons (Scotland) Administration Act, 23 and 24 Vict. cap. 105, but fell to be, and was in fact, assessed by the Commissioners of Supply as a landward part of the county of Dumbarton, and the prison assessment was levied upon proprietors from the passing of said Act, until the passing of the Prisons Act, 1877. Under section 84 of the General Police and Improvement (Scotland) Act, 1862, which is referred to for its terms, the first parties assess all occupiers of lands or premises within the burgh in the sums necessary to be levied for the 'police purposes' of that Act. By that section it is provided that the assessment just mentioned shall, for the purposes of that Act, be called the 'police assessment.' The burgh of Kirkintilloch is a special police district of the county of Dumbarton, under the County Police Act, 20 and 21 Vict. c. 72, and by virtue of that Act there is a police assessment leviable by the Commissioners of Supply within the burgh upon owners of property.

"The first parties have hitherto assessed only owners of property for sewage purposes, in terms of the General Police and Improvement Act, 1862. They have imposed and levied, or are about to levy, a similar assessment for the year 1889-90, and propose to do so annually in future, until the whole sum of £23,645 is defrayed. The second parties now object to this, and maintain that said assessment should be levied on occupiers only, under and in terms of the Public Health Act of 1867. In any event the second parties maintain that the cost of obtaining the said Provisional Order and Confirmation Act, and of purchasing land and wayleave rights, and constructing the purification works, and laying intercepting and out-fall sewers, as above mentioned, is leviable on occupiers only, in terms of the Public Health Act, 1867. The third parties maintain that the course adopted by the first parties is correct."

At the hearing the second parties conceded that the £4070—the cost of making the sewers originally—was rightly imposed upon owners. Their argument in regard to the £19,575 sufficiently appears from the judgment of the Court.

Argued for the first and third parties;—The purification works were a necessary adjunct of the sewerage operations under the 96th section of the Act of 1862, for which owners only were liable, and if the Commissioners had been able to obtain the land by private bargain no question could have been raised. It was admitted that it was the Public Health Act, 1867, alone which gave the power to take land, but the fact that it had been necessary to get power to acquire land

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was not enough to alter the incidence of the taxation, which otherwise would have fallen under the Police Act of 1862 upon owners. As stated in the case, there were two senses in which the words "police assessment" used in the 94th section of the Public Health Act, 1867, could be interpreted in regard to the burgh of Kirkintilloch. If they were held to apply to the assessment levied by the Commissioners of Supply (now the County Council) which was strictly the assessment for maintenance of the police force, then as the Commissioners of Police levied neither a prison nor a police assessment, the new rate would fall to be levied in the same way as the poor-rate, *i.e.*, half on owners and half on occupiers.

At advising,—

LORD ADAM.—The parties to this case are, first, the Commissioners of Police of the burgh of Kirkintilloch, under the Police and Improvement Act of 1862, and as such the Local Authority of the burgh under the Public Health Act of 1867; second, certain owners of heritable property within the burgh; and third, certain occupiers of heritable property within the burgh.

We find from the case that the burgh of Kirkintilloch adopted the Police Act of 1862 in 1870, and elected Commissioners of Police under that Act, who, under the Public Health Act of 1867, became the Local Authority of the burgh. When these two Acts came into operation in Kirkintilloch there was no system of public sewers in the burgh, and the Police Commissioners had to provide such a system, and did so at a cost of £4070, the whole proceedings being taken under the Act of 1862. To discharge the expense of these operations the Police Commissioners levied an annual assessment upon the owners of heritable property within the burgh under the Act of 1862.

In consequence of legal proceedings instituted by certain riparian proprietors who complained of the pollution of streams passing through their lands by the outflow of these public sewers the Police Commissioners of the burgh were compelled to undertake the construction of a system of sewage purification and disposal works. To enable them to acquire the land necessary for that purpose, they had to apply for a Provisional Order Confirmation Act under the Act of 1867, which they accordingly did. The land was acquired and the works constructed, and the cost of the scheme to date, including the cost of constructing the original sewers, is £23,645.

The details of that expense are set forth in the case under seven heads, the seventh item being the cost of former public sewers, £4070. I may dispose of this last item at once, as it is not now matter of dispute that the Commissioners of the burgh, in order to defray that expense, rightly imposed an assessment upon the owners of heritable property within the burgh. After deducting that item there are still six items of expenditure left, amounting to the sum of £19,575, and the real question we have to decide is whether the assessment necessary to meet that charge is to be laid on owners or occupiers of heritable property within the burgh.

Before proceeding, however, to a consideration of that question, I may say that all the six items I have mentioned have been occasioned by the sewage purification and disposal works, and that it is, in my opinion, impossible to separate one of these items from the other, as not being part of the same scheme, and that they must all, as regards the question of assessment, be dealt with together.

The next point to be kept in view is that these works were constructed by

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the Commissioners of Police and the Local Authority under the powers given by the Public Health Act of 1867. In the Provisional Order Confirmation Act there are set forth by way of preamble the clauses of the Act of 1867, under which the Commissioners applied for powers, and having got these powers they executed the works, with the result that they expended the sum already stated. The works accordingly were all executed under the Act of 1867, and the only question we have to decide is, whether under the assessing powers of the Act of 1867 the expense is properly constituted a burden on the owners, or on the occupiers of heritable property within the burgh.

The assessing clause of the Act of 1867 is the 94th, which enacts that "With respect to burghs having a population of less than ten thousand according to the census last taken, and not having a local Act for police purposes," and Kirkintilloch falls in that category "... (2) All charges and expenses incurred by the Local Authority in executing this Act or any of the Acts hereby repealed, and not recovered as herein before or after provided, may be defrayed out of an assessment to be levied by the Local Authority along with but as a separate assessment from any one of the assessments hereinafter mentioned in this section; that is to say, the said assessments shall be assessed, levied, and recovered in like manner, and under like powers (which powers are hereby given and are declared to extend over the whole and every part of the district of the Local Authority) as the prison assessment or police assessment, as the Local Authority shall resolve, where the Local Authority is a town-council or Police Commissioners, or trustees acting as Police Commissioners; or, if there be *no* prison or police assessment, an assessment levied in like manner as is hereinafter authorised, where the Local Authority is a parochial board." Now this assessment is to be levied "in like manner" as the prison assessment or the police assessment, as the Local Authority shall resolve, and the Commissioners of Police are the Local Authority in this case. Therefore, if there is both a prison assessment and a police assessment, they can choose either one or other along with which to levy this assessment. If there is no prison assessment they must levy it along with the police assessment, and *vice versa;* and if there is neither a prison nor a police assessment, another alternative is open to them, with which we are not here concerned.

The question then comes to be whether there is in the burgh of Kirkintilloch a prison assessment, or a police assessment, or both a prison and a police assessment, which the Commissioners of Police are in use to levy, and in the case we are told that there is no prison assessment leviable in the burgh, the reason being that as regards that assessment Kirkintilloch is assessed as part of the county by the Commissioners of Supply. With regard, however, to the police assessment we are told that "under section 84 of the General Police and Improvement (Scotland) Act, 1862, the first parties assess all occupiers of lands or premises within the burgh in the sums necessary to be levied for the 'police purposes' of that Act. By that section it is provided that the assessment just mentioned shall, for the purposes of that Act, be called the 'police assessment,'" and by referring to the section we see that that is so. It is accordingly matter of admission that there is no prison assessment leviable in the burgh, but that there is a police assessment levied upon occupiers. The particular assessment with which we are dealing is therefore to be levied in the like manner, and along with the police assessment—which means, on the same parties as are subject to that assessment, and that being so there is an end of the case.

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I think the statute is clear, and that the expenditure of £19,575 must be met by assessments laid on occupiers and not on owners.

LORD M'LAREN and the LORD PRESIDENT concurred.

THE COURT found and declared that the assessment so far as it was necessary to defray the amount of £4070 mentioned in the case was to be imposed upon the owners of heritable property within the burgh, and that the assessment so far as it was necessary to defray the amount of £19,575 was to be imposed upon the occupiers of heritable property within the burgh.

CAIRNS, M'INTOSH, & MORTON, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 14.

Nov. 1, 1890. Wilson v. Purvis.

JOHN R. WILSON, Pursuer (Reclaimer).—*Shaw.*
J. WATSON PURVIS, Defender (Respondent).—*M'Kechnie—Baxter.*

Reparation—Slander—Innuendo—Privilege—Issue.—In an action of damages for slander the pursuer averred that he had let a cutting machine on hire to W., and that on W. becoming insolvent, and granting a trust-deed, he (the pursuer) had removed the machine from his premises; that the defender, the trustee's agent, wrote to the pursuer a letter, stating,—"I have been instructed by the trustee, who has already written you twice on the subject, to apply to you for evidence of your right to remove from W.'s premises a cutting machine, which you removed without his permission. Unless I have this evidence, or delivery of the machine, by Tuesday morning, I shall place the matter in the hands of the fiscal without further notice"; that the statements in the letter were false and calumnious, and falsely and calumniously implied, and were intended by the defender to imply and represent, that shortly before the date of the letter the pursuer was guilty of the crime of theft by having stolen a cutting machine from the premises of W.; that the said letter was written and sent, and the said charge of theft made by the defender against the pursuer, maliciously, without instructions from his client, the trustee, and although he well knew there were no grounds for it, for the purpose of concussing the pursuer into an abandonment of his right to the machine, and in order to gratify the feeling of ill-will. *Held* (1) (following *Mackay* v. *M'Cankie*, 10 R. 537) that the letter would bear the innuendo, and that the pursuer was entitled to an issue; and (2) (*dub.* Lord Kinnear) that the word "maliciously" should not be put in the issue.

Opinions (*per* the Lord President and Lord Adam) that if it were proved that the defender made the charge of theft without instructions from his client, he was not privileged.

Opinion (*per* Lord Kinnear) that if the defender had instructions from his client to write a letter to the pursuer demanding delivery of the machine, the mere variation in its terms from his instructions would not deprive him of his privilege.

1ST DIVISION. Lord Kinnear. C.

IN March 1890 John R. Wilson, wholesale manufacturer of tradesmen's fittings and machines in Edinburgh, raised an action of damages for slander against J. Watson Purvis, solicitor, Glasgow.

The pursuer averred;—(Cond. 2) "In June 1889 the pursuer let a cutting machine on hire to William Wright, baker, Stranraer, but as the latter became insolvent, and unable to pay the hire, the pursuer removed the said machine, which was his property, from Wright's premises, and resumed the possession of it, as he was entitled to do by the terms of his contract. Prior to the removal Wright had called a meeting of his creditors, at which a state of affairs, prepared by W. Greig Steel, accountant in Glasgow, trustee under a voluntary trust-deed for behoof of creditors granted by Wright in his favour, was submitted. Wright had explained to Steel that he held the machine on hire from the pursuer, and said machine was not included in said state of affairs as the property of

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Wright. The pursuer also at said meeting explained to Steel that the said machine had been hired to Wright, and Steel was satisfied with the explanation, and was quite willing that said machine should be removed by the pursuer. These facts were well known to the defender, Purvis, who acted as the agent in the trust."

(Cond. 3) "The defender, Purvis, on 1st March 1890, wrote the following letter to Wilson:—'Wright's Trust.—Dear Sir,—I have been instructed by the trustee in the above, who has already written you twice on the subject, to apply to you for evidence of your right to remove from Wright's premises a cutting machine, which you removed without his permission. Unless I have this evidence, or delivery of the machine, by Tuesday morning, I shall place the matter in the hands of the fiscal without further notice.—Yours truly, J. WATSON PURVIS.'"

(Cond. 4) "Said letter was sent to, and was received by, the pursuer on or about the date it bears. It is of and concerning the pursuer. The statements in said letter are false and calumnious, and falsely and calumniously imply, and were intended by the defender, Purvis, to imply and represent, that shortly before the date of the said letter the pursuer was guilty of the crime of theft, by having stolen a cutting machine from the premises of the said William Wright."

(Cond. 5) "Said letter was written and sent, and said charge of theft was made by the defender, Purvis, against the pursuer maliciously, without instructions from his said client, and although he well knew there were no grounds for it, for the improper and malicious purpose of concussing the pursuer into an abandonment of his right of property in said machine, and in order to gratify a feeling of ill-will against the pursuer, and to injure him in his business."

The defender, in his answers, stated that Mr Steel, the trustee, had written to the pursuer, on 19th February 1890, in these terms:—"I understand that you removed from Mr Wright's premises in Stranraer a cutting machine which you had sold to him on time payment. Kindly let me have copy of your agreement, as I can find no trace of the transaction amongst Mr Wright's papers.—Yours truly, W. GREIG STEEL, Trustee." No reply having been received, Steel wrote again to Wilson, on 26th February, that action would at once be taken if no satisfactory reply were given, and the matter put in the hands of the law-agent to the trust. No reply was made to these letters, and the cutting machine was not returned by pursuer. Steel thereupon wrote to the defender, Purvis, the following letter:—"1st March 1890.—Wm. Wright's Estate.—Dear Sir,—At foot you will find copy of two letters which I have written to a Mr Wilson, 38 Lady Lawson St., in Edinbro', but to which I have received no reply. Kindly take the matter in hand, and insist upon delivery of the machine in question failing required proof, and charge Wilson with your expenses."

In answer to cond. 3 the defender stated;—"The instructions by the defender Steel to this defender were contained in the letter dated 1st March 1890, which is referred to."

The defender pleaded;—(2) The action is irrelevant. (3) The statements complained of not being slanderous, defender should be assoilzied, with expenses. (4) The statements made by the defender in the said letter are privileged.

The following issue was adjusted by the Lord Ordinary (Kinnear) for the trial of the cause:—"It being admitted that a letter, in the terms contained in the schedule hereto annexed" (*i.e.*, the letter above quoted), "was written and sent by the defender to the pursuer—Whether said letter is of and concerning the pursuer, and falsely, calumniously, and

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maliciously represents that he was guilty of the crime of theft by having stolen a cutting machine from the premises of William Wright, baker, Stranraer, to the loss, injury, and damage of the pursuer? Damages laid at £1000."

The pursuer then moved the First Division to have the issue varied by the deletion of the words "and maliciously," and by inserting the word "and" between the words "falsely" and "calumniously."

He argued;—(1) The letter bore the innuendo set forth in the issue. The case of *Mackay* was conclusive upon that point.[1] (2) There was no case of privilege, and therefore the word "maliciously" ought to be struck out of the issue. It might have been different if Steel had authorised the letter, but all he intended was that civil proceedings should be taken to recover the machine. If the defender had given information to the fiscal there might then have been a case of privilege, and it might further turn out at the trial that there were communications between Steel and the defender other than what appeared upon record which would amount to privilege. But no privilege attached to the defender simply from his position as agent.

Argued for the respondent;—(1) The letter did not bear the construction put upon it. (2) A communication to the procurator-fiscal was privileged, and malice and probable cause ought therefore to be put into the issue,[2] for although the procurator-fiscal was not approached here, there was no reason to doubt that it was the *bona fide* intention of the defender to report the matter to him.

LORD PRESIDENT.—This is a very small and a very narrow case, in my view. It appeared to me at first sight that it was very doubtful whether there was any issuable matter to send to trial. But I think the case of *Mackay* v. *M'Cankie* is a sufficient precedent for granting an issue, and therefore the only question is as to the form of issue, whether the word "maliciously" is to be inserted, as well as "falsely and calumniously," or whether it is to be omitted. The answer to the question depends, I think, a good deal upon the state of the record, and we are informed there that the defender, Mr Purvis, was agent for the trustee upon a bankrupt estate. He received letters of instruction from the trustee with regard to the recovery of a cutting machine which was said to belong to the bankrupt, and he carried out these instructions by writing the letter complained of. There cannot be a doubt that the letter goes beyond the instructions, and accordingly *prima facie*, and as the case stands upon record, the defender does not seem to be at all in a position of privilege. He wrote at his own hand, and without instructions, a letter which the pursuer has innuendoed, and we must assume properly innuendoed, to mean that the letter contains an imputation of theft, and that it was intended to lay the matter in question before the procurator-fiscal.

I am of opinion that the word "maliciously" ought not to be inserted in the issue, but I think it is necessary to add that the facts may possibly give the case a different complexion, and that it may turn out that there are grounds for the defence of privilege. If it should so turn out, it is, I think, quite in the power of the presiding Judge, as malice is averred upon record, to intimate to the jury that they cannot return a verdict for the pursuer, unless malice on the

[1] Mackay v. M'Cankie, Jan. 27, 1883, 10 R. 537.

[2] Craig v. Peebles, Feb. 16, 1876, 3 R. 441; Croucher v. Inglis, June 14, 1889, 16 R. 774.

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defender's part be proved. That is not, however, sufficient to justify the insertion of the word "maliciously" in the issue.

To the extent I have explained, I differ from the Lord Ordinary as to the form of the issue to be allowed.

LORD ADAM.—I think the case of *Mackay* is an authority for granting an issue in this case. The facts of the two cases are very similar.

As to the form of issue, my opinion is that the matter of privilege should be disposed of at the trial. The defender was an agent employed by Mr Steel to vindicate the right of a bankrupt estate, on which he was trustee, to a cutting machine, and to recover it from the present pursuer. The matter was one purely of civil right, and the instructions which the defender got were merely to insist upon delivery of the machine. Instead of that, the defender wrote a letter which the pursuer avers and offers to prove accuses him of theft. If the pursuer succeeds in proving the innuendo he has placed upon the letter, I am not at present disposed to think that there was any privilege. At the same time, the defender may be able to shew at the trial that he was privileged, and if so, it will be for the presiding Judge to direct the jury that malice must in that event be also proved to their satisfaction, before a verdict for the pursuer can be returned.

LORD M'LAREN.—Any experience I have had regarding this class of cases inclines me to the view that it is impossible to lay down absolute rules defining the right of a pursuer of an action of damages for slander to have a case presented to a jury where the words used are not actionable in themselves. The Court has in more than one recent case assoilzied from actions of constructive slander where the words used did not on a reasonable construction infer a right to reparation. I wish to guard myself against being supposed to hold that every one who gives notice to the procurator-fiscal with a view to a prosecution gives ground for an action of damages. It may very well be that in giving notice he is doing what is only fair and just. If he is only prevented from following up the notice by receiving satisfactory explanations or because something has occurred to satisfy him he was mistaken, I should not hold that he had laid himself open to an action for libel. But again, there may be cases where the threat of a criminal prosecution has been used for the purpose of inducing the person against whom it was directed to give way to a demand. It would be proper to send the latter class of case to a jury.

I do not think that any *prima facie* case of privilege is raised upon record. That would only arise if the notice had been followed up by a representation to the procurator-fiscal. I can quite understand the Lord Ordinary's view that this was the initial step of an information to be lodged with the criminal authorities, but I am not satisfied that it was an initial step, or that there was any intention of proceeding further. It will be for the Judge at the trial to determine whether a case of privilege has been proved, and to direct the jury accordingly.

LORD KINNEAR.—If your Lordships are all of opinion that the question whether the pursuer can get a verdict in this case without satisfying the jury that the letter he complains of was written maliciously should be left to the presiding Judge at the trial, then I do not dissent from your Lordships' view that the word "maliciously" should be struck out of the issue. But I could not con-

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cur in the judgment if it implied that the pursuer would be entitled to a verdict although malice had not been proved. I cannot assent to the view which was expressed by one of your Lordships that there can be no privilege because of a variation between the written instructions given to the defender by his client and the terms of the letter he wrote in carrying them out. That may or may not be evidence tending to prove malice. But it appears to me to have no bearing on the question whether it is necessary that malice should be proved.

THE COURT varied the issue in terms of the pursuer's motion.

P. MORISON, S.S.C.—WILLIAM BLACK, S.S.C.—Agents.

No. 15.
Nov. 4, 1890.
Gray v. North British Railway Co.

WILLIAM GRAY, Pursuer.—*Guthrie Smith—Watt.*
NORTH BRITISH RAILWAY COMPANY, Defenders.—*Comrie Thomson—F. T. Cooper.*

Reparation—Precautions for the safety of the public—Railway—Escape of dog entrusted for carriage.—In an action of damages against a railway company by a man who had been bitten by a dog which had escaped from the custody of the company, the following facts were proved:—The dog, with a collar and chain attached, was delivered to the railway company at Kelso for carriage to Perth, the guard being told that it was a quiet animal. At Waverley Station, Edinburgh, where it had an hour and a-half to wait in the parcel-office during change of train, it seemed to get excited, and snapped at its chain. On being led out to rejoin the train it at first went quietly, but soon shewed a disposition to bite, and finally broke away from the porter who was leading it, and escaped from the station. It found its way to a public garden at some distance, where it was secured by the pursuer and two other gardeners, and left in the charge of the pursuer, when it bit him. The jury returned a verdict for the pursuer. The Court *granted* a new trial, on the ground that there was no evidence of fault on the part of the railway company in permitting the dog to escape.

Opinions that the injury complained of was too remote to infer liability on the part of the company even if they had been responsible for the escape of the dog.

1ST DIVISION. C.

ON 31st August 1889 a collie dog was delivered to the North British Railway Company for conveyance from Kelso to Perth. While in transit, at the Waverley Station, Edinburgh, from the Kelso to the Perth platform, it escaped out of the station, and found its way through the town to the Botanic Gardens, more than a mile from the station. It then bit a gardener named Gray, who was endeavouring to take it out of the Gardens. Gray brought an action for damages against the company.

He averred that the dog was a vicious dog; that the company's servants when it was delivered to them were so told; that they nevertheless failed to take the proper precautions to prevent it from escaping while in their custody; and therefore that its escape and his injury were due to their fault.

The defenders pleaded;—(2) The pursuer, not having received the injuries of which he complains owing to the fault of the defenders, they are entitled to absolvitor. (3) The pursuer having received the injuries of which he complains owing to his having approached the said dog, though it was obviously dangerous to do so, the defenders should be assoilzied.

The case was tried before Lord Trayner and a jury at the Summer Sittings, 1890, upon the following issue:—"Whether on or about 31st August 1889, and in or near the Royal Botanic Gardens, Edinburgh, the

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pursuer was bitten by a dog which had been placed in the defenders' custody for transit from Kelso to Perth or elsewhere, through the fault of the defenders, to his loss, injury, and damage. Damages laid at £250."

The following was the import of the evidence led at the trial:—The owner of the dog deponed that he had never seen any sign of vice about it, and that it was quiet and in its usual state at the station; that he had told the guard of the train that it was a quiet dog; that he had offered the guard a muzzle, but that the guard, on hearing that it was a quiet dog and unaccustomed to being muzzled, had thought it better to leave it unmuzzled. It had a collar on with a chain attached. This evidence the guard corroborated, and further deponed that the dog was quiet during the journey to Edinburgh, when it was tied up in his van in the usual way.

At Edinburgh it had an hour and a-half to wait till the departure of the Perth train. The company have dog kennels at the Waverley Station, but the practice of the company, when a dog has to wait for a short time, is to tie it up in the luggage office; and this was done in the present instance by the porter to whom the guard handed the dog. The porter gave this evidence,—"When I got it (the dog) out of the van I did not like its appearance exactly at first. I clapped it. I led it along very gently to the parcel-office. I let it stop. After it stopped a change came over it. It commenced to bite at the chain very much. I took it to the parcel-office and tied it up there. It was left there for the next train." A parcel deliverer named Ross took it out of the luggage-office in order to put it into the Perth train, but when on the way it broke away and escaped out of the station. The porter followed it through the town until he lost sight of it. This porter's evidence, so far as material, is quoted by Lord Adam.

At the Botanic Gardens it was observed in an apparently excited state by Professor Balfour, the curator of the Gardens, who told three gardeners, one of whom was the pursuer, to chase it out of the Gardens. While they were trying to do so it got entangled in a railing, when they secured it. The two other gardeners went off to get the police, leaving it in charge of the pursuer. While they were absent it inflicted the injuries complained of. It was ultimately taken to the Dogs' Home, where it was condemned by the instructions of the veterinary surgeon, and killed.

The jury returned a verdict for the pursuer, assessing the damages at £30.

The defenders moved for a new trial, and obtained a rule.

The pursuer shewed cause.

LORD PRESIDENT.—My opinion is that this verdict cannot stand, as I think that there is no evidence to support the charge of fault made against the railway company or their servants.

Railway companies are in the habit of carrying dogs or other live animals, and in so doing they are under a certain responsibility, not only towards the owner of the animals, but also towards the public. If a dog is known to be vicious, and the railway company is informed of this, the company is bound to take not only usual but extraordinary precautions to prevent it from escaping and so doing injury to the public, but that is not the kind of case here. The averment that the dog was known to be vicious has, I think, been completely negatived by the evidence of the owner and the guard in whose charge the dog travelled from Kelso. It appears to me that what they did was in the circumstances most judicious. The guard was assured by the owner that the dog was a perfectly good-natured animal, but was told that if he wished to have a muzzle

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he might have one, and in the exercise of his discretion the guard said he did not want it. Nothing occurred in the course of the journey to shew that the dog was vicious or to lead the guard to change his opinion as to its character. It was delivered at the Waverley Station, where it had an hour and a quarter to wait for the train to Perth, and in accordance with the usual custom it was chained up in the parcel office. Up to this time there was no appearance that anything was wrong with the dog. No doubt it was a little impatient, as dogs are apt to be on a journey, especially such dogs as collies, which are accustomed to plenty of exercise. That was not a thing to excite suspicion or alarm in the mind of anyone accustomed to the habits of dogs. It rather appears that the porter who took the dog from the parcel-office to the train was somewhat new to such work, and not accustomed to the habits of dogs, but I do not know that a railway company is bound to supply servants whose qualifications include a knowledge of the ways of dogs. That is not what one looks for in a railway porter, whose chief requirements perhaps are strength and attentiveness. Well, the dog tried to escape, and so far got the better of the porter, as it contrived to frighten him, and so get loose from his hold. Down to that time no mischief was done, and certainly, as far as I can see, nothing amounting to fault on the part of the railway company or their servant has been proved. It is impossible to say that the railway company's servant was guilty of *culpa* in the way he dealt with the dog. All that can be said is that the dog escaped.

Then is the railway company to be answerable for all the remote consequences of that escape? I think not. If it could be shewn that the necessary and immediate result of the escape was the injury of someone, it might be a different case, but it is impossible to conceive anything more remote than the injury suffered by the pursuer. I do not wish to say anything harsh, but I must say that I think that the dog was injudiciously treated at the Botanic Gardens. If I felt obliged to follow the case further, I might say that the cause of the pursuer's injury was produced at the Botanic Gardens. I do not, however, put my decision on that ground. I think it is sufficient to say that there is no evidence of fault on the part of the railway company and its servants.

Lord Adam.—I concur. It was the duty of the railway company to use all due precautions for the safe custody of this dog. Such precautions vary with the circumstances of each case, and if the railway company had been informed, as the pursuer alleges on record they were informed, that the dog was vicious, the case would have been quite different. The railway company, however, were not so informed, but, on the contrary, they were informed that it was a quiet dog. So that the precautions necessary in this case were only those required in the case of a quiet dog.

The dog behaved well till it reached Edinburgh, and was taken to the parcel-office at the Waverley Station. The only passage that I can find implying or suggesting any fault on the part of any servant of the company is in the evidence of John Ross, the parcel deliverer, who was examined on behalf of the defenders. He says, "I noticed nothing peculiar about the dog till it was tied up. When it was tied up I noticed that it was very vicious. It seemed to get excited, and snapped at its chain. It did not do any mischief then." The meaning of that, however, I take to be that the dog wanted to be free, and snapped at its chain; I do not think that it is meant to suggest that the dog was in a wild condition. After an hour and a quarter Ross went up to the dog, and found it to be quiet.

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He says, "About five minutes before one it was time to take the dog to the train. I tried to take it to the train. It went quietly out of the office at first, and made no effort to bite me when I unloosed it." Now, I do not see how it can be suggested that there was any fault on the part of the witness in taking this apparently quiet dog to the train in the way he did. He says further,—"When we got to about opposite the stationmaster's office it began to jump about. It was not very serious; it was just trying to catch hold of its chain. I then began to see that the dog was excited and disposed to bite. I held it by the chain, keeping it at arm's length. It began to try and bite my hand. I held it so that it would not have so much purchase, and kept it on its hind feet. I held it so for three or four minutes, and the whole weight of the dog was on my arm. In the long run I could not hold it any longer, and had to let it go. He overmastered me." In these circumstances, where was the fault on the part of the company? I can see none; and if the case was so put to the jury, as I believe it was, I think there is no evidence to justify the verdict.

That being the case, I do not think it is necessary to go further. I agree, however, that even if the company had been in fault in regard to the dog's escape, they would not be responsible for all the remote consequences of that escape.

With regard to what took place at the Botanic Gardens, the case appears to me to be this. Three of the gardeners had the dog tied to a rope, and if anything happened after that surely they were responsible for it. If it was wrong for the railway officials not to have sent two porters to take the dog to the train, as it was argued it was, surely there was fault on the part of the gardeners, the dog having by this time undoubtedly shewn itself to be vicious, to leave it in the charge of one man. I think their conduct must be held to be the proximate cause of the injury.

LORD M'LAREN.—The obligation which the railway company came under in this case is the same as the obligation undertaken by anyone who has the temporary custody of domestic animals—that is to say, an obligation to take all reasonable and ordinary precautions to prevent the escape of animals whose escape may be productive of mischief. What "reasonable precautions" are depends on the kind of animal which is in question.

In this case there was nothing to suggest that the dog was bad tempered, or that more than the usual precautions were necessary, and I think the pursuer has entirely failed to prove fault on the part of the railway company.

I also agree that the pursuer's injury was not the direct and immediate consequence of the dog's escape. It would have been so if the dog had flown at and bitten a passer-by immediately on escaping. Apparently the dog was doing some harm to the flower beds at the Botanic Gardens, and the pursuer's injury was consequent on an attempt to put the dog out of the Gardens.

LORD KINNEAR and LORD TRAYNER concurred.

THE COURT made the rule absolute.

J. F. EDWARDS, Solicitor—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

No. 16.

Nov. 7, 1890. Commercial Bank of Scotland, Limited, v. Beal.

COMMERCIAL BANK OF SCOTLAND, LIMITED, Pursuers (Real Raisers). ALFRED HENRY BEAL, Defender and Claimant (Reclaimer).—*Sol.-Gen. Pearson— Shennan.* M'LENNAN & URQUHART, Defenders and Claimants (Respondents).—*C. S. Dickson.*

Contract—Penalty—Liquidate damage—Agreement by purchaser to deposit a sum to be forfeited in the event of failing to implement.—In the course of negotiations for the purchase of a business, the intending purchaser agreed to deposit in bank in the joint names of himself and of the seller a certain sum "as part payment of the price." It being stipulated that in the event of his failure "to pay the balance of the purchase-money" before a certain date, the deposit should "be forfeited to" the sellers, "in full satisfaction of all causes of action, and the purchaser shall be bound forthwith to endorse the deposit-receipt" for the money. The purchaser failed to complete the purchase by payment of the purchase price. *Held* that the sellers were entitled, without going into any proof of damage, to receive the money deposited.

2D DIVISION. Lord Trayner. M.

IN July 1889 negotiations were commenced between Alfred Henry Beal, estate-agent, London, and M'Lennan & Urquhart, brewers, Dalkeith, relative to a sale of the brewery of the latter to a company which it was proposed to form.

By a minute of agreement dated 23d July 1889 entered into between Beal on behalf of himself and of the other proposed purchasers and Mr Robert Menzies, S.S.C., acting on behalf of M'Lennan & Urquhart, the price of £35,000 was agreed upon, and the vendor undertook, *inter alia*, by article fourth, to prove that the business had been established for more than forty years, and that the net profits had been not less than a certain sum. It was further provided as follows:—(Fifth) "The purchaser hereby agrees to deposit at the London branch of the Commercial Bank of Scotland the sum of £1000 in the joint names of himself and the vendor, and within seven days of the date hereof to inspect, or cause to be inspected, the property and books, and within two days after the completion of such inspection the purchaser shall give the vendor notice, by post, whether he finds that the vendor's statements, as above set forth in the preceding article, have been substantiated or not. If the purchaser should prove that the vendor has failed to implement the undertaking contained in article fourth hereof, then the vendor shall immediately concur in the repayment to the purchaser of the said sum of £1000, and the purchaser and any agent employed by him to inspect the property shall not divulge any information acquired by them in the course of such inspection. If the vendor implements the aforesaid undertaking, the parties shall enter into a more formal agreement, and on the 2d day of September next the purchaser shall deposit a further sum of £4000, and in the event of his failure to make the said deposit, the first mentioned sum of £1000 shall be forfeited to the vendor, and after the said deposits have been made the purchaser shall be bound to pay the purchase price, and to complete the transaction before the 1st day of October next, and failing the payment of the said purchase price within the said period, the amount of the said two deposits shall be forfeited to the vendor, provided always that the vendor shall have produced by that time a full and sufficient title and searches of incumbrances shewing a clear record to the purchaser."

In accordance with this agreement Beal deposited £1000 with the London branch of the Commercial Bank of Scotland, Limited, on 23d July 1889, in the joint names of Mr Menzies and himself.

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He received evidence that the matters which the vendors agreed to prove were as they had represented.

On 22d August 1889 the formal agreement contemplated in the agreement of 23d July was entered into. By the first article thereof it was provided that the vendors agreed to sell and the purchasers agreed to purchase the brewery, with the plant and goodwill, at the price of £35,000, "whereof £1000 has already been deposited, in the joint names of the said Robert Menzies and the purchaser, with the London branch of the Commercial Bank of Scotland."

The fifth article provided as follows:—"On or before the lapse of six days from the date hereof, the purchaser shall deposit the further sum of £4000 as part of the purchase price, in the joint names of the vendors and the purchaser, with the said branch of the said bank, after which (but not till then) the purchaser shall be entitled to form a limited liability company if he desires to do so, or to sell his said purchase to a company, with or without limited liability, and to advertise the same; and in the event of his failure to make the said deposit of £4000, the deposit of £1000 shall be forfeited to the vendors."

By the sixth article of the agreement the balance of the purchase price was to be paid on or before 31st October 1889.

The eighth article provided,—"If the purchaser shall fail to pay the balance of the said purchase money on or before the 31st day of October 1889, the said two deposits of £1000 and £4000 shall be forfeited to the vendors in full satisfaction of all causes of action, and the purchaser shall be bound forthwith to indorse the deposit-receipts for said two sums, provided always that the vendors shall be able to produce a full and sufficient title and searches of incumbrances shewing a clear record to the purchaser."

Beal, on 24th August 1889, deposited £4000 with the Commercial Bank in joint names of himself and M'Lennan & Urquhart, as provided by the fifth article of the second agreement. The stock in trade was subsequently valued, and the price thereof fixed. M'Lennan & Urquhart also paid off a bond for £2775 which existed over the property.

Beal endeavoured to form the proposed company, but found it impossible to do so, and in consequence the purchase could not be implemented.

A dispute having arisen between Beal and M'Lennan & Urquhart as to the two deposited sums of £1000 and £4000, the Commercial Bank, on 1st March 1890, raised an action of multiplepoinding to have the question of right to the money decided.

The fund *in medio* consisted of the £1000 and the £4000.

M'Lennan & Urquhart claimed the whole fund *in medio*. They stated that, in consequence of Mr Beal's failure to implement the contract of sale and of the actings which took place in consequence of the agreements, they had suffered loss to an amount exceeding £5000.

Beal also claimed the whole fund *in medio*, or, alternatively, the whole fund after deduction of the actual loss sustained by M'Lennan & Urquhart in consequence of his non-implement of the contract. He stated that although M'Lennan & Urquhart were "aware that the successful floating of a company was essential to the completion of the purchase, and that their co-operation was of the highest importance in securing this result, they obstructed and hampered all Mr Beal's efforts. They put difficulties in the way of advertising the prospectus; they delayed signing the memorandum and articles of association; and, generally, they acted in such a way as to render all Mr Beal's efforts nugatory. Although aware of the importance of having his name on the board of directors of the new company, one of their number, Mr Alexander M'Lennan, after verbally agree-

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ing to join the board, and after retaining for about eight days a draft prospectus containing his name as a director, suddenly withdrew his name from the board. After verbally agreeing to take £10,000 of the purchase price in shares, the partners of Messrs M'Lennan & Urquhart resiled from this proposal, and consented to take only £6000 in shares. The result of this conduct was to create an unfavourable impression on the investing public, and the share capital was not fully subscribed. In particular, one gentleman who had undertaken to subscribe £5000 withdrew his offer on learning that Mr Alexander M'Lennan had refused to join the board of directors. A final effort was made to float the company, which would have been successful if the partners of Messrs M'Lennan & Urquhart had consented to increase their holding in shares from £6000 to £9000, but this proposal they declined."

Beal also stated,—"The said sum of £5000 was intended to secure Messrs M'Lennan & Urquhart against any loss actually sustained by them through any failure on Mr Beal's part to carry out his contract, but it was not in the contemplation of the parties that this sum should be regarded as liquidate damages. Mr Beal's non-implement of the contract of purchase was caused entirely by the obstructions and hindrances offered by Messrs M'Lennan & Urquhart, and the partners of their firm. These were contrary to the good faith of the contract, which was entered into by all parties on the clear understanding that it could be carried out only through the formation of a limited liability company. This claimant would never have entered into the agreement of 22d August 1889, above referred to, unless he had been clearly led to understand that he might rely on Messrs M'Lennan & Urquhart's co-operation in floating the proposed company. Any loss which Messrs M'Lennan & Urquhart have suffered is attributable to the actings of themselves and their partners, and is not a loss which ought to be defrayed out of the fund *in medio*. But it is believed and averred that Messrs M'Lennan & Urquhart have suffered no damage whatever in their business. There was no break in the continuity of its management, and their trade and credit continue as good as they were before the negotiations above narrated. They have therefore no claim on the fund *in medio*. In any event, however, any damage they have suffered through the transaction in question is of trifling amount, and the sums constituting the fund *in medio* would be an exorbitant and unreasonable amount to be awarded to them in name of damages."

M'Lennan & Urquhart pleaded;—1. In respect of the agreements founded on, and of Mr Beal's failure to pay the balance of the purchase price, these claimants are entitled to be ranked and preferred in terms of their claim.

Beal pleaded, *inter alia*;—2. The claimant should be ranked and preferred in terms of the first alternative of his claim in respect that (1) the claimants, Messrs M'Lennan & Urquhart, have suffered no loss; (2) any loss suffered by the said claimants was due entirely to their own actings. 3. Alternatively, the claimant should be ranked and preferred in terms of the second alternative of his claim, in respect that the claim of Messrs M'Lennan & Urquhart is subject to equitable modification, as being exorbitant and unreasonable, and of the nature of a penalty.

On 18th June 1890 the Lord Ordinary (Trayner) ranked and preferred M'Lennan & Urquhart to the whole fund *in medio*.*

* "OPINION.—The claimants on the fund *in medio* in this process entered into an agreement, dated 23d July 1889, whereby Messrs M'Lennan & Urquhart (as vendors) agreed to sell, and Mr Beal (as purchaser) agreed to purchase the vendors' brewery plant and appurtenances, at the price of £35,000. The vendors undertook to prove that their business had been established for over

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Beal reclaimed, and argued;—It must indeed be admitted that the English case of *Wallis* v. *Smith* relied on by the Lord Ordinary was

forty years, and that their net profits for the four years preceding the agreement had amounted on an average to not less than a specified sum. The purchaser agreed to deposit with the Commercial Bank £1000, in the joint names of vendors and purchaser, which was to be repaid to the purchaser in the event of the vendors being unable to establish that their business was of the age, and their average profits of the amount represented.

"If on these points the vendors satisfied the purchaser, then a more formal agreement was to be entered into, and the purchaser was to deposit a further sum of £4000; in the event of his failure to make this deposit, the first deposit was 'to be forfeited to the vendor,' and if, after making the second deposit, the purchaser failed to complete the transaction, and pay the whole price before the 1st October 1889, 'the amount of the said two deposits shall be forfeited to the vendor.'

"The first deposit of £1000 was duly made; and the purchaser having been satisfied by the vendors regarding the matters which they had undertaken to prove, the 'more formal agreement' contemplated by the parties was entered into on 22d August 1889, the principal provisions of which, so far as concerns the present case, are as follows:—By Art. 1 the vendors agree to sell, and the purchaser agrees to purchase, the brewery, its plant, appurtenances, goodwill, &c., 'at the price of £35,000 (whereof £1000 has already been deposited).' (Art. 5) Within six days from the date of the agreement the purchaser agrees to deposit the further sum of £4000 'as part of the purchase price,' in the joint names of himself and the vendors; 'and in the event of his failure to make the said deposit of £4000, the deposit of £1000 shall be forfeited to the vendors.' (Art. 8) If the purchaser fails to pay the balance of the purchase money on or before 31st October 1889, 'the said two deposits of £1000 and £4000 shall be forfeited to the vendors, in full satisfaction of all causes of action, and the purchaser shall be bound forthwith to endorse the deposit-receipt for said two sums,' &c.

"The purchaser made the second deposit, but he has failed to make payment of the balance of the price. He cannot now carry through the transaction. He explains in his condescendence and claim the causes which have in some measure at least prevented him from implementing his agreement, and he throws blame on the vendors, whose conduct, he says, has contributed to this result. There is no averment, however, that the vendors have failed in the performance of any part of the agreement which imposed obligations upon them: the purchaser's averments amount only to this, that the vendors have not acted as the purchaser expected they would; and that, if they had acted otherwise, the agreement could have been implemented by the purchaser. The question to be determined, therefore, is this, Seeing that the purchaser has failed to fulfil his part of the agreement, and that there has been no failure therein on the part of the vendors, are the vendors entitled to claim the amount of the foresaid two deposits forfeited to them?

"The purchaser maintains that the provision in the agreement as to forfeiture of the £5000 should be read as meaning that failure on his part to fulfil his agreement should involve a penalty of £5000, and that under the clause so read he is only liable in such damage as the vendors can establish to have been sustained by them through his (the purchaser's) failure to implement; or otherwise that the £5000 should be read as liquidate damage, in which case again the vendors are not entitled to claim the whole stipulated amount, if it appears to the Court that the claim is unconscionable and exorbitant. On the other hand, the vendors maintain that, on the plain words of the agreement, the £5000 was to be forfeited to them in the event which has happened; and that, in any view, it is neither penalty nor liquidate damage, but part payment of price by the purchaser, which he cannot claim back on failure to complete his purchase.

"The questions thus raised appear to me to be attended with difficulty; but

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directly against the claimant, if it was applicable. But the Scottish law on this matter differed in principle from that of England. By the former there was always room for modification of a stipulated penalty, and there was also room for the modification even of liquidated damage, if unconscionable in amount.[1] The damage actually sustained was all which the Court would allow to be recovered in either of these cases. The words of the obligation pointed to a penalty clause, not to liquidate

I have come to the conclusion that the vendors must prevail. I do not think the clause of forfeiture can be read as a clause merely importing that on failure to implement the purchaser should be liable in a penalty of £5000. Under such a clause the party failing to implement is liable in the whole damage caused by his failure. That damage may be more or less than the amount of the penalty named; but whatever the amount of it may be, that is the measure of his liability, and the measure of the corresponding right.—(Mayne on Damages, 3d ed. 124.) In the present case, the vendors could not under their agreement claim more than £5000 in any case, even if they suffered damage to twice the amount; for they have agreed in express terms that the £5000, if forfeited, shall be 'in full satisfaction of all causes of action.' One of the important elements, therefore, of an ordinary penalty clause is here excluded. Again, the failure on the part of the purchaser to implement his contract might, and most probably would, inflict damage which the vendors would have the greatest difficulty in proving; indeed, might not be able to prove at all, as specific damage. How this attempt to sell their business might affect their own customers if they continued the business, or affect the mind of other purchasers if they endeavoured again to sell it, could never be ascertained. This consideration is very material in determining whether the stipulation is to be read as one merely for penalty or one for liquidate damage (*Sainter* v. *Ferguson*, 1849, 7 C. B. 716). On a consideration of the whole agreement, I should therefore be of opinion that the £5000 was treated by the parties as liquidate damage rather than as penalty.

"If treated as liquidate damage, is it exorbitant and unconscionable? I cannot say that it is. The amount claimed is rather more than 14 per cent of the whole price, which is a large percentage, no doubt, but not one which I would characterise as unconscionable, or one which, *prima facie*, exorbitantly exceeds what might very well be anticipated as the damage likely to arise from non-implement of the contract, and therefore be agreed on and fixed as the damage due and payable in that event.

"But I prefer to put my judgment in favour of the vendors on the grounds set forth as the grounds of judgment in the cases of *Hinton* v. *Sparkes* (1868, L. R., 3 C. P. 161), and *Wallis* v. *Smith* (1882, L. R., 21 Ch. Div. 243), which resemble the present case in all material respects more closely than any case I can find reported in our own books. In the latter case the Master of the Rolls observed 'That it is of the utmost importance as regards contracts between adults—persons not under disability and at arm's length—that the Courts of law should maintain the performance of the contracts according to the intention of the parties.' I agree with the observation, and have endeavoured to give effect to it here. The parties to this contract were at arm's length, and each quite capable of protecting his own interests. Their intention as regards the £500 deposited does not seem to me to admit of any doubt. They intended, and the said (and said it more than once, for it appears on both the agreements I have referred to), that if the purchaser failed to carry out his contract as agreed upon the deposited money should belong to the vendors. It may have been a bad bargain for the purchaser to make, but it was his bargain, and he cannot complain if he is now held to it."

[1] Johnston v. Robertson, March 1, 1861, 23 D. 646, 33 Scot. Jur. 335; Forrest & Barr v. Henderson, Nov. 20, 1869, 8 Macph. 187, 42 Scot. Jur. 89; Crai v. M'Beath, July 3, 1863, 1 Macph. 1020, 35 Scot. Jur. 587; Robertson v. Driver Trustees, March 2, 1881, 8 R. 555, Lord Young, at p. 562; Watson v. Nobl Dec. 16, 1885, 13 R. 347.

damage, for the deposits were, in a certain event, to be "forfeited to the vendor." Equity would always interfere, whatever the stipulation might be called, to prevent one party punishing the other or making an unconscionable and oppressive profit at his expense. Such was the profit the respondents claimants were aiming at. A proof ought to be allowed in order that the reclaimer might establish by the books of M'Lennan & Urquhart, and by other evidence, that they had really suffered no loss, and further that they were themselves to blame for the failure of the negotiations. The case of *Elphinstone*[1] relied upon by the respondents did not affect the doctrine of the cases cited. There the payments which were held to constitute liquidate damage and not penalty were proportionate to the extent of the failure, and it was pointed out by Lord Watson that when a single lump sum was made payable in various events some of which might cause serious and some trifling damage, the presumption was that the sum was a penalty and subject to modification. That was the nature of this case.

Argued for the respondents;—There was truly no difference between the Scottish and English systems on the question of penalty and liquidate damage, as the case of *Elphinstone* shewed. The cases cited by the Lord Ordinary, and which resembled the present, were therefore authorities in considering the question. The case was truly not one requiring a consideration of the law as to penalty clauses. It was a case of deposit on certain conditions, and the question whether the deposit was to be forfeited by non-fulfilment of these was a question of what the agreement intended. Each deposit was spoken of in the agreement as a part payment or payment to account of the price to be ultimately payable, not as a penalty at all.

LORD JUSTICE-CLERK.—The law upon the subject of penalty and of liquidate damages is now well settled. A mere penalty will not be enforced according to its terms, but inquiry will be allowed as to the real amount which the other party has suffered, and the penalty will be modified accordingly.

But this is quite a different case. It is one in which the two parties agree together that, a contract having been entered into, a deposit shall be made by Mr Beal of a certain sum. By a certain stage of the negotiations Mr Beal, the purchaser, deposited £5000 as part of the price of that which he agreed to purchase, and the terms of the deposit were that if he did not fulfil the conditions of purchase that sum of £5000 was to be forfeited to the seller. A distinct contract to that effect is not a stipulation for liquidate damages in any sense, nor a stipulation for a penalty. One can see that parties such as M'Lennan & Urquhart would be unwilling to enter into a contract of sale without being placed in a position of safety in the event of it not being carried into effect. Now, I do not think that any more distinct words could have been used in order to express this arrangement than those which the parties have used. I think that the case is on all-fours with one of these referred to by the Lord Ordinary. The principle of it applies directly, and I have heard nothing to satisfy me that that principle is not according to the law of Scotland.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

THE COURT adhered.

SKENE, EDWARDS, & GARSON, W.S.—JOHN C. JUNNER, W.S.—WATT & ANDERSON, S.S.C. —Agents.

[1] Lord Elphinstone v. Monkland Iron and Coal Co., Limited, June 29, 1886, 13 R. (H. L.) 98.

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Souter v. Finlay.

MARGARET SPROUL OR SOUTER, Petitioner.—*Salvesen.*
ROBERT FINLAY AND ANOTHER, Respondents.—*Goudy.*

Process—Judicial Factor—Curator Bonis—Recall—Pupils Protection Act, 1849 (12 *and* 13 *Vict. c.* 51), *secs.* 1 *and* 31—*Distribution of Business Act* (20 *and* 21 *Vict. c.* 56), *sec.* 4, *subsec.* 5.—*Held* (after consultation with the Judges of the First Division) that a petition for recall of the appointment of a curator bonis and for appointment of a new curator bonis is incompetent in the Inner-House, and must be presented to the Junior Lord Ordinary.

2D DIVISION I.

IN 1877 Peter Couper, accountant, was, on the petition of Robert Finlay, appointed curator bonis to John Souter.

On 29th August 1890 Finlay presented a petition to the Lord Ordinary in the Bill-Chamber praying for the removal of Couper from the office of curator bonis and for the appointment of another person in his room, stating that the accounts of the curator had been audited by the Accountant of Court down to 30th September 1889, at which date there was a balance brought out due to the curator of £548, 16s. 8d.; and that it had "been ascertained by the petitioner that in February 1879 the said Peter Couper, as curator bonis, applied for and obtained a loan of £400 from the Property Investment Company of Scotland, and that that sum does not appear in his accounts"; that he had left Edinburgh under suspicious circumstances; and that a petition for sequestration of his estates had been presented, and a judicial factor had been appointed thereon.

On 12th September 1890 the Lord Ordinary on the Bills (Rutherfurd Clark), who doubted the competency of the petition before the Bill-Chamber, declined to remove Couper, but appointed Robert Cockburn Millar to be curator bonis *ad interim* to Souter.

On 15th October Margaret Sproul or Souter, wife of the ward, presented a petition to the Second Division craving the Court to recall the interim appointment, to remove Couper from office, and to appoint a Mr Munro as curator. The petitioner stated the same facts with regard to the disappearance of Couper as were stated in the petition of Finlay.

She further maintained that Finlay's petition was not competent in the Bill-Chamber, and objected to Robert Cockburn Millar, who had been appointed curator bonis *ad interim*, being appointed curator.

To this petition Mr Finlay and Mr Millar lodged answers, in which they maintained, *inter alia*, that Finlay's petition, which was now depending before the Junior Lord Ordinary, was competent, and was "the proper course to adopt under the Pupils Protection Act (12 and 13 Vict. c. 51), sec. 31,* and the Distribution of Business Act (20 and 21 Vict. c. 56), sec. 4."* They also stated that the Junior Lord Ordinary (Kincairney) had meantime, on 23d October, ordered service of Finlay's petition on the ward and on Couper.

Argued for Mrs Souter;—The proper course was by petition to the Inner-House. The object was to remove a factor for misconduct, and the petitioner had therefore rightly appealed to the *nobile officium* of the Court.[1]

Argued for Finlay and Millar;—The petition of Finlay was competent and was in accordance with the Distribution of Business Act as well as of the Pupils Protection Act. There was also authority for the proceeding.[2]

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* Quoted *infra* in the opinion of the Lord Justice-Clerk.

[1] Mitchell v. Mitchell, July 20, 1864, 2 Macph. 1378, 36 Scot. Jur. 693; Rhind v. Sheach, July 20, 1875, 2 R. 1002.

[2] Kyle, June 10, 1862, 24 D. 1084, 34 Scot. Jur. 541; Tweedie, Dec. 8, 1886, 14 R. 212; Masterton v. Erskine's Trustees, May 14, 1887, 14 R. 712.

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LORD JUSTICE-CLERK.—Two petitions have been presented for the removal of the curator bonis to John Souter and for the appointment of a new curator bonis. One of them was presented to the Junior Lord Ordinary and the other by another party to this Division of the Court. The question between the parties is one of competency. It appears that doubts were felt by the officials of the Court as to which was the proper tribunal for consideration of the matter in the first instance, and as the point is one which may often occur in practice we thought it right to take time for consideration. Having done so, I do not feel serious difficulty as to the result.

By the Pupils Protection Act, 1849 (12 and 13 Vict. c. 51), sec. 31, it is enacted that "the Court shall have power, on cause shewn, to remove or accept the resignation of any tutor or curator coming under the provisions of this Act, and to appoint a factor loco tutoris or curator bonis in his room"; and "the Court" is defined (sec. 1) to mean "either Division of the Court of Session." There is therefore no question what would be the proper tribunal under that Act.

But in 1857 there was passed the Distribution of Business Act (20 and 21 Vict. c. 56), sec. 4 of which provided that "all summary petitions and applications to the Lords of Council and Session, which are not incident to actions or causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer-House, who shall deal therewith and dispose thereof as to him shall seem just; and, in particular, all petitions and applications falling under any of the descriptions following shall be so enrolled before, and dealt with and disposed of by, the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court . . . ." (Subsec. 5) "All petitions, applications, and reports under the Act 12 and 13 Victoria, chapter 51, entituled 'An Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity in Scotland'"—the Pupils Protection Act.

That enactment is distinct and specific. The Junior Lord Ordinary is to be the Judge in the first instance, subject of course to review by the Division.

I therefore conclude that the petition to the Inner-House which is before us is not competent, and that the petition to the Junior Lord Ordinary was the only competent process. But as the matter had been regarded as one of doubt in practice, which it was desirable to remove, I propose that no expenses be found due by the party who presented the petition to the Inner-House.

LORD YOUNG.—I am of the same opinion. The question is purely a question of practice, and I am not surprised that the Clerks of Court and our learned brother Lord Rutherfurd Clark should have felt some doubt upon it. We thought it right, the question being one of practice, to confer with the Judges of the other Division, and they concur with us in our decision. It is now settled, therefore, that such petitions are to be presented in the first instance to the Lord Ordinary.

LORD RUTHERFURD CLARK.—I concur.

THE COURT dismissed the petition of Mrs Souter.

SIM & GARDEN, S.S.C.—ROBERT FINLAY, S.S.C.—Agents.

No. 18.

Nov. 8, 1890.

Selbie v. Saint.

JAMES SELBIE, Pursuer (Appellant).—*Watt—Kemp.*
GEORGE SAINT, Defender (Respondent).—*Ure—Mac Watt.*

Reparation—Slander—Privilege—Privilege of litigant in stating matter pertinent to action.—In an action by a tenant against his landlord for damages for breach of contract in taking possession before the expiration of the lease of the shop let to the pursuer, the defender *inter alia* averred that the tenant had gone to England, and had left the shop in charge of J. S., that J. S. "was seldom sober" during the time he was on the premises.

In an action of damages for slander raised by J. S. against the landlord, *held* that the defamatory statement made by the landlord in the other action being pertinent to the cause was privileged, and that as the pursuer had failed to set forth facts from which malice could be inferred the action fell to be dismissed.

2D DIVISION. Sheriff of Aberdeenshire.

I.

THIS action of damages for slander was raised in the Sheriff Court at Peterhead by James Selbie, messenger-at-arms, Peterhead, against George Saint, grocer there, in the following circumstances:—

Saint had let a shop in Peterhead to John Penny, shoemaker, from Whitsunday 1889 to Whitsunday 1890. In October 1889 Penny left Peterhead and gave the charge of the shop to James Selbie. On 11th October Saint ejected Selbie from the shop and after locking the door took away the key.

Penny then raised an action of damages against Saint for breach of contract.

In his defences to this action Saint averred;—(Stat. 2) "The pursuer and Mr Selbie commenced to clear the premises with the evident intention of defrauding defender of his right of hypothec for his rent, but he obtained a warrant from the Court, and sequestrated in security some effects which pursuer or Selbie did not manage to remove." (Stat. 3) "After the sequestration was laid on, Mr Selbie lived on the premises. . . ." (Stat. 4) "Mr Selbie was seldom sober during the time he was on the premises, and he used the same improperly, and was such a nuisance and source of danger that the defender's other tenants complained to him and to the police of Selbie's conduct."

Selbie raised the present action against Saint, in which, after setting forth statement 2 in the defences to Penny's action, and the statement in article 4 that "Mr Selbie was seldom sober during the time he was on the premises," he averred that these statements were "of and concerning the pursuer, are false and slanderous, and were made maliciously and without probable cause."

There was no further statement of facts from which malice could be inferred.

The defender did not dispute having made the averments complained of in his defences to Penny's action. He denied that they were slanderous. He stated that the pursuer was notour bankrupt.

The defender pleaded privilege, and further, that the pursuer's averments were insufficient to support the action.

The Sheriff-substitute (W. A. Brown) allowed a proof.*

* "NOTE.— . . . Looking to the public position claimed by the pursuer, and their own character, I am unable to hold that the expressions complained of are not actionable. The only point on which I have felt any difficulty is whether on the doctrine of *Scott* v. *Turnbull* (11 R. 1131) it was not necessary for the pursuer to condescend on facts and circumstances from which malice is to be inferred, but the statement as to the pursuer's course of insobriety appears to me to be both irrelevant and impertinent to the issue which the defender was meeting in the action founded on, and according to the implication of that case, on these conditions such specifications would not be required. . . ."

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On appeal the Sheriff (Guthrie Smith) ordained the pursuer to find caution for expenses, on the ground that the action was substantially the same as a prior action which the pursuer had brought in the Small Debt Court and had abandoned on the eve of trial, after putting the defender to the expense of preparing for trial, and on his failure to find caution the action was dismissed.

The pursuer appealed, and (besides arguing that in the circumstances caution was unnecessary) contended on the relevancy of the action, that the words complained of though stated in a pleading in Court formed an actionable wrong.

The defender's contention amounted to a claim for an absolute privilege to a litigant to injure a third party by any statement in his pleadings however false and unjustifiable. It was admitted that a witness had such complete privilege, and that a Judge and a counsel also enjoyed it.[1] But it had never been held that a party had such a privilege, and the considerations of public policy which applied to the other cases did not apply to him. Indeed, the case of *Williamson* v. *Umphray*[2] settled that they did not. The statements here complained of were not relevant or pertinent to Penny's action.

Argued for the defender;—The action should be dismissed as irrelevant. The statement complained of was used by the defender when defending himself in a law-suit, a highly privileged position. It was relevant to that defence, and, what was alone sufficient, it stated a matter pertinent to the action. This action therefore could not be maintained.[2]

At advising,—

LORD JUSTICE-CLERK.—This case is before us on an appeal from the judgment of the Sheriff finding that the pursuer must find caution for expenses. I confess that if I thought that the action was a relevant action which ought to be allowed to proceed—apart from the question of caution for expenses—I should have much difficulty in affirming that judgment in the circumstances.

But the question of the relevancy of the action has been raised and argued, and we are entitled to deal with it, and if our view is adverse to the relevancy it is desirable we should express it and bring the litigation to an end. The objection to the relevancy is that the pursuer avers a case of slander said to be contained in pleadings by the present defender in another action, in which he had to defend himself against proceedings at the instance of a person named Penny. I think that the pursuer has not stated any ground upon which we could hold that his action is relevant. It is certain that in the ordinary case an averment by a party to a suit in Court cannot, if only it is relevant or pertinent to the action in which it is made, form a good ground for an action of damages for slander, at all events if it is not averred that it was made without probable cause and with malice, and that in such a way as I shall presently allude to. Now, was this averment which is complained of relevant or pertinent? The present defender was being sued by Penny for damages for having wrongfully turned out of a house of which he is the owner this pursuer Selbie, whom Penny alleged that he had left there as a caretaker. His defence there included a statement—being

[1] Mackellar v. Duke of Sutherland, Jan. 14, 1859, 21 D. 222, 31 Scot. Jur. 139, and June 18, 1862, 24 D. 1124; Munster v. Lamb, 1883, L. R., 11 Q. B. D. 588; Gordon v. British Metaline Co., Nov. 16, 1886, 14 R. 75 (Lord Rutherfurd Clark's opinion).

[2] Scott v. Turnbull, July 18, 1884, 11 R. 1131; Williamson v. Umphray, June 11, 1890, 17 R. 905; Farquhar v. Neish, March 19, 1890, 17 R. 716.

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that complained of—that Selbie was seldom sober while so employed; that in consequence the premises were not cared for, and goods which were subject to his (the defender's) hypothec were being removed, and that he was therefore justified in acting as he did.

That was a statement which in my opinion is both relevant and pertinent. But it is sufficient that it was pertinent, and that admits of no shadow of doubt. I have therefore no difficulty at all in holding that the pursuer, who now founds his action upon it, has stated no relevant case. He would further require to allege malice and want of probable cause, and it would not be sufficient merely to aver malice. It would be necessary further to aver specific facts from which the malice might be inferred. The law to that effect is now well settled, and although I cannot say I have ever understood the principle upon which that law is based, I am bound to apply the law as it is.

I think this action must be dismissed as irrelevant.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the interlocutors of the Sheriffs, and dismissed the action.

CHARLES GEORGE, S.S.C.—SMITH & MASON, S.S.C.—Agents.

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A B, Petitioner (Respondent).—*Low—Sandeman.*
C B, Respondent (Reclaimer).—*Guthrie Smith—A. S. D. Thomson.*

Curator Bonis—Insanity—Insane delusion—Opposition of alleged incapax—Necessity of cognition.—The wife of a man who was detained in a lunatic asylum presented a petition for the appointment of a curator bonis to her husband. He opposed the petition, maintaining that he ought not to be superseded in the management of his affairs until he had been cognosced upon a brieve from Chancery. He did not dispute the propriety of his being in the asylum, but stated that such delusions as he might labour under in no way interfered with his business capacity. The Court, on a consideration of medical reports obtained by the petitioner, by the respondent, and by the Court, *granted* the petition.

1ST DIVISION.
Lord Kincairney.
C.

ON 10th June 1890 Mrs A B, the wife of C B, presented a petition for the appointment of a curator bonis to her husband, then an inmate of a lunatic asylum. The petitioner stated that her husband was of unsound mind, and was unfitted for the management of his own affairs; and she produced certificates by Dr Grainger Stewart and Dr Heron Watson, and by Dr George W. Balfour and Dr Littlejohn.

Dr Grainger Stewart and Dr Heron Watson stated that they felt it impossible, at the date of their examination on 20th May, "to grant a certificate for the appointment of a curator bonis." They recommended delay, and a further examination after the lapse of a month or six weeks, for the purpose of deciding upon the necessity of appointing a curator.

Dr Balfour, who examined C B on 28th May, and Dr Littlejohn, whose examination took place on 31st May, expressed the opinion, in general terms, that C B was of unsound mind, and incapable of managing or of giving directions for the management of his affairs.

C B lodged answers, in which, without denying that he was of unsound mind, he stated that his mental condition was not such as to incapacitate him from the management of his affairs.

He produced certificates by Drs Clouston and Bramwell, who stated that, on their visit on the 28th June, they found C B coherent and acute

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in regard to business matters, but, taking into account the whole of the facts elicited at a prolonged examination of his mental condition, they felt unable to give a certificate that he was yet fit to manage his affairs or give directions for their management.

C B's estate consisted of personal property to the amount of about £40,000, which consisted chiefly of shares in various companies.

On 11th July 1890 the Lord Ordinary (Kincairney), having heard counsel, remitted to Sir Arthur Mitchell, Chief Commissioner in Lunacy, to examine the petition, answers thereto, and productions, and thereafter to visit the respondent, and to report whether, in his opinion, the respondent "is at present in such a state of mental derangement as to render him incapable of managing or of giving directions for the management of his affairs."

On 4th August Sir Arthur Mitchell reported that he had examined the petition, the answers thereto, and had read and considered numerous documents and letters tending to throw light on the respondent's mental condition, "and I have had three interviews with him. I have now to report that, in my opinion, he is at present of unsound mind, and that, in consequence of this, he is incapable of managing or of giving directions for the management of his affairs. I have arrived at this opinion without hesitation or difficulty."

Thereafter the respondent lodged a minute, in which he "respectfully protests against being deprived of the management of his own affairs on such inquiry as has been made under the present petition, and humbly moves the Court to supersede further procedure under the petition until the question of the respondent's capacity to manage his affairs shall be determined by the verdict of a jury under a brieve for his cognition, to be applied for by the petitioner or any other party having interest."

On 15th August the Lord Ordinary, after a further hearing, appointed Mr Harry Cheyne, W.S., to be curator bonis to the respondent.*

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* "OPINION.— . . . The case was debated before me, and the respondent's counsel moved that I should make a remit to the Sheriff to direct an inquiry as to the respondent's state of mind, and report.

"I considered the case so delicate and important that I should then have reported it to the Inner-House, but I thought, considering the differences in the medical certificates, that the case was hardly prepared to be submitted to their Lordships.

"I rather understand that the course of making a remit to the Sheriff, suggested by the respondent's counsel, has not of late years been regarded very favourably, and I considered that I had hardly a right to devolve on the Sheriff a duty which appeared to be my own; and ultimately I came to think that the safest step I could take was to make a remit to a medical gentleman who had not been employed by either party, and whose opinion I could regard as of weight and authority.

"Having ascertained that Sir Arthur Mitchell had not been consulted in the case in such a way as to affect his absolute neutrality, I, on 9th July, remitted to him to examine the petition and answers and productions, and thereafter to visit the respondent, and to report whether, in his opinion, he was in such a state of mental derangement as to render him incapable of managing or of giving directions for the management of his affairs. Sir Arthur Mitchell has now returned a report, stating his opinion, 'without hesitation or difficulty,' that the respondent is at present of unsound mind, and, as a consequence, incapable of managing or of giving directions for the management of his affairs.

"Sir Arthur Mitchell's report is expressed in general terms, but he was good enough to call on me and to explain his views in more detail. It appears that the respondent is, in Sir Arthur's opinion, subject to delusions related to what is known as spiritualism, of such a nature as to render him quite an unsafe

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The respondent reclaimed.

Before the hearing the respondent lodged two further reports by medical men as to his mental condition.*

guardian of his own property, and which might render him liable to be very readily imposed on by designing people who were aware of his weakness. He entertains besides, Sir Arthur informs me, feelings of mistrust towards his family which cannot be altogether disregarded.

"There have been submitted to me certain documents which were put in the hands of Sir Arthur Mitchell, and I refer in particular to notes of a seance held in the respondent's house, written by him, and to three volumes, also written by him in pencil, purporting to consist of letters addressed to him, although they are really written by himself. It would not, I think, be convenient to describe these documents in this note, but, to my mind, they thoroughly corroborate Sir Arthur Mitchell's opinion, and indeed leave no room for doubt about the serious character of the respondent's delusions.

"The agents for the petitioner and for the respondent have been again heard, and it has been strongly pressed, on behalf of the respondent, that he shewed an intelligent comprehension of his own affairs—which seems to be true—and that he could safely be trusted with them, and in particular that he could not, or ought not, to be deprived of the control of his own property without the verdict of a jury obtained on a brieve from Chancery, under the provisions of the 101st section of the Court of Session Act.

"I have felt the force of this contention, but what, as it appears to me, I have to consider is whether it is right and safe that the respondent should be left without control in the meantime, and until the meeting of the Court.

"A brieve from Chancery cannot proceed at present; and while I do not doubt that the respondent has an intelligent knowledge of his own property, as indeed he has proved, and is probably a gentleman in many respects of ability, still I agree in Sir Arthur Mitchell's view that his considerable property is not safe under his control, so long as he remains under the influence of the singular hallucinations which at present possess him.

"I think therefore that my duty is to appoint a curator bonis. My appointment is, of necessity, substantially, though not nominally, an interim one, if it shall hereafter appear to the Court that the condition of the respondent's mind should be submitted to the consideration of a jury. It rather appears to me, however, to be better for the respondent that a curator bonis should be appointed than that his present state of mind should be submitted to a jury. For, should he shortly recover—and I have not heard anything which precludes that hope—it will be much easier to restore to him the full control of his affairs than it would be if he were found by a jury to be insane.

"I need not say that of course either of the gentlemen suggested by the parties is perfectly qualified for the office of curator; but, as matters stand, I am precluded from availing myself of the assistance of either.

"The following authorities were referred to:—*Spiers*, 4th July 1851, 23 Jurist, 610; *Henderson*, 17th July 1851, 23 Jurist, 668, 14 D. 11; *Forsyth*, 19th July 1862, 24 D. 1435, 34 Scot. Jur. 709, under name *J. D.*; *Irving* v. *Swan*, 7th Nov. 1868, 7 Macph. 86, 41 Scot. Jur. 50; *Downs* v. *Downs*, Shand's Practice, ii. 1008.

"I do not think that cases bearing on the testamentary capacity of persons alleged to be of unsound mind are applicable."

* These reports were dated 7th November 1890. One was by Dr Howden, superintendent of the Montrose Royal Lunatic Asylum, and Dr James Ferguson, Perth. They stated that they had had an interview with the respondent, "conversing with him for about two hours regarding himself and his affairs, as well as general topics. We found him calm and self-possessed in manner, of a high degree of intelligence, with a mind widely and accurately informed, and able to reason on many subjects in a clear and rational manner. He appeared thoroughly familiar with the condition of his financial affairs, and alive to his interest in regard to them." Then, after giving a detailed account of their examination, they stated that they were of opinion "(First) That C B is a

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Argued for the respondent;—In principle no one of full age could, against his will, be deprived of the management of his affairs until he had formally been cognosced and declared insane. No doubt the jurisdiction of the Court to appoint curators bonis to persons of alleged incapacity had been sustained in *Bryce* v. *Graham*,[1] but the remedy was essentially of a summary and temporary character, intended to prevent immediate danger to the property of the alleged *incapax*. It was true that the convenience of procedure by summary petition, as contrasted at least with the former procedure under a brieve from Chancery, had led to the practice of making such appointments as a permanent remedy, where there was no opposition on the part of the alleged *incapax*, and no real doubt of his incapacity; but that practice did not supersede the principle that the only regular method of depriving a man of the management of his affairs was by a cognition; on the contrary, the Court of Session Act of 1868, in providing a new and simple procedure for cognition,[2] had shewn the intention of the Legislature. In order to justify the Court in appointing a curator bonis to an alleged *incapax* it was essential to prove both his incapacity to manage his property and immediate danger to that property. It was not enough merely to prove mental weakness. Now, the present petitioner failed on both these points. Admitting that the respondent laboured under certain delusions, there was no proof, but the contrary, that these delusions in the slightest degree interfered with his capacity to look after his property. It might be for his advantage to be in an asylum, but his residence there was not incompatible with managing his property. An insane delusion was not necessarily inconsistent with testamentary capacity,[3] nor ought it to be regarded as necessarily inconsistent with business capacity *inter vicos*.[4] It was said that the respondent had conceived an unreasoning aversion to certain of his relatives. Many people did that, and shewed that they had done so in their wills, but was that a ground for holding

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person of unsound mind; (second) that, if at large, C B might be dangerous to the persons who are the objects of his suspicions, and that the nature of his delusions unfits him to treat with fairness the members of his own family and household, and renders him liable to be biassed in a similar manner against others; (third) that, nevertheless, he is capable of clearly appreciating his worldly interests in many ways; (fourth) that if management of his affairs includes a just and natural regard to the interests of his family, we do not consider he is worthy of being entrusted with their management; but (fifth) that we are not prepared to say that his mental condition, as ascertained by us, incapacitates him from administering his affairs in other respects."

The other report was by Dr Yellowlees, superintendent of the Glasgow Royal Asylum, in which, after giving a detailed account of his interview with the respondent, the reporter concluded,—"My interview does not justify me in expressing a very definite or conclusive opinion as to C B's mental condition, owing to his extreme reticence and constant fencing with words, notwithstanding that I was sent to see him by his own agent. I believe that C B is conversant with his business affairs and investments, and that he could give directions concerning them, but such directions would be influenced, or swayed, or determined by the presence of delusions as to relatives or others conspiring against him, and desiring to injure him, and might be influenced by insane ideas as to spiritualism and its devotees, supposing C B to entertain such delusions and ideas."

[1] Bryce v. Graham, July 23, 1828, 3 W. and S. 323.
[2] 31 and 32 Vict. cap. 100, sec. 101.
[3] Ballantyne v. Evans, March 3, 1886, 13 R. 652.
[4] Henderson, July 17, 1851, 14 D. 11, 23 Scot. 668; Forsyth, July 19, 1862, 24 D. 1435, 34 Scot. Jur. 709.

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them to be insane? Then it was said that the respondent was subject to spiritualist delusions, and might under their influence dispose of his property unwisely. But the disposal of property was one thing, the management of it another. A sane man of full age might dispose of his property as he pleased, however unwisely or unreasonably in the eyes of his relatives. To deprive him of that right he must be proved to be insane, and a cognition was the only legitimate way of proving that. If, on the other hand, he was—whether from mental or from bodily weakness—incapable of managing his property, the Court would supply that defect by appointing a curator bonis. But of business incapacity in the present instance there was not the slightest evidence; the property indeed, though considerable, was not of a character to require any very great powers of management. The petition ought to be refused; or, at all events, a formal proof of the averments on both sides ought to be allowed. At present there was nothing more than *ex parte* statements.

Argued for the petitioner;—The respondent was an inmate of a lunatic asylum, and it was not suggested that he had been wrongly placed there, or that he ought now to be released. The *onus* therefore was on him to shew that he had capacity to manage his affairs. He had failed to discharge that *onus*. It was clear that he was subject to spiritualist delusions, which, if they did not interfere with his business capacity in the narrowest sense, certainly made it possible that under their influence he might greatly damage his patrimonial interests, and that was sufficient to justify the appointment of a curator bonis. Of the jurisdiction of the Court to make such appointments there could be no doubt. It was in the discretion of the Court whether they would exercise that jurisdiction or leave the matter to be determined upon a brieve from Chancery. Here there could be no doubt of the propriety of making the appointment craved, for the respondent was in all probability on the fair way to complete recovery, and if he was subjected to the excitement of a trial before a jury that would almost certainly undo all the good that had been done—if it did not permanently incapacitate him.

Lord President.—I do not think that it can be disputed, as a general principle of our law, that a man of full age is not to be deprived of the management of his own affairs, except by the verdict of a jury finding him incapable of managing them; but just as little can it be disputed that there has been a practice from a very early period of appointing factors or curators bonis to persons in an infirm state of mental health where it appeared, or might be conjectured, that the infirmity was likely to prove of a merely temporary character. I do not say that the statutes regulating the procedure in regard to the cognition of insane persons, and particularly the last—the Court of Session Act of 1868—in express words confine the issuing of a brieve from Chancery, and the cognition of a person as insane, to cases in which the insanity is obviously of a permanent character, but in general I think it is that sort of case only which ought to be submitted to a jury. Where the incapacity is plainly of a temporary character, the appointment of a curator bonis is obviously the more expedient and proper remedy, and even if there is a doubt as to whether the incapacity is permanent or is merely temporary, I still think that the appointment of a curator bonis is the more judicious remedy in the first instance at least.

The jurisdiction of the Court to appoint curators bonis to manage the estates of persons mentally incapable existed, and was exercised, long before the Act of Sederunt of 1730, but the words of that Act are instructive as shewing the class of cases to which it was intended to apply. It defines the class of persons to

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whom factors or curators bonis might be appointed to be "pupils not having tutors, and persons absent that have not sufficiently empowered persons to act for them, or who are under some incapacity for the time to manage their own estates"; and the object of the appointment is declared to be "to the end that the estates of such pupils or persons may not suffer in the meantime, but be preserved for their behoof and of all having interest therein." The Pupils Protection Act, 1849, recites these words in its preamble, obviously shewing that it was the intention of the Legislature to continue the special remedy contemplated by the Act of Sederunt and to confine it to the same classes of persons—that is to say, pupils, absent persons, or persons under some incapacity "for the time." It appears to me, therefore, that in cases of alleged mental incapacity the question always is, whether the particular case is to be regarded as one of permanent incapacity, or merely as one of incapacity "for the time"; and the answer to that question of course depends on the evidence laid before the Court.

If it had been perfectly clear that there was no possibility of this gentleman ever recovering his mental capacity, I should have been of opinion that the proper course would have been to sue out a brieve of cognition from Chancery; but that is certainly not the state of the facts with which we have here to deal. The respondent, although a person of great mental acuteness, at present appears to be labouring under delusions of a very peculiar and perplexing description, and from the evidence before us, particularly the later evidence,—I mean the report of Drs Howden and Ferguson, and the report of Dr Yellowlees,—I think it is quite plain that his present condition of mind makes it very unsafe to leave him in the management of his own affairs; yet I do not see anything in the medical reports which discourages the hope that his former mental condition may be completely restored by judicious treatment. Even already his residence in the asylum appears to have wrought a considerable improvement, and that being so, it appears to me that it would be rather a strange thing for his relatives —to whom alone such a course would be competent—to sue out a brieve from Chancery with the object of having him formally declared to be insane and permanently deprived of the management of his affairs, subject to the possibility of his being reinstated by a declarator of reconvalescence. Such a remedy is only to be resorted to in extreme cases, and in the present case everything points to the application of a temporary remedy—that is to say, to the appointment of a curator bonis, which is the only temporary remedy known to our law.

It was urged that the respondent himself desired that the question of his mental capacity should be tried by a jury. I confess that I am not disposed to attach much importance to his opinion. Neither he himself nor his legal advisers thought fit to set forth in the answers a demand that the question of his mental capacity should be submitted to the judgment of a jury. But, on second thoughts, after having seen a copy of Sir Arthur Mitchell's report, he, on the 12th August, writes to his law-agents in these terms:—"Having to-day seen a copy of Sir A. Mitchell's report, I still maintain that I am perfectly competent to manage my own affairs, and I wish you to insist on the question of my capacity being tried by a jury. I cannot consent to the appointment of a curator bonis; still, if one must be appointed, I wish Mr William Mitchell, S.S.C., to be appointed." And, accordingly, a minute is lodged in which the respondent "respectfully protests against being deprived of the management of his own affairs on such inquiry as has been made under the present petition, and humbly moves the Court to supersede further procedure under the petition until the question of the respon-

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dent's capacity to manage his affairs shall be determined by the verdict of a jury under a brieve for his cognition, to be applied for by the petitioner or any other party having interest." Now, if this suggestion had come from anyone else I should have said that it was the suggestion of an enemy. I can hardly conceive anything more likely to retard this gentleman's recovery than an inquiry into his mental condition before a jury. If there is one course more probable than another to make him permanently mad, it is the course suggested in this letter and minute.

I see no reason to doubt, in the first place, that this gentleman's present mental condition is such as to make him unfit to manage his own affairs in the meantime; and, in the second place, I think it is quite possible, if it is not probable, that he may at some future time be in such a state as to make it safe that he should be restored to the uncontrolled management of his affairs. I therefore think that the Lord Ordinary has taken the proper course in appointing a curator bonis.

Lord Adam.—I agree, and have very little to add. There is no doubt of the competency of such a proceeding as this. It is a proceeding which is independent of the ordinary process of cognition upon a brieve from Chancery, and is further the more suitable course to adopt where the unsoundness of mind is not likely to be enduring, for if the person recovers his mental capacity, the curatory may easily be recalled; if on the other hand it becomes apparent that the unsoundness of mind is of a permanent character, the appointment of a curator bonis does not preclude the nearest male agnate from suing out a brieve of cognition in the usual way. That is my view upon the competency of this petition, and the only remaining question is as to the expediency of the appointment in this instance.

The main matter for consideration is, what is the course most conducive to the benefit of the man himself? Now, his case is peculiar in this respect, that he is now in a lunatic asylum, and is admittedly of unsound mind. He does not himself say in the answers that he is of sound mind. His case is, that while he is of unsound mind he is not of unsound mind to the extent of being unfit to manage his own business affairs. But upon the evidence before us in the form of medical certificates—and some of these were obtained at his own instance—it is clear that his mental unsoundness goes a great deal further than this. [His Lordship then referred to some parts of the medical reports and proceeded]—Now, the question is whether it is right and proper that a person so described should have the management of his affairs in his own hands, and to that question I say no.

Lord M'Laren.—Some important questions have been argued in this case regarding the jurisdiction of this Court, or rather the manner in which the jurisdiction ought to be exercised for the benefit of those unfortunate persons who are afflicted with mental derangement. I wish to make an observation as to one of the points that were raised in the argument,—viz., whether all such questions should not be tried by a jury when an issue of fact as to sanity or insanity is clearly raised. Now, that undoubtedly is the mode of trial where the issue of insanity is raised under a brieve of cognition. But I should be sorry to give countenance to the supposition that this is the only way in which a question of mental capacity can be investigated with a view to making provision for the care of the person and the property of the insane. The process of cognition never

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has been within the historical period the only process for determining such questions. It is strictly a proceeding for the appointment of a tutor of law, and can only be instituted by some person claiming that office as of right. But along with the process of cognition there have subsisted other modes of providing for the care of the property and the person of the insane which, if not as old as the process of cognition, may at least lay claim to a respectable antiquity. One of these is the process of curatory, the origin of which your Lordship has traced, and there is also the jurisdiction originally exercised by the Court of Exchequer, and now by the Court of Session, in the appointment of tutors-dative to insane persons in cases where the tutor at law does not choose to act. We do not have many applications for the appointment of tutor-dative,—I suppose because it is a gratuitous office, and because it is more convenient that such estates should be managed on the footing of professional responsibility by agents who make it their business, and who are paid for their services. But in either case the mode of inquiry has in general been the same. The Court has proceeded partly on the reports of professional persons submitted to it, and partly, at least in all cases of doubt or difficulty, on the reports of experts selected by the Court itself, for the purpose of informing itself as to the true state of mind of the person interested. I am far from saying that there may not be cases where it is necessary that a proof or inquiry of a more formal character should be undertaken. If, for example, a defender who up to the date of the presentation of the petition was in the management of his affairs, and was considered by all his friends to be of sound mind, should be made the subject of an application of this kind, and if answers are given in amounting to a substantive denial of all the petitioner's allegations as to the defender's mental condition, I do not doubt that we should deal with such a case either by dismissing the application (leaving the question to be tried under a brieve of cognition), or by remitting the question raised in the petition and answers for trial by a Judge with or without the assistance of a jury as might be judged expedient. But as your Lordship has pointed out no such issue is raised in the present case. In their answers the respondent's advisers very properly admit,—what they must know to be consistent with fact,—that the mind of the respondent is to a certain extent clouded, and they only raise the question whether this state of cerebral or mental disease is of such a character as makes it necessary that he should be deprived in the meantime of the conduct and control of his affairs. That, I apprehend, is properly a question to be dealt with according to judicial discretion, and it would be quite contrary to our inveterate practice, and I think not consistent with good sense, that for the purpose of settling such a question we should resort to the more elaborate forms of jury trial and proof in open Court, modes of proceeding which could hardly fail to be injurious to the health of the person whose interests we are considering.

I am therefore of opinion that the Lord Ordinary has properly dealt with this case, having before him the opinions of very competent men, and amongst others the highest authority in Scotland—as high authority as exists anywhere,—viz., that of the Chief Commissioner of Lunacy.

LORD KINNEAR concurred.

THE COURT adhered.

TODS, MURRAY, & JAMIESON, W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 20.

Nov. 13, 1890.

Drysdale & Gilmour v. Liquidator of International Exhibition of Electrical Engineering and Inventions.

DRYSDALE & GILMOUR, Petitioners.—*Asher—C. S. Dickson.*

JAMES ALEX. ROBERTSON, C.A. (Liquidator of International Exhibition Association of Electrical Engineering and Inventions).—*Murray—A. S. D. Thomson.*

Company—Winding-up—Creditor—Voluntary winding-up placed under supervision—Resolution to wind up—Companies Act, 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 79 *and* 129.—A company was incorporated under the Companies Acts, 1862 to 1886, for the purpose, *inter alia*, of carrying on an Exhibition of Electrical Engineering, &c. "during the year 1890." A few days before 1st November, when the Exhibition was to be closed, a creditor presented a petition stating that the company was unable to pay its debts, and praying that it be wound up by the Court.

On 5th November the company at a general meeting passed a resolution that the company should be wound up voluntarily, and appointed a liquidator. The liquidator, with concurrence of certain creditors, applied to the Court by a note in the creditor's petition for an order placing the voluntary liquidation under the supervision of the Court.

The creditor opposed the prayer of the note, maintaining (1) that the resolution was incompetent, on the ground that all the purposes of the company had not been fulfilled, and that the company ought to have proceeded by way of special resolution duly confirmed, or by an extraordinary resolution; and (2) that, seeing the company was unable to pay its debts, the petitioner, as a creditor, was entitled to an order for a winding-up by the Court.

The Court *held* (1) that the resolution (though neither extraordinary nor special) was competent under sec. 129,* subsec. (1), of the Companies Act, 1862; (2) that notwithstanding the prior petition by the creditor for judicial liquidation, the voluntary liquidation was lawful and expedient, and ought not to be interfered with; and (3) that the note by the liquidator in the creditor's petition craving an order placing the liquidation under the supervision of the Court should be granted, and the appointment of the liquidator confirmed. The creditor's petition was accordingly *refused*.

2D DIVISION. I.

THE INTERNATIONAL EXHIBITION ASSOCIATION OF ELECTRICAL ENGINEERING AND INVENTIONS was formed in 1889. The association was limited by guarantee.

The objects for which it was established were, as stated in the memorandum of association, *inter alia*, as follows:—"(*a*) To open and to carry on during the year 1890 an exhibition in or near Edinburgh, in the county of Midlothian, of engineering, inventions, manufactures, products, industries, and material resources of all nations, and of the machinery and appliances relating thereto, and of all articles illustrative of science and art."

Other purposes were to purchase or take on lease real or personal property, including ground and buildings for the exhibition, to construct buildings for the exhibition, and to use them or let them on lease, to sell and dispose of the same, and also "(*f*) To allocate spaces to exhibitors,"

* Section 129 of the Companies Act, 1862 (25 and 26 Vict. c. 89), enacts,—"A company under this Act may be wound up voluntarily, (1) whenever the period, if any, fixed for the duration of the company by the articles of association, expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; (2) whenever the company has passed a special resolution requiring the company to be wound up voluntarily; (3) whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up the company. . . ."

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&c., "and to make the whole funds so obtained available for defraying the expenses incurred by the association in organising, promoting, and conducting the exhibition, and in winding up the affairs of the association, and otherwise, in so far as the same shall be required for such purposes."

The 41st article provided,—"The association shall be wound up voluntarily as soon as convenient after the fulfilment of the purposes for which it is established."

On or about 21st October 1890, the period at which the exhibition was to be closed being Saturday, 1st November 1890, the Executive Council of the association issued to the members a notice calling a meeting for Wednesday, 5th November, to consider, *inter alia*, the following resolution:—"That the purposes for which the association was established having now been fulfilled, it is now required by the association, in general meeting assembled, that the same be wound up voluntarily, and the meeting hereby resolve that the association be wound up voluntarily."

On 29th October 1890 a petition for the winding up of the association by the Court was presented by Drysdale & Gilmour, contractors. The petitioners stated that they were creditors of the company to the amount of £9000; that a preference was, it was feared, being secured by the British Linen Company Bank, to whom the guarantee letters of the guarantors had been hypothecated; and that "the association is unable to pay its debts, and it is just and equitable that it should be wound up."

An order for intimation and service was obtained on this petition on 29th October.

On 5th November 1890 the meeting of the association was held, and the resolution, of which intimation had been given, was proposed and unanimously passed.

A resolution was also passed that Mr J. A. Robertson, C.A., be appointed liquidator, and a committee were nominated to advise with him.

Mr Robertson was directed by the meeting to apply to the Court to have the liquidation placed under the supervision of the Court.

On 7th November 1890 Mr Robertson presented to the Court a note in the petition of Drysdale & Gilmour praying for an order that the voluntary winding-up should be continued, but subject to the supervision of the Court, and also praying the Court to confirm his appointment as liquidator; and, further, to find Drysdale & Gilmour entitled to the expenses of the petition at their instance, and to direct the same to be expenses in the liquidation.

The note stated that creditors for a large amount concurred with the liquidator in making the application.

Argued for Drysdale & Gilmour;—The liquidation was a creditor's liquidation, for it was clear that there was hopeless insolvency. The contention of the liquidator amounted to this, that the company, the debtor, should elect its own trustee and decide the manner of its own winding-up. The resolution to wind up was incompetent. It ought to have been by special resolution duly confirmed fourteen days after its date. In short, the association should have proceeded under subsec. (2) or (3) of sec. 129 of the Companies Act, 1862, and not under subsec. (1). The circumstances were not those which the 1st subsec. contemplated. The words "whenever the period, if any, fixed for the duration of the company by the articles of association expires" could not apply, because there was no period fixed by the articles of the association. The memorandum said only that an exhibition was to be carried on "during the year 1890." Nor could the following words apply, viz.:—"Whenever the event, if any, occurs upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the

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company in general meeting has passed a resolution requiring the company to be wound up voluntarily." There was no such article of association, and, further, such event had not occurred in this case. There were other objects of the company to be fulfilled. It had still the object unfulfilled of ingathering charges for space, for rent of its property, and the object of selling its buildings, and of dividing its surplus, if any. The resolution was therefore incompetent. Besides, "winding-up" was different from "dissolution." A company subsisted during a winding-up and fell to be "dissolved" only when that process was finished. Drysdale & Gilmour had an interest to have a winding-up order on their petition, for if the winding-up was on their petition its date would be 29th October, while if the prayer of the voluntary liquidator were granted its date would be 5th November. Preferences might depend on the intervening period. It was certain that the bank was attempting to gain such a preference. A creditor was entitled to have such an order, or, at all events, it took a very special case to deprive him of the right.[1]

Lastly, the note was incompetent. A liquidator could not ask for a supervision order, but only a creditor, a contributory, or the company could do so.[2]

Counsel for the liquidator was not called on as to the competency of the resolution to wind up. He stated at the bar that twenty-two creditors, whose claims amounted to £6000, concurred in the liquidator's note. Further, that no preferences were being acquired, and that the liquidator had already entered on his duties and ingathered considerable funds.

At advising, the opinion of the Court (Lords Young, Wellwood, and Stormonth Darling) was delivered by

LORD YOUNG.—We have considered this case, and we are all of opinion that the voluntary liquidation which is going on now is lawful, and that there are no sufficient reasons why we should interfere with it by putting the association under another form of liquidation and another liquidator. The result is that we will refuse the petition for judicial liquidation at the instance of Drysdale & Gilmour, and substantially—the form of the order may be matter for consideration—accede to the prayer of the note,—that is, to sanction the voluntary liquidation under the supervision of the Court, and confirm the appointment of the liquidator and of the gentlemen who have been nominated to advise with him. The result is simply this, that as the association must be wound up, we think that winding-up under voluntary liquidation is lawful, competent, and upon the whole the most expedient.

THIS interlocutor was pronounced:—"Having resumed consideration of the petition, with the note for James Alexander Robertson chartered accountant, Edinburgh, No. 20 of process, allow the said note to be amended at the bar, and the same having been amended accordingly, direct and ordain that the voluntary winding-up of the International Exhibition Association of Electrical Engineering and Inventions, 1890, resolved on by the resolution passed at the general meeting of the said association, held on 5th November 1890, be continued, but subject to the supervision of the Court Confirm the appointment of the said James Alexander Robertson as liquidator of the said association in terms of and with all the powers conferred by the Companies Act, 1862, and Acts amending and extending the same: Also confirm the appointment of Sir

[1] Companies Act, 1862, 25 and 26 Vict. c. 89, sec. 79; Buckley on Companies (5th ed.), p. 196; General Rolling Stock Co., Limited, 1865, 34 Beavan, 314.

[2] *In re* Pen-y-van Colliery Co., 1877, L. R., 6 Ch. Div. 477; Wilson v. Hadley, Nov. 8, 1879, 7 R. 179.

Thomas Clark, John Wilson, Robert Cranston junior, Robert Shillinglaw, John C. Dunlop, Peter L. Henderson, and George Gilroy, as a committee to advise with the liquidator in relation to all matters or questions arising in the liquidation: Find the petitioners, Drysdale & Gilmour, Alexander Drysdale, and George Gilmour, entitled to the expenses of the petition, and direct the same to be expenses in the liquidation: And remit to Lord Stormonth Darling, Ordinary, in terms of the 6th section of the Companies Act, 1886, to proceed in the subsequent proceedings in the winding-up: *Quoad ultra* refuse the prayer of the petition, and decern."

DAVIDSON & SYME, W.S.—REID & GUILD, W.S.—Agents.

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WILLIAM BELL MACDONALD AND ANOTHER, First Parties.—*Sol.-Gen. Pearson—C. K. Mackenzie.*

HELEN JOHNSTON CUTHBERTSON AND ANOTHER, Second Parties.—*Asher—M'Lennan.*

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Writ—Testament—Holograph—Adoption of writing not holograph—Will partly printed, partly holograph.—A B, a domiciled Scotsman, resident in Shanghai, filled up, dated, and signed a printed form of a will drawn in English style, but left the annexed attestation schedule blank, there being no subscribing witnesses. The form contained blanks (1) for the name of the testator, (2) for the names of the legatees, and (3) for the name of an executor. In the first A B inserted his own name and designation, in the second the names of his two brothers, and the words "equally and jointly, if one deceased to the survivor only," and in the third the name of a friend. The words of bequest and the description of the subjects were in print. The whole document, with the manuscript insertions, read as a bequest by A B of his whole heritable and moveable property to his two brothers. The execution of the will was defective according to the law of England, the *lex loci*, but it was founded on as a valid will by the law of Scotland. *Held* (*diss.* Lord M'Laren) that the document could not receive effect as a holograph will.

THOMAS JOHNSTONE MACDONALD, merchant at Shanghai, in China, died there on 12th September 1887. He was by birth a Scotsman, and was at the date of his death domiciled in Scotland.

1st DIVISION. C.

After his death the following document was found in his desk at Shanghai. It consisted of a printed form of testament, having originally blanks for the insertion of various particulars. The particulars which had been filled into these blanks were in the handwriting of the deceased, and he had signed his name at the end. In the copy here given the portions in Roman type shew what was in the document as printed; the italic type shews what the deceased wrote. The deceased left no other document of a testamentary character:—

"THIS is the last WILL and TESTAMENT of me, *Thomas Johnstone Macdonald*,
of *Shanghai*.

I direct that all my just Debts and Funeral and Testamentary Expenses be paid and satisfied by my Execut*or* hereinafter named, as soon as conveniently may be after my decease. I give, devise, and bequeath

[*A line was drawn across this blank.*]

all and every my Household Furniture, Linen, and Wearing Apparel, Books, Plate, Pictures, China, Horses, Carts, and Carriages, and also all and every Sum or Sums of Money which may be found in my House or be about my person or due to me at the time of my decease, and also all my Stocks, Funds, and Securities for Money, Book Debts, Money on Bonds, Bills, Notes, or other Securities, and all and every other

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of my Estate and Effects whatever and whatsoever, both real and Personal, whether in Possession or Reversion, Remainder or Expectancy, unto *my two brothers, William Bell Macdonald, Donald Macdonald,* equally and jointly. *if one deceased to the survivor only,* to and for *their* own Use and Benefit absolutely. And I nominate, constitute, and appoint *Edward Ogilvie Arbuthnot, of Shanghai,* to be Executor of this my WILL; and hereby revoking all former or other WILLS and TESTAMENTS by me at any time heretofore made, I declare this to be my last WILL and TESTAMENT. IN WITNESS WHEREOF, I, the said *Thomas Johnstone Macdonald,* have to this my last WILL and TESTAMENT set my Hand the *twenty-third* day of *July,* in the year of Our Lord One Thousand Eight Hundred and *Eighty Three.* *T. J. MACDONALD.*

* (Testator's Signature.)

Signed, sealed, published, and declared, as and for the last WILL and TESTAMENT of the said

in the presence of us, who in his presence and in the presence of each other, all being present at the same time, have hereunto set our hands as WITNESSES thereto, on the day of the date written.

× ×

Signature of Witnesses.

This was a special case presented to determine the validity of the foregoing document.

The first parties were the two brothers of the deceased mentioned in the deed. The second parties were certain of his heirs *ab intestato.*

The foregoing facts were stated in the case. It was further stated that the law of Shanghai, where the deed was made, was the law of England, and that by the law of England the document in question was invalid as a will in respect it was not attested by two or more subscribing witnesses.

The question of law was:—"Is the document referred to in the foregoing case a valid will according to the law of Scotland?"

The first parties maintained the affirmative. The second parties maintained that the document was not valid as a will in respect that it was not holograph of the deceased; that its essential or substantial parts were neither in his handwriting nor were they adopted by him as holograph, and that the document had annexed to and incorporated with it a form of attestation by witnesses, in terms appropriate to its execution before witnesses, in accordance with the forms required by the law of the place where it was made. It was therefore *ex facie* intended by the deceased to be executed with the solemnities of that law, or at least to remain inoperative unless and until acknowledged in the presence of witnesses, and the deceased having prescribed solemnities to himself, the document was invalidly executed according to the law of Scotland in respect of non-compliance with these solemnities.

Argued for the first parties;—The document here was effectual as the will of the deceased either because the non-holograph portions had been adopted by the deceased as holograph, or because it was holograph *in essentialibus.* A non-holograph or partly non-holograph deed might be adopted as holograph,[1] and such adoption need not be express; "indubitable implication" was enough.[2] In *M'Intyre* v. *M'Farlane's Trustees*[3] the holograph words "I add to this" had been held sufficient to infer adoption. Here it was impossible to look at the paper without inferring,

[1] Gavine's Trustees v. Lee, Jan. 12, 1883, 10 R. 448.

[2] Maitland's Trustees v. Maitland, Nov. 10, 1871, 10 Macph. 79, 44 Scot. Jur. 48, per Lord Kinloch, p. 84.

[3] M'Intyre v. M'Farlane's Trustees, March 1, 1821, F. C.

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from the careful way in which all the blanks were filled up, that the testator intended the printed portions to stand as parts of his will—reading the whole together, there was a complete sequence of ideas. It was not a case of adoption in the sense of the incorporation of an invalid deed into a valid one. What the deceased had done was to say by implication that he meant the deed as a whole to stand as his will. It was not the true test to take the holograph words by themselves in the first instance, and treat the non-holograph words *pro non existentibus*. On the contrary, the import and effect of the holograph words was much influenced by the company in which they were found, and their position on the paper.[1] Applying that test there could be no reasonable doubt here. The main object of the solemnities of authentication was security against forgery, and the exception of holograph writs was because, as Lord Stair observed, they were "unquestionably the strongest probation by writ and least imitable."[2] The principle of that exception applied where the non-holograph words were not in writing but in print, for there was practically no danger of fabrication in such a case, less perhaps than in the case of a writing wholly holograph. The provisions of the Titles to Land Act, 1868,* and the Conveyancing Act, 1874,† applied only to cases in which the written portions were not holograph of the subscribers. Then the writing was holograph *in essentialibus*. Words of gift were not essential,[3] a bond had been found to be holograph in which only the debtor's name, the sum, and the dates were holograph.[4] Here there was the name and designation of the deceased and his subscription, there was a destination to his two brothers which was unequivocal, and there was a date. There were therefore the *essentialia* of the will of this man, for *essentialia* did not mean the elements which distinguish a will as such from other classes of deeds, but the elements which distinguish the will of the deceased from other wills. If the document down to the subscription was to be treated as holograph, the circumstances that these blanks in the attestation clause were not filled up and that there were no subscribing witnesses were immaterial; the deed stood on its own holograph character, and attestation was unnecessary. Even if attestation was ineffectually attempted, that would not deprive the deed of the privileges of a holograph deed.[5] The testator had not here prescribed attestation as a special solemnity, as in the case of *Nasmyth* v. *Hare*.[6]

Argued for the second parties;—Non-holograph words might be adopted as holograph, and there might be adoption, or validation, by anticipation when a valid deed contained a clause dispensing with solemnities in future deeds. But in either case the intention to adopt or to validate must be expressed in written words, intelligible in themselves, and subscribed. Actual words of adoption might not indeed be necessary, if an intention to adopt was fairly to be inferred from the language used; in that sense there might be adoption by implication. Here, however, there was not a single completely holograph sentence from the beginning to the end of the deed, and to imply an intention to adopt from the position of isolated holograph words in the paper—which was the implication founded on by

[1] Christie's Trustees v. Muirhead, Feb. 1, 1870, 8 Macph. 461, per Lord President Inglis, p. 463, 42 Scot. Jur. 215.

[2] Stair, iv. 42, 6.

* 31 and 32 Vict. cap. 101, sec. 149.

† 37 and 38 Vict. cap. 94, sec. 38.

[3] Colvin v. Hutchison, May 20, 1885, 12 R. 947, per Lord President Inglis, p. 955.

[4] Vans v. Malloch, Jan. 23, 1675, M. 16,885; A v. B, Feb. 9, 1874, 11 S. L. R. 259.

[5] Yeats v. Yeats' Trustees, July 6, 1833, 11 S. 915, 5 Scot. Jur. 523.

[6] Nasmyth v. Hare, July 27, 1821, S. App. 65.

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the other side—was in effect to infer testamentary intention from what the testator had done, not from what he had written. *Mortis causa* deeds were in the matter of adoption to be distinguished from deeds *inter vivos*, which were intended to be acted on.[1] Then admitting that intention to adopt was competently established, the whole non-holograph words must be held to be adopted, including the attestation form. Attestation was unnecessary in a holograph deed, but a testator might prescribe such additional solemnities as he saw fit,[2] and here the deceased, if he intended to adopt at all, must be held to have intended the solemnity of attestation, for if he did not, he would have deleted the attestation form. The first parties founded on the care with which the deceased had filled up the blanks as shewing his intention; therefore what he did not delete he must be held to have intended to remain. Then the deed was wanting, *quoad* its holograph portions, in the *essentialia* of a testamentary deed.[3] There were no words of gift nor any words which unequivocally shewed an intention to give; and there was an entire uncertainty as to the subject of the alleged gift. As far as the holograph words went, it might be the whole estate of the deceased or a part only. In reality the case on the other side came to this, that the deed should stand because the non-holograph words were in print not in writing, but the law of Scotland did not attach any privilege to printed words, they were simply non-holograph. The Titles to Land Act of 1868[4] required that the name of the writer should be specified in the case of deeds partly printed and partly written; and the Conveyancing Act of 1874[5] in dispensing with the name of the writer plainly contemplated that a partly printed deed should be tested.

At advising,—

Lord President.—Mr Thomas Johnstone M'Donald was a domiciled Scotsman, but at the time of his death he was resident in Shanghai, and he made the document here in question at that place. It is quite apparent upon the face of the document that there was an attempt made to make a will according to the law of the place where he was resident, that is according to the forms of the law of that place, and if he had succeeded in doing that his will would have been valid, because by the common law of Scotland the will of a domiciled Scotsman is valid if it is made either according to the forms prescribed by the law of his domicile or according to the forms prescribed by the law of the place in which he was resident at the time when the will was made. Now, we have it as a matter of joint statement by the parties that the law of England is the law of the place where this will was made, and that by English law it is essential to the validity of a will that the testator's signature be made or acknowledged by him in the presence of two or more witnesses, who shall also attest and subscribe the will. Now, the document here in question is not subscribed by any witnesses at all, so that it can hardly be said to be a will made according to the forms of the law of the place in which the deceased was resident. And it is equally clear that the document does not comply with the law of the domicile of the deceased,—that is, the law of Scotland,—in regard to the attestation of written instruments, because the forms prescribed by the law of Scotland for the attestation of wills

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[1] Weir v. Robertson, Feb. 1, 1872, 10 Macph. 438, 44 Scot. Jur. 238; Skinner v. Forbes, Nov. 13, 1883, 11 R. 88.

[2] Nasmyth v. Hare, *supra*.

[3] Heriot v. Blyth, Nov. 1681, M. 17,020, Bell's Pr., sec. 20.

[4] 31 and 32 Vict. cap. 101, sec. 149.

[5] 37 and 38 Vict. cap. 94, sec. 38.

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are the forms prescribed for the attestation of all written instruments. We have no statutory rules peculiar to wills as they have in England; all the rules regarding the attestation of written instruments with us are equally applicable to testamentary writings and to deeds *inter vivos*, and it cannot be said that this document complies with any of the solemnities required by the law of Scotland for the attestation of written instruments. Therefore the only resource left to those who are supporting the will is to maintain that this is a holograph writing of the testator, because if it be holograph of the testator the law of Scotland will recognise it as valid, no matter where it is made. The question then comes to be whether this document can be regarded in any sense as a holograph will.

Now it is very difficult to believe that the deceased intended the document to be a holograph will, because he adopts a printed form—a skeleton of a will—intended to be completed according to the forms of the law of England. It contains not merely a declaration of his purposes and a statement of various things which are necessary to the expression of a testator's intention, but it also bears that it is "sealed, published, and delivered as and for the last will and testament of the said in the presence of us, who in his presence and in the presence of each other, all being present at the same time, have hereunto set our hands as witnesses thereto on the day of the date written." Now he makes no use of that testing-clause at all. He leaves that entirely blank except in so far as printed, and he contents himself with merely subscribing his name above that testing-clause and at the end of the document, which consists partly of printing and partly of certain words written by himself. It was maintained that the portion of the will written by the deceased himself is sufficient to shew what his intention was, and that if his intention can be gathered from these written words, the whole ought to receive effect as being holograph of the testator. But there are great difficulties in the way of sustaining that argument. The only parts of the document of any importance which are filled up in the hand of the testator are, in the first place, his own name and designation at the commencement; in the second place, the names of two persons who are apparently intended to benefit by the will; and, in the third place, the name of a person who is apparently intended to be executor. The words in writing do not appoint the executor. They merely express the name and designation of the supposed executor, but they fill up the clause which begins in print, "I nominate, constitute, and appoint." That is the entire writing under the hand of the deceased—his own designation, the name and designation of parties who are apparently intended to be benefited, and the name of a person inserted in the skeleton clause of nomination of executors. In the writing of the deceased we have no words of gift or bequest at all, and therefore, in so far as his writing is concerned, there is no evidence that he intends to make a gift or bequest. Then we have no description in the writing of the deceased of what he intends to give or bequeath. It may be the whole of his estate or it may be a part of his estate. The print no doubt informs us that it is the whole of his estate, but so far as his own writing goes that is a blank. In short, of the essentials of a will there seem to me to be two of the most important absolutely wanting in that part of the document which is in the handwriting of the deceased, namely, words of gift or bequest, and words descriptive of the subject of the gift or bequest. In these circumstances I find myself bound to come to the conclusion, although somewhat unwillingly, that this is an invalid will and cannot receive effect.

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A good deal of argument was addressed to us upon the analogy of cases in which writings not holograph were sustained because they had been adopted as holograph. I cannot see the application of that law to the present case. If at the end of this document there had been a writing holograph of the deceased, saying,—"I adopt the whole of the above, both printed and written, as holograph, and declare it to be my last will and testament," that would have brought the case within the purview of the authorities to which we were referred. But we have nothing in the least degree approaching to that. We have nothing but the signature of the supposed testator, and therefore I think that the doctrine of adoption, as applicable to holograph and non-holograph instruments, has no place in the present case. I am therefore for finding that this will is invalid.

Lord Adam.—The only question we are asked is this,—"Is the document printed in the appendix a valid will according to the law of Scotland?" According to my view of the law of Scotland, I understand that a will to be valid must be a probative will. It must either be holograph or tested. The particular document with which we are dealing is not tested, and therefore the question arises, whether it is holograph in the sense which the law requires. I quite concur in thinking that a writing to be holograph does not require to be wholly in the handwriting of the maker, but I entirely adopt Mr Bell's statement of the law of what a holograph document is when he says that holograph writings are wholly or in the essential parts written by the party and subscribed by him. I think that is a correct description of what a writing, professing to be holograph, must be. If that be so, the question that remains is this, whether or no this document which we are considering is in the handwriting of the subscriber in its essential parts. I agree with your Lordship that this document is not in its essential parts in the handwriting of the maker. All that we have in the handwriting of the maker are some names of parties who may or may not be intended to take benefit. Reading only what is written, it is impossible to make sense out of this document. In the writing of the granter, it has no directions to give his estates to anyone,—no words of will, and when you come to what is most material—the subject of the grant—that is found to be entirely in print. Now that being the character of this document, I can come to no other conclusion than this, that it is not in its essential parts in the handwriting of the maker. There is the peculiarity that the non-holograph parts, instead of being in the handwriting of another, happen to be printed, but to my mind that makes not the slightest difference in the consideration of the case. If the essential parts are not holograph, it is no matter how much of the rest may be written, how much printed. What we must look to is not the foreign element, but the necessary element. Upon these grounds, I have come to the conclusion that this document is not a valid will according to the law of Scotland. I may say that I do not think any question of intention arises here. I think it is likely enough that Mr Macdonald did intend to make a valid will, but then he did not carry his intention validly into effect, because he did not comply with those things which I think are requisite by the law of Scotland to make a valid will.

A great deal was said at the discussion about the adoption of non-holograph writings. Upon that matter I agree with your Lordship. In order to the adoption of an informal writing you must have a probative writing stand

ing by itself, either holograph or tested, which expresses the matter of the adoption. No. 21.

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LORD M'LAREN.—I am quite alive to the inconvenience arising from the expression of differences of opinion in matters relating to wills and conveyancing, but as I have formed a clear opinion in this case in favour of the validity of the will I feel bound to state it. I do so the more willingly that these questions often come up in new and unexpected forms, and I am by no means certain that we have got to the end of this chapter of our law.

I approach the consideration of this case from a somewhat different point of view from that which your Lordships have chosen. I think the first question to be considered is whether this is a document of a class which by our statute law must be authenticated by witnesses. The objection which is taken to it is that it is not subscribed by witnesses, nor are any witnesses mentioned as having been present at its execution. Now, our law upon that subject I need hardly say is purely statutory. It is sufficiently evident from the statements of our institutional writers and from history that prior to the statutes with which we are familiar the law recognised no broad distinction between deeds written by the granter himself and those written for him by another hand. In either case all that was necessary as matter of solemnity was that the deed should be signed and sealed, or sealed without being signed; and although for greater security it was usual to call in witnesses these were not necessarily instrumentary witnesses. They were not required as matter of solemnity to subscribe the deed, nor was it necessary that their names should be inserted in the deed. Not to over-elaborate this question, but coming at once to the Act of 1681, I find that there the subscription by witnesses and the requirement of the designation of the witnesses and the writer's name are all treated as one series of solemnities which were necessary to the validity of the deed, and therefore, if it had not been that the writer and witnesses are classed together in the statute, there is nothing in the words of the Act which would exclude its application to holograph deeds. But apparently, just because the statute speaks of the writer and witnesses, its operation has uniformly been limited by authority and practice to the case where the deed is written by a hand other than that of the granter; and I take it that the distinction between deeds holograph and deeds not holograph means nothing more than this: that the one is the case of a deed written by a clerk's hand, and falling under the statute, and the other includes all deeds which are not of that description. Stair and Erskine, in treating of holograph deeds, speak of them expressly as exceptions to the operation of the statute. When they speak of a deed as being holograph, provided it is holograph in the essential parts, they are evidently treating of the case of a deed which is partly written in the hand of a different person, but has important portions inserted in the granter's own hand, and these are regarded as holograph deeds. I do not find that our writers treat at all of the case of a printed form filled up in the granter's hand, and I see nothing in their writings to exclude the proposition that such a deed may be a holograph deed. The case, in the absence of authority, must be treated very much as one of impression. It appears to me that, where everything that is necessary to convert the printed schedule into a deed having a real meaning and application to the circumstances of the case is filled up in the handwriting of the granter, that is in truth and in substance a holograph deed, and it is only a verbal criticism to say that it is not strictly holograph,

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because all the reasons which lead to the exception of holograph deeds from the statute apply to a case of this kind. The main reason is the impossibility of interpolation. In the case of a deed admitted to be holograph, unless the granter's hand be actually forged, which is a case no authentication can guard against, you have the certainty that whatever was written there by the granter was meant to be part of his deed. In the case of a deed written by another hand you have not that certainty, because there may be the interpolation of pages, marginal additions, erasures, &c., and there is nothing to shew whether these were done before or after subscription. The will we have under consideration fulfils this requisite of a holograph deed: that every word in it authenticates itself, because it is in the handwriting of the granter. It is quite true that if you take the manuscript words without the printed words you cannot make sense of the will. That observation would apply to every instrument which could be prepared in such form. It may be said, with equal truth and propriety, that there is nothing in the print the sense of which is complete in itself without the manuscript addition. It is the intelligent filling up of the deed—the combination of the printed and manuscript words—which make sense of the deed, and all that is necessary to convert the printed form into a deed is in the handwriting of the granter. For these reasons I think it is very much to be desired that this convenient mode of making a simple will such as this is—a mode which appears to afford perfect security against fraud—should be recognised. I find nothing in writers of authority against the reception of such an instrument, and therefore, if the matter were to depend upon my opinion, I should hold this to be a good writing at common law, and not falling under the statutes regarding the authentication of deeds.

Lord Kinnear.—I agree with the majority of your Lordships. If this were a question of intention merely, there would be a great deal to be said in support of the will. But we are not looking at this instrument as a Court of construction for the purpose of ascertaining what the writer intended to effect. The preliminary question, with which alone we are concerned, is whether it satisfies the conditions prescribed by law for the authentication of written instruments. These conditions are prescribed by statutes, and if the statutes are applicable, the only question we have to consider is whether the statutory conditions have been fulfilled or not. But then it has been held from the earliest times, since the statutes regulating the authentication of written instruments were passed, that properly construed they do not apply to holograph writings, which mean, and can only mean, instruments written entirely by one hand, and that the hand of the subscriber. No doubt that definition requires to be enlarged by admitting that instruments may in certain cases be considered holograph, although they may contain other writing than that of the subscriber, but then that has been allowed only in cases in which those additional words which are not in the hand of the subscriber of the document are purely formal or superfluous, so that if they were struck out or disregarded, you would still have a complete expression of the writer's intention. It appears to me therefore that the question whether a document can receive effect as holograph is a mere question of fact; and I am unable to entertain any doubt that a document which is partly written and partly printed cannot by any possibility be holograph, if the printed parts are of any importance at all, because that contradicts the very definition of the word holograph. It is of no consequence whether

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those parts of a document which are not autograph of the subscriber are written by somebody else, or whether they are printed or lithographed. It is not holograph in the one case any more than in the other.

But a question has been raised which requires consideration, whether the Statute of 1681, which regulates the attestation of instruments that are not holograph, applies at all to instruments like that in question which are partly written and partly printed. Now, it would appear to me that if it did not, the conclusion would be that such an instrument ought to be sustained, not merely when important parts of it, or certain parts of it, are in the handwriting of the subscriber, but where the whole instrument is printed, provided it be subscribed, because upon that hypothesis there is no statutory solemnity applicable to such instruments. But I do not think it is necessary that we should consider the effect of the Act of 1681 upon that question as if it stood alone, because whether it applies to such instruments or not, it is at all events quite certain that the Act of 1868 applies to them, and that Act regulates in very clear and positive terms the conditions upon which such instruments are to receive effect. It provides that all documents may be partly written and partly printed, engraved, or lithographed, provided always that certain conditions are satisfied as to the character of the testing-clause. Now, that appears to me to be a statute which regulates the attestation of such a document as this, and I am unable to see any ground upon which we could refuse to apply that enactment, unless we were to hold that the document in question did not really fall within its terms, because it was not in a reasonable sense a document partly printed, but was in a reasonable sense holograph.

I entirely agree with the observations which your Lordship and Lord Adam have made with reference to cases of adoption, which do not appear to me to be applicable to this question at all.

THE COURT answered the question in the negative.

ROBERT STRATHERN, W.S.—AULD & MACDONALD, W.S.—Agents.

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JOHN STURROCK, Pursuer (Respondent).—*Sol.-Gen. Pearson—Craigie.*
WELSH & FORBES, Defenders (Reclaimers).—*Johnston—Salvesen.*

Reparation—Wrongous use of diligence.—In an action of damages for wrongous use of diligence, the pursuer averred that in the course of an action of maills and duties raised against him by an investment company,—a heritable creditor,—for whom the defenders acted as law-agents, proposals had been made that the pursuer should grant trust-conveyances for behoof of his creditors of certain heritable subjects belonging to him, and that the defenders should in return deliver to the pursuer discharges by the investment company and by themselves of certain securities; that the defenders wrote to the pursuer, "upon exchange of these documents all personal claims against you at the instance of the investment company or ourselves shall be held as discharged"; that, in terms of this arrangement, the trust-deeds were delivered and became operative; that notwithstanding the arrangement the defenders, after taking decree in the action of maills and duties against the pursuer for £28, 10s. 7d. of expenses, had wrongfully executed a charge upon the decree.

The defenders maintained that the action was not relevant, in respect that it appeared from the pursuer's statement that he had after due notice allowed decree to go out against him in the action of maills and duties.

Held that the pursuer was entitled to an issue whether the defenders, having obtained a decree against the pursuer for £28, 10s. 7d., wrongfully and in breach of an agreement, the terms of which are contained in the letter, charged the pursuer to make payment of said sum.

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Nov. 14, 1890. Sturrock v. Welsh & Forbes.

1st Division. Ld. Kinnear. C.

THIS was an action of damages for wrongous use of diligence at the instance of John Sturrock, shorthand writer in Edinburgh, against Messrs Welsh & Forbes, S.S.C., and John Welsh and Roderick Forbes, the individual partners.

The pursuer made the following averments:—In and prior to 1886 the pursuer was proprietor of certain heritable properties in Edinburgh and Leith. The North British Property Investment Company, Limited, and the British Linen Company were postponed heritable creditors over certain of these properties. In November 1886, the Investment Company raised an action of maills and duties against him and the tenants in the properties in the Sheriff Court at Edinburgh. The pursuer defended the action, and on 3d February 1887, the Sheriff-substitute pronounced decree against him, with expenses. He appealed to the Sheriff. While this appeal was pending negotiations took place between the pursuer and Welsh & Forbes, law-agents in Edinburgh, who acted on behalf of the Investment Company and the British Linen Company, as well as on their own behalf as creditors, which resulted in a proposal that the pursuer should grant two trust-conveyances, one conveying certain of his properties to Mr Richard Brown, C.A., as the nominee of the bank, and the other conveying certain others of his properties to Mr Davidson Smith, C.A., as the nominee of the investment company, upon condition of the pursuer getting an immediate discharge. These deeds were dated on or about 14th April 1887. At the time these trust-deeds were signed, Welsh & Forbes wrote to Sturrock a letter in the following terms:—"29 St Andrew Square, Edinburgh, 14th April 1887.—We hereby undertake, with reference to the trust-conveyances executed by you to-day in favour of Mr Richard Brown and Mr Davidson Smith, 1. that they shall not be binding upon you until they are formally acceded to by Messrs Burness, the British Linen Bank, the North British Property Investment Company, and ourselves; 2. that, when the deeds are so acceded to, we shall deliver to you discharges by the North British Property Investment Company and us of their and our securities over (1) your dwelling-house at Wardie, (2) the portion of the Marjoribanks superiority sold by you to Mr Byers, (3) discharge of the poinding and of the charge of payment upon our bond, and (4) discharge of arrestments in the action at our instance. Upon exchange of these documents all personal claims against you at the instance of the Investment Company or ourselves shall be held as discharged, and all claims at your instance against said company or against us shall also be held as discharged. The balance due to the Investment Company and to us has been left blank in the schedules attached to the trust-deeds in the meantime." The conditions mentioned in the letter were purified, and on 7th November 1887 the deeds, &c. in question were finally delivered, and the trust-deeds became operative.

(Cond. 4) "Notwithstanding the said letter of 14th April 1887, and the fact that the discharge contained in the same had then become absolute by the conditions being purified as above set forth, the defenders, towards the end of the year 1887, proceeded to have the pursuer's appeal to the Sheriff in the action of maills and duties dismissed, with expenses, and ultimately to take decree against the pursuer for £28, 10s. 7d., being the taxed amount of said expenses, in name of the defender Roderick Forbes, as alleged agent-disburser. The defenders were duly warned that the pursuer relied upon the letter of 14th April 1887 as discharging their claim for said expenses, and that any proceedings in respect of same would be at their own risk. A copy of the correspondence passing between the

parties in reference thereto is produced and referred to."* (Cond. 5) "On 27th October 1888 the pursuer was, without any preliminary warning, most illegally and unjustly served with a charge upon said decree. The pursuer thereupon presented a note of suspension of said charge, and after certain procedure the Lord Ordinary (Wellwood), upon 12th June 1889, suspended the charge, with expenses, on the ground that said letter of 14th April 1887 operated as a universal discharge in favour of the pursuer of all personal claims at the instance of the said Investment Company and of the defenders, including the expenses found due by him in said action of maills and duties, and that after the date of the letter the pursuer had no further interest in said action." (Cond. 6) "The said charge was given by the defender Roderick Forbes on the instructions of, or as agent for, the said firm of Welsh & Forbes, to whom the account of expenses, but for the discharge which they had granted, would have been due. The said charge was wrongous, oppressive, and illegal, and the same has caused the pursuer serious loss and damage, and also great trouble and anxiety of mind. He has also incurred a large account to his agents for extrajudicial expenses in connection with the suspension of said charge."

The pursuer pleaded;—(1) The said charge being wrongous and illegal, the pursuer is entitled to damages as concluded for.

The defenders pleaded, *inter alia*, that the action was not relevant.

The Lord Ordinary (Kinnear), on 16th July 1890, allowed the following issue:—"(1) Whether the defenders, having on or about 16th December 1887 obtained a decree against the pursuer for the sum of £28, 10s. 7d., on or about 27th October 1888 wrongfully charged the pursuer to make payment of the sums contained in said decree, to his loss, injury, and damage? Damages laid at £500."

The defenders reclaimed, and argued;—The decree on which the charge proceeded was regularly obtained in an action of which the pursuer had due notice. The alleged discharge of 14th April 1887 ought to have been pleaded to the Sheriff, which had not been done. The pursuer was not entitled to lie by and allow decree in absence to be taken and then raise an action of damages upon the decree being executed.[1]

Argued for the respondent;—The pursuer could not have pleaded the discharge in the Sheriff Court to the effect of preventing decree. The defenders were entitled to decree for the purpose of constituting the debt against the trust-estate. But they had no right to enforce it against the

* Letter, Mr Sturrock to Mr Richard Brown, C.A.:—"5th Decr. 1887.—I enclose notice of enrolment in the action of maills and duties at the instance of the North British Property Investment Company against me. I understood that the trust-deed put an end to all preferences, and, if that is so, there is no occasion for further procedure in the case. However, as you are the party now interested, as coming in my place, I leave the matter for you to deal with as you may consider expedient."

Letter, Mr Sturrock to Mr Forbes:—"9th Decr. 1887.—I duly received your firm's notice of enrolment in this case, which I forwarded to Mr Richard Brown, the trustee. He returned it, but I did not get the notice back until after the case had been disposed of. I have also received your letter of this date, and relative account, which I am at a loss to understand. All personal claims at the instance of the Investment Co. and your firm were held as discharged, and that was one of the conditions of granting the deed. I shall be glad, therefore, if you will let me know, at your earliest possible convenience, what is the meaning of your letter, and what position you take up in the matter."

[1] Aitken v. Finlay, Feb. 25, 1837, 15 S. 683, 9 Scot. Jur. 333; Bell v. Gunn, June 21, 1859, 21 D. 1008, 31 Scot. Jur. 556; Ormiston v. Redpath, Brown, & Co., Feb. 24, 1866, 4 Macph. 488, 38 Scot. Jur. 225.

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pursuer personally.[1] Judicial proceedings were privileged, but diligence was not, and for wrongous use of diligence the agent as well as the client was liable. The defenders could not here plead ignorance of the discharge, which might have excused them. The correspondence shewed that the pursuer had taken up this position from the first, and that the defenders were well aware of it.

At advising,—

LORD PRESIDENT.—I agree with the Lord Ordinary in holding that the pursuer is entitled to an issue substantially in the terms proposed by him in the issue which is before us. But that issue, I think, will be made much more specific and much more intelligible to the jury if the wrong which is alleged against the defenders be specified more particularly. Therefore, I took leave to suggest during the debate that after the words "wrongfully charged" should be inserted the words "in breach of the agreement contained in the letter of 14th April 1887." And further, I agree with the suggestion by Mr Johnston in his reply, that the issue will be still further improved if the letter itself is set out in a schedule appended thereto, as the Judge and the jury will then have before them the ground upon which the charge is said to have been wrongfully made.

Under the issue as so adjusted there will arise at the trial a question of law as well as a question of fact. The question of law of course relates to the construction of the alleged agreement, and that is a matter upon which at present I express no opinion, as I suppose none of your Lordships intend to do. It will be for the presiding Judge to direct the jury in that respect. The question of fact raised upon the issue as so adjusted will turn mainly, I should think, upon whether the pursuer has in any way debarred himself from making his claim now in consequence of his not appearing in the Sheriff Court to oppose the decree being pronounced against him in the terms of which he had notice.

Upon a review of the correspondence which is in print between the defenders and the agents for the pursuer and the pursuer himself, I think the position taken by the pursuer was a perfectly reasonable one in the circumstances. The pursuer came to the conclusion that he could not very well oppose a decree going out against him in the action of maills and duties, because the action of maills and duties, as is usual in such cases, concluded against him as debtor for payment of the expenses of the process. The position the pursuer seems to have taken was this—that as he was very much in the same position as a sequestrated bankrupt, having surrendered all his estate to his creditors and put himself under trust, a decree taken out against him after the occurrence of that surrender in bankruptcy could be nothing more than a ground of claim for a ranking in the process of distribution which was to follow. I think that was quite a reasonable position for him to take in the circumstances, and it is not necessary to give any opinion at present as to whether it is absolutely correct in point of law. I cannot hold therefore that the pursuer neglected any proceeding that he ought to have taken before the Sheriff in that action of maills and duties. He might perhaps, if he had appeared, either have got the decree modified or reduced to a decree of constitution by inserting the words *cognitionis causa tantum*. That would have been substantially what he thought this decree would be, viz., a foundation for

[1] Gibb v. Edinburgh Brewery Co., June 19, 1839, 11 Macph. 705, 45 Scot. Jur. 438; Henderson v. Rollo, Nov. 18, 1871, 10 Macph. 104, 44 Scot. Jur. 73; Smith v. Taylor, Dec. 8, 1882, 10 R. 291.

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a ranking in the bankruptcy. But I do not think he did any injury to anyone by failing to appear, and I do not think he can be blamed in the circumstances for not going into Court and disputing the matter, which he must have done at his own cost, seeing that he was of opinion—and probably rightly of opinion—that the decree as it was actually issued was nothing more than a decree of constitution.

It seems to me, also, that the defenders themselves seem to have taken the same view of the subject originally, because after they obtained this decree they did not proceed to put it into execution as a decree against the pursuer personally. They delayed proceedings for about a year before taking any action under this decree. And at last when they did take action upon it the matter was raised—and I think quite competently raised—in a process of suspension before Lord Wellwood, in which the pursuer maintained that this decree could not be enforced against him personally, and that plea was sustained by the Lord Ordinary by an interlocutor which has now become final. His Lordship proceeded upon a construction of the agreement, and whether that construction turns out in the end to be sound or not—it at least put him in the position, consistently with his own opinion of the law and the circumstances of the case, of granting relief to the pursuer from anything in the nature of personal diligence upon this decree.

Now, that being so, it appears to me that the pursuer has a perfectly relevant case. What may become of it in the end is another affair, because that will depend upon what is the construction ultimately adopted of the agreement in question. But his case as stated upon record appears to me to be entirely relevant. He says that the charge given upon the decree against him was in breach of that agreement. If he can satisfy the jury upon that question he will be entitled to a verdict.

LORD ADAM.—In this case the defenders obtained a decree in the Sheriff Court against the pursuer, ordaining him to pay a sum of £28, 10s. 7d., being the amount of taxed expenses incurred in a process of maills and duties in that Court. About a year after the date on which this decree was obtained the defenders charged the pursuer to make payment of that sum. A suspension of that charge was then brought in this Court, which Lord Wellwood disposed of by granting suspension, and the present action is an action of damages brought against the pursuers in the Sheriff Court action for having executed the charge which has been suspended. The question accordingly is, whether or not the present pursuer is entitled to the issue he craves, and I agree with your Lordship that he is entitled to that issue.

I think, upon the authority of the case of *Aitken* v. *Finlay*, and the other cases that were quoted to us, that where a person has obtained a decree from a competent Court, and puts that decree into force by diligence and execution, he is not liable for damages thence arising, although it may afterwards turn out that there are grounds or reasons or objections which might have been urged against the decree being granted at all. I think a person having a good ground of objection to a decree going out against him is bound to appear at the proper time and place, and state that ground, and if he fails to do so the party putting the decree in force is not responsible. If I thought this was a case of that kind, I should be in favour of refusing the issue. But I do not think that is really the nature of this case.

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The question which arises here is, Whether the objections which are now stated to the enforcing of this decree are objections which the pursuer ought to have appeared and stated in the Sheriff Court before decree was granted? If he ought to have appeared and stated them, then an issue ought to be refused. That he might have appeared and stated them is one thing; that he ought to have appeared and stated them is another thing. If he had appeared and stated them his objection would have been that in accordance with an arrangement between him and his creditors the defenders in this action had discharged or agreed to discharge all personal claims against him, that this was one of them, and that therefore decree should not go out against him. But he might probably have been met with the answer that, although that was so, the defenders were entitled to have this claim constituted in order that they might rank upon it on his estate; and that being so, I have great difficulty in seeing why this decree should not have been granted in the terms in which it has been granted. I do not know whether that form prevails in the Sheriff Court or not, but they might, if they wished to be very careful, have asked the decree *cognitionis causa tantum*. But I hardly think that the pursuer ought necessarily to have gone forward and obtained this limitation. I think that after what had passed he was entitled to think that that decree would be treated as a decree of constitution, and I am not at all clear, the pursuer having made over all his estate for the benefit of his creditors, whether at this present moment it is anything more than a decree of constitution.

In these circumstances I am of opinion that the pursuer is not to blame for not having gone forward and objected to decree being granted in the terms in which it was granted. The ground accordingly upon which I think that this issue ought to be granted is that the objections now stated are truly objections to the decree being put in force, and not objections which ought to have been stated before the Sheriff.

Lord M'Laren.—I agree with your Lordship and Lord Adam. I consider that where a pursuer or a creditor has obtained decree for a sum to which he is not entitled, or for a larger sum than the debt to which he is entitled, he may notwithstanding proceed to enforce that decree, and no action of damages will lie at the instance of the defender if the defender was in a position to enter appearance in the original action, and successfully maintain the defence on which he has succeeded in having the decree suspended. Now, the question in this case is, Whether the grounds of suspension on which Lord Wellwood set aside the Sheriff's decision are such as might have been lawfully maintained by Mr Sturrock before the Sheriff when he received notice that the case would be enrolled for decree? That is a question of construction of the correspondence. It appears to me on the whole that both parties must have understood that the decree which the Sheriff was to be asked to pronounce was one in which Mr Sturrock had no personal interest. He says so himself plainly, and Messrs Welsh & Forbes say nothing to the contrary. I hold therefore that Mr Sturrock was not bound to appear before the Sheriff, and that he might reasonably assume that the decree to be taken was one which was not to be put in force against him, but was only for the purpose of constituting a claim for expenses against his estate, which he had made over for voluntary distribution. In these circumstances the question arises whether that decree has been wrongfully put into execution against the pursuer. The question whether it was wrongfully done

is a matter for a jury. It is not to be assumed as clear that Mr Sturrock might not and ought not to have appeared before the Sheriff and objected to this decree being pronounced. However, that is a matter on which either party may justify his action to the jury.

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LORD KINNEAR concurred.

THE COURT approved the following issue for the trial of the cause:—"(1) Whether the defenders, having on or about 16th December 1887 obtained a decree against the pursuer for the sum of £28, 10s. 7d., on or about 27th October 1888 wrongfully and in breach of an agreement, the terms of which are contained in the letter printed in the schedule hereunto annexed, charged the pursuer to make payment of the sums contained in said decree, to his loss, injury, and damage?"

STURROCK & GRAHAM, W.S.—WELSH & FORBES, S.S.C.—Agents.

ELIZABETH COLVIN, Pursuer.—*Salvesen—Dewar.*
WILLIAM JOHNSTONE, Defender.—*C. S. Dickson—G. W. Burnet.*

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Colvin v. Johnstone.

Reparation—Promise to marry—Mora—Acquiescence.—In an action of damages raised in 1889 for breach of a promise to marry alleged to have been made in 1879, the defender admitted the promise, but pleaded that the pursuer's claim was barred by *mora* and acquiescence. It was proved before a jury that from 1881 till the raising of the action, the pursuer, though living in the same town as the defender, had hardly ever spoken to the defender, and when *passing him* in the street simply recognised him; but, in 1885, hearing that he was engaged to another woman (whom he married in 1889), she wrote to her intimating her prior engagement. The jury returned a verdict for the pursuer. On a motion for a new trial, the Court refused to disturb the verdict.

Observations on the plea of *mora* and acquiescence in cases of breach of promise of marriage.

1ST DIVISION. C.

IN January 1890, Elizabeth Colvin, daughter of the late John Colvin, farmer, Castlemains, near Sanquhar, brought an action of damages for breach of promise of marriage against William Johnstone, saddler, High Street, Sanquhar.

The pursuer averred that the defender had, in June 1879, promised to marry her; that the defender had never fulfilled that promise, but had married another woman in December 1889; (cond. 8) that from 1881 "the pursuer could not help noticing that defender's attitude towards her had changed. He did not seek her society or court her with his former ardour. He only spoke to her twice after his return, and on the latter of these occasions he demanded from her all the letters she had received from him, and when they met afterwards they simply recognised each other. This changed behaviour greatly distressed her, for no change had taken place in her feelings towards him. She was willing and anxious that he should implement his promise of marriage to her, but he never referred to the matter or gave any reason for the change in his behaviour. The engagement was never terminated between the parties." Cond. 9) ". . . The pursuer imagined that so long as the defender remained single she had no recourse against him for non-implement of his contract. While he was courting his present wife, she wrote her, intimating to her that the defender was trothed to her, and that the defender came to her and desired his engagement broken off and his letters returned or burned. She declined, and then intimated to him that if the letters were destroyed it would be after she had obtained redress."

The defender admitted that he had promised to marry the pursuer, and

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that he was now married to another woman. He stated that in January 1880 the pursuer had by letter declared the engagement at an end, and had agreed to destroy his letters to her, as he had agreed to destroy hers to him; and that, in 1885, on his finding out from a letter she had written to the lady whom he ultimately married that she had not destroyed his letters, he met her and she again promised to destroy them, admitting that the engagement was at an end.

The pursuer pleaded;—(1) The defender having promised to marry the pursuer as condescended on, and he having not implemented the said promise, is liable in damages.

The defender pleaded;—(1) The pursuer's claim is barred by *mora* and acquiescence. (2) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the action. (3) Any engagement to marry having been cancelled by mutual agreement between the parties, and the pursuer having acquiesced in the engagement being broken off, the defender is entitled to absolvitor, with expenses.

The case was tried before Lord Trayner and a jury upon the following issue:—"Whether in or about the month of June 1879 the defender promised and engaged to marry the pursuer? and whether the defender wrongfully failed to implement his said promise and engagement, to the loss, injury, and damage of the pursuer?"

The following was the import of the evidence:—The marriage was originally fixed to take place in January 1880, but in October 1879 it was agreed to postpone it till July 1880. The pursuer deponed,—"In January 1880, the defender was in Sanquhar on a visit. I noticed then that he was changed. His manner shewed coldness, but I don't remember him asking me to release him from his engagement. . . . He came back to Sanquhar in 1881 to commence business as a saddler, which he has carried on ever since. After his return he never came to see me. When he met me he has spoken just in passing. I never asked the reason of his coolness, and he never gave any. I was anxious to marry him because I was still fond of him. . . . I never released the defender from his engagement. When he became engaged in 1885 I wrote to the lady telling her that I had not finished my engagement with defender. In consequence of that letter defender came to see me. He was angry about it. I did not then agree to break off his engagement, or to burn his letters, until I had done with them. . . . Cross-examined.—When defender came to me in 1885 about the letter I had written he asked me to burn his letters. I had not promised to burn them. I did not, that I remember, write to defender while he was at Port Ellen, saying I had burned his letters, and asking him to burn mine, but I may have done so. . . . I don't think I have ever asked the defender to marry me since 1885. Re-examined.—I have only spoken to the defender in passing since 1885."

The defender deponed;—"In 1881 I got a letter from pursuer asking me to destroy her letters, and saying that she had destroyed mine." He further deponed that at the interview in 1885 the pursuer had again promised to destroy the letters,—"I heard no more till the Saturday before I was married, when I got the pursuer's agent's letter. I thought I was free when I married."

The jury returned a verdict for the pursuer, damages £70.

The defender moved for a rule, on the ground that the verdict was against the evidence. Besides arguing that the evidence proved that the pursuer had expressly released him from his promise, the defender argued upon the plea of *mora* and acquiescence;—The whole conduct of the pursuer, as admitted by her on record and in her evidence, shewed

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that she had acquiesced in the engagement being at an end. It was impossible that a woman should continue to suppose herself to be engaged to a man when she was in the habit of passing him in the street with only the amount of recognition spoken to by the pursuer. But even if she had not acquiesced she must be held as barred by *mora* from now insisting in her claim. In the case of claims which required constitution mere delay to enforce the claim might be sufficient to support a plea of *mora*, although it was not alleged that there had been abandonment or acquiescence.[1] That peculiarly applied to a claim founded on a promise to marry, which could not reasonably be hung up for an indefinite time, and applied also to the facts here. If the pursuer intended to keep it alive in 1885 when she wrote the letter to the woman to whom the defender had become engaged, she was bound to follow it up by action. By not doing so she had lost whatever right she might previously have had.

The Court granted the rule.

The pursuer shewed cause. On the question of *mora* and acquiescence: The question was one of fact, and the jury had found for the pursuer. The evidence was such as to justify such a verdict.

At advising,—

LORD TRAYNER.—This is an action for breach of promise of marriage, the issue in which was tried before a jury and myself at the last sittings. The trial resulted in a verdict for the pursuer, the jury assessing the damages at £70. The defender has moved your Lordships for a rule on the pursuer to shew cause why a new trial should not be granted, and we have now heard the discussion upon that rule.

The state of the record is this:—The promise of marriage and the breach on the part of the defender by his having married another lady are admitted, but the defender maintains that the pursuer released him from his promise or engagement expressly upon two different occasions. He has a separate defence apart from the express release of the pursuer based upon the length of time which the pursuer has allowed to elapse before enforcing her claim. [His Lordship then considered the evidence bearing on the alleged express release, and came to the conclusion that no such release had been proved.]

The only other point in the case that remains then is the question whether the pursuer has lost any right to her remedy by her delay in bringing the action. I think that raises a question of very considerable delicacy. If a woman in the position of this pursuer intends to enforce an engagement of marriage I think she is bound to do so timeously. At all events, she is not entitled after a coolness has arisen, and all courting or communication has ceased, to let the defender go on for years under the impression that the matter is at an end. In such circumstances I think a pursuer is bound to make it plain to a defender that she holds him to his engagement. This case, however, presents a peculiarity which I think takes it out of any general rule of that kind. Although the coldness between these parties commenced in 1881, and action was not raised till 1890, yet during these nine years the defender was not without warning that the pursuer meant to insist upon her claim. In 1885, when the pursuer heard that the defender was courting another lady, she wrote to her intimating distinctly that she had a claim which she meant to insist on. And again, when she heard that the marriage was imminent, in the end of 1889, her

[1] Cook v. North British Railway, March 1, 1872, 10 Macph. 513, 44 Scot. Jur. 352.

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agent wrote to the defender insisting on fulfilment of his engagement. If the pursuer had allowed the estrangement to proceed from 1881 to 1889 without any intimation of her intention to hold the defender to his engagement, I should have had no difficulty in holding that she had forfeited her claim to damages. But her intimations were made at those periods when she might be expected to make a claim if she intended to do so at all. The first time was when the defender was courting another lady. I think that was the first occasion on which she could possibly be held bound to intimate her claim. And then when the marriage became imminent she made a distinct protest against it, and gave intimation of her claim upon the defender by her lawyer's letter. I think it impossible to hold, looking to these two protests, that she acquiesced in the defender's conduct or abandoned her claim to damages. I therefore think the defence has failed, and I am of opinion the rule ought to be discharged.

LORD ADAM.—[After dealing with the first ground of defence]—The question remains whether the defender was discharged by *mora* and acquiescence. The delay which the defender relies on is the delay which took place between 1881, when he returned to Sanquhar, till 1889, when the action was raised, a delay of eight years. I do not think there is any law in this question. There is no prescription of marriage obligations or marriage promises. This question therefore must depend upon the acts of the parties during that time, and is therefore a question of fact. If I had been upon the jury I should have been disposed to have given a verdict the other way, but it is not the province of the Court thus to review the finding of the jury, and when I find that the jury, considering questions of fact, have come to a certain verdict, and that the Judge who tried the case agrees with the jury, I have come to the conclusion that this is not one of those extreme cases where we can upset the verdict.

LORD M'LAREN.—I understand your Lordships are all of opinion that the verdict should not be interfered with, but I am anxious, so far as my opinion is concerned, that we should not be supposed in the course we are taking to sanction the proposition that claims of this character may be indefinitely hung up, or that they may not be discharged by a lapse of time. As there is no period of prescription applicable to actions for breach of contract, it follows that these actions must be brought within a reasonable time. I think that in the absence of a settled period the law requires that the claim should be insisted in within a reasonable time. That time will depend on the nature of the action and the circumstances of the case. If that be so, I have no conception that a party may enlarge the time by merely intimating the claim without taking any active steps. Now, as the period between the breach and the raising of the action is a great deal longer than I should consider to be within the limits of a reasonable time, it would seem to follow that the verdict of the jury should not be supported. But my reason for concurring in the course suggested by Lord Trayner is this, that I think the case is not before us in such a shape that we can deal with the legal question. That question might have been brought before us in other ways. The defender might have objected to the case being sent to trial at all. I should have had sympathy with a motion to that effect. Next, he might have proposed to take a separate issue of implied discharge, and then the attention of the jury would have been specially directed to that as a definite point in the case.

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And again, the defender might have asked the Judge to give a specific direction to the jury, who would have clearly brought the point before them; and if the Judge did not give the direction the question might have come before us on a bill of exceptions. I am not satisfied that the jury in considering the case had clearly before them that this question of implied discharge was a separate point on which they might have found for the defender, even although they were of opinion that there was a breach of promise. But, of course, I must assume that the presiding Judge gave the necessary direction, as there is no exception.

In all the circumstances I think we must look upon this as a question of fact from the manner in which it has come before us, though I cannot help feeling that the result at which the jury have arrived is neither consistent with good sense nor with the justice of the case.

LORD KINNEAR.—I agree with Lord Adam. I think the question between the parties in this case is a question of fact which appears to me to be sufficiently raised by the issue sent to the jury. The question in the issue was, whether the defender had wrongfully failed to perform his promise, and as the promise was admitted and the non-performance was admitted, I agree with Lord Adam that the defender had to satisfy the jury that the breach was not wrongful. But upon the question of fact I must say that, judging of the evidence for myself, I should not have been able to reach the conclusion at which the jury arrived. But, then, I think it was a proper question for the jury. I do not think it can be said that their verdict cannot be justified by any reasonable view of the evidence, and since their verdict has been given upon a question which was proper for them, and since it has the approval of the Judge who tried the case, I agree with Lord Adam that we ought not to disturb it.

LORD PRESIDENT.—There is no doubt that the defender promised to marry the pursuer in 1879, and that in the year 1889 he married another woman. That, however, is not in the least degree conclusive, because he might be perfectly able to justify his conduct notwithstanding these two facts. Accordingly, the issue sent to the jury was, whether in disabling himself from fulfilling his promise he acted wrongfully. It was of course for the pursuer to shew that he did act wrongfully; and, on the other hand, it was for the defender to shew that there were circumstances to justify his conduct. It appears to me that there are nothing but questions of fact raised by the issue, and therefore one must be very slow in disturbing the unanimous verdict of the jury in favour of the pursuer, a verdict which has the entire approval of the Judge who tried the cause. The result of my consideration of the case is in entire accordance with the views expressed by Lord Adam and Lord Kinnear.

THE COURT discharged the rule.

THOMAS M'NAUGHT, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

No. 24.

Nov. 15, 1890.
Ferguson v. Buchanan.

JANE FORSYTH BUCHANAN OR FERGUSON, Pursuer (Respondent).—*Guthrie Smith—Salvesen.*
ROBERT BUCHANAN (Executor and Trustee of Thomas Buchanan), Defender (Reclaimer).—*Asher—A. S. D. Thomson.*

Jurisdiction—Forum non conveniens—Succession—Domicile.—A Scotsman, who went in 1874 to reside in Manchester, in May 1889 executed a will in

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English form, in which he declared that his domicile was in England. He died in September 1889, and his executor obtained probate. The testator's only child having presented a petition in the Sheriff Court of Lanarkshire to have it found that the testator died domiciled in Scotland, and obtained interim interdict against the executor distributing the funds without providing for payment of legitim, the executor on 16th December 1889 obtained from the Chancery Division of the High Court of Justice in England an order that, *inter alia*, an inquiry should be made whether the testator was domiciled in England, and appointing a receiver to collect the estate.

On 23d December 1889 the testator's daughter raised an action in the Court of Session, concluding for declarator that the testator was domiciled in Scotland, and that she was entitled to legitim.

The Court, in respect that the question of domicile was before the Court in England, *dismissed* the action.

2D DIVISION. Ld. Trayner. M.

IN 1874 Thomas Buchanan, a Scotsman, who had formerly been in business in Glasgow went to reside in Manchester, where he acted as agent for the firm of John Buchanan & Brothers, wholesale confectioners, Glasgow, till his death.

On 14th May 1889 he executed a will in the English form, in which he stated,—"I have, as will be observed, omitted to leave my daughter Jane any legacy, share of residue, or other interest under this my will. This I have done purposely, as it is my intention and wish that she shall not receive any benefit under the same. And I declare that my domicile is in England, and that I have no intention of abandoning such domicile."

Mr Buchanan died on 22d September 1889, when on a visit to one of his brothers in Glasgow.

The executors named in the will were his brother, Robert Buchanan, and his nephew, Andrew Buchanan. Robert Buchanan, being the only executor of full age, obtained probate in England and raised an administrative suit in England.

On 2d December 1889 Mrs Jane Forsyth Buchanan or Ferguson, the testator's only child, presented a petition in the Sheriff Court of Lanarkshire against her father's executors, in which she prayed the Court to find that the testator was at the time of his death domiciled in Scotland, and to ordain the defenders to lodge an inventory in the Sheriff Court of Lanarkshire, and to prohibit the executors from distributing the estate on the footing that the testator was domiciled in England, and without providing for the petitioner's claim for legitim, and meantime to grant interim interdict. Interim interdict was granted.

The executor then made an application to the Chancery Division of the High Court of Justice in England, on which Mr Justice Chitty, on 16th December 1889, made the following order,—"It is ordered that the following accounts and inquiries be taken and made, that is to say, 1. An account of the personal estate not specifically bequeathed, of Thomas Buchanan deceased, the said testator, come to the hands of the plaintiff, Robert Buchanan, the acting executor of his will, or to the hands of any other person or persons by or for the order or use of the said plaintiff. . . . 6. An inquiry whether the testator was, at the time of his decease, domiciled in England, and if it shall be found that the testator was not domiciled in England, where was his domicile. And, in the event of its being found that the testator was domiciled in Scotland—7. An inquiry whether the personal estate of the testator is subject to payment of any and what portion thereof to any child or children of the testator living at his death, notwithstanding the provisions of his said will. . . . The Judge doth hereby appoint Bentley James Bridgewater, auctioneer, to receive, collect, and get in the personal estate of the

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said testator. And it is ordered that the plaintiff, Robert Buchanan, the executor of the testator's will, do deliver over to the said Bentley James Bridgewater, as such receiver, all securities in his hands for such personal estate, together with all books and papers relating thereto."

On 23d December 1889 Mrs Ferguson, with consent of her husband, raised an action in the Court of Session against Robert Buchanan, the executors and the beneficiaries under the will, for declarator that her father was at the date of his death domiciled in Scotland, and that the pursuer as his only child was entitled to legitim out of his estate. The pursuer further concluded for interdict against the defenders, as executors, withdrawing the estate of Buchanan furth of Scotland, and beyond the jurisdiction and control of the Courts of Scotland, and from rendering an account thereof to the High Court of Justice in England, or of any tribunal other than the Courts of Scotland, till the pursuer's claim upon the estate should be satisfied. The summons as originally laid contained conclusions for reduction of the settlement left by the pursuer's father, but these conclusions were subsequently abandoned.

The defenders denied that the pursuer's father died domiciled in Scotland, and averred that he was domiciled in England at his death.

The defenders pleaded, *inter alia*;—(1) *Forum non conveniens.* (2) *Lis alibi pendens.* (4) The testator having died domiciled in England, the pursuer is not entitled to legitim.

The Lord Ordinary (Trayner), on 5th November 1890, repelled the first and second pleas in law for the defenders, and allowed the parties a proof of their respective averments as to the domicile of the late Thomas Buchanan.

The defenders reclaimed, and argued;—England was the convenient *forum*. The will was in English form, and the deceased had been long resident in England. An inquiry was commenced in the Court of Chancery before this action was brought. The pursuer was called to that action, and could appear there and establish, if she had evidence to shew it, that the deceased died domiciled in Scotland. This second process in Scotland was therefore unnecessary, and ought to be dismissed. The proceedings before the Sheriff did not make any difference.

The pursuer argued;—The admitted facts of the case shewed a Scots domicile, or at least a case into which the Courts of Scotland should inquire. The pursuer had taken proceedings in the Sheriff Court before the Chancery proceedings were instituted. The defenders were attempting by means of the English proceedings to avoid having the question decided in the appropriate Court. There was nothing in the English proceedings to interfere with the action.[1]

LORD JUSTICE-CLERK.—It appears that before this action was raised proceedings had been taken in the Court of Chancery to have the estate of the deceased Mr Buchanan administered under the direction of that Court. The action, as originally laid, was for reduction of a will executed shortly before Mr Buchanan died, as well as for declarator that he died domiciled in Scotland, and that the pursuer was entitled to legitim. But the latter conclusions alone now remain, since the pursuer discovered the existence of another will, which would not be open to objection, and which would regulate the disposal of the estate, in the event of her success in the reduction of the last will. She therefore abandoned her reductive conclusions.

In the proceedings in England the Judge of the Court of Chancery has ap-

[1] Brown v. Maxwell's Executors, May 21, 1884, 11 R. 821.

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pointed a receiver, and he has also directed an inquiry to be made as to whether the deceased died domiciled in England, and if not, in what country his domicile was. In the face of that judgment, we are asked to proceed with this action, which, as I have said, was raised subsequently to the commencement of the English Chancery suit. That, so far from being a convenient, would be a very inconvenient course. I think we should do nothing to interfere with the proceedings in the Court of Chancery. The pursuer will have an opportunity before that Court of raising every question of domicile which she desires to raise in this action.

It only remains to be considered whether the proper course be to sist this action till the result of that depending in the Court of Chancery be made apparent, or to dismiss it altogether. I think that the proper course is to dismiss it. It will of course remain open to the pursuer to raise any competent action which may yet be required. But the proper course now is to dismiss this action.

LORD YOUNG.—I am of the same opinion. The estate in question is that of a man who originally belonged, we are told, to Scotland, but went to Manchester in 1874, and resided there till his death in September 1889. He died leaving a will in English form. His estate appears to consist for the most part of a sum at his credit in the books of a business in Glasgow of which he was a partner. In December an administration suit was raised in Chancery, and a receiver was appointed on his estate, and on 16th December the Court of Chancery made an order directing inquiry as to his domicile. On 23d December, just a week later than that order, this action was brought. It is now, by the abandonment of the reductive conclusions, reduced to being an action of declarator as to domicile only, and I think that, considering the standing order of the Court of Chancery, it is not fitting for us to entertain it. I cannot doubt the competency of the English suit. It appears to me to constitute no interference with the proper jurisdiction of the Scottish Court, and to be *prima facie* competent and proper. I think it would, in these circumstances, be improper that we should entertain this action, and I therefore agree with your Lordship that it should be dismissed.

LORD RUTHERFURD CLARK concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and dismissed the action.

GILL & PRINGLE, W.S.—SIMPSON & MARWICK, W.S.—Agents.

No. 25.
Nov. 18, 1890.
Munro's Executors v. Munro.

MRS JANET DAWSON OR MUNRO AND OTHERS (William Munro's Executors), First Parties.—*MacWatt.*

MRS JANET DAWSON OR MUNRO AND OTHERS (Trustees of William Munro Senior), Second Parties.—*MacWatt.*

MRS JANET DAWSON OR MUNRO, Third Party.—*Sym.*

REVEREND JOHN COCHRANE JOHNSTON AND OTHERS, Fourth Parties.—*MacWatt.*

JAMES DAWSON AND OTHERS, Fifth Parties.—*Younger.*

Succession—Will—Revocation—Conditio si testator sine liberis decesserit—Pencil alterations.—A solicitor, on 5th February 1884, made a holograph will in favour of his parents should they survive him, and failing them in favour of his nephew. A year afterwards he married, executing a marriage-contract in which he settled part of his estate upon his wife and children. He died in 1889, leaving a widow and children. After his death the will was found in his reposi-

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tories altered in pencil in favour of his wife and daughter. The alterations were in his handwriting, but were neither initialed nor signed, and had no date attached to them.

Held (1) that the will as it originally stood became inoperative by reason of the *conditio si testator sine liberis decesserit*, and (2) that the pencil alterations were to be regarded merely as converting the will into a draft for another will to be afterwards made.

2D DIVISION. M.

WILLIAM MUNRO, writer and banker, Dunoon, died on 27th September 1889, survived by his wife, Mrs Janet Dawson or Munro, to whom he was married on 17th June 1885, and three children, of whom the eldest was a daughter. He was also survived by his parents, Mr William Munro senior and Mrs Janet M'Rostie or Munro, and by a nephew, Alexander John Munro Bennett.

The deceased left a holograph will, dated 5th February 1884, by which he made over "my whole means and estate, heritable and moveable, to my parents should they survive me, failing them to my nephew," but under burden, *inter alia*, of two sums of £100 to be paid to the ministers and sessions of, respectively, the United Presbyterian Church, Dunoon, and the United Presbyterian Church at Alva.

This holograph settlement was found in the repositories of the deceased, put up together with certain jottings or memoranda holograph of the deceased, and shewing the state of his affairs as at 31st December in each of the years 1883 to 1887. The holograph settlement, which was written in ink, had the following pencil alterations made thereon:—The word "parents" was deleted, and the word "wife" was written below it; the word "they," occurring in the same line, was deleted, and the word "she" was written in between it and the next word "survive." The word "nephew" was deleted, and the word "daughter" was written below it. The alterations were in the handwriting of the deceased. They had been made in pencil only, were not initialed or signed, and no date was attached to them.

The deceased had, on 16th June 1885, executed an antenuptial contract of marriage in favour of trustees, in which he settled £2000, part of his estate, upon his wife and children in full satisfaction of *jus relictæ*, legitim, and all other claims against his estate.

Mr Munro left personal estate amounting to £7246, 17s. 8d., and also heritable properties, subject to a bond of £700, the gross rental of which was £218.

By trust-disposition, dated 7th November 1889, Mr Munro's parents, with consent of his nephew, assigned their rights under his will to trustees for behoof of his widow and children, subject to an annual payment of £40 which their son had been in use to pay them.

Questions having arisen in regard to the succession to Mr Munro's means and estate, a special case was presented to the Court by (1) Mr Munro's executors; (2) by the trustees acting under his parents' trust-deed; (3) by his widow; (4) by the ministers and sessions of the United Presbyterian Churches at Dunoon and Alva; (5) by the tutors and curators to the pupil children.

The questions for the opinion of the Court were as follows:—"(1) Is the said holograph settlement effectual as a will in favour of Mr Munro's parents, under burden of payment of the debts and legacies therein mentioned? (2) Is the said holograph settlement, in respect of the pencil alterations made thereon by Mr Munro, effectual as a will in favour of the third party, under burden of the payment of the debts and legacies therein mentioned? (3) Does the said holograph settlement effectually bequeath to the minister and session of the United Presbyterian Church, Dunoon, a legacy of £100 for the purposes therein mentioned, and does

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it effectually bequeath to the minister and session of the United Presbyterian Church at Alva a legacy of £100 for the like purposes? (4) Was the said holograph settlement revoked by the subsequent birth of children to Mr Munro by the operation of the *conditio si testator sine liberis decesserit*, and does the whole of his means and estate, subject to the obligations undertaken by him in the said antenuptial contract of marriage, belong exclusively to his three children as his heirs *ab intestato?*"

Argued for the first and second parties;—(1) The unauthenticated pencil alterations and additions to Mr Munro's holograph deed must be taken to be merely deliberative.[1] (2) That being so, the deed must be taken as a will in favour of the parents, unless it was revoked by the operation of the *conditio si testator sine liberis decesserit.* This condition however was a mere presumption, founded on the *pietas paterna*, and yielded to facts and circumstances from which the testator's intention to retain his will unaltered could be inferred.[2] There were such facts and circumstances here. (*a*) The will did not, when it came to be carried out, deal with the testator's whole estate. The marriage-contract dealing with a part was effectual.[3] (*b*) The testator lived a "competent" time after the birth of a child. (*c*) After the birth of the eldest child he had his will in view. The pencil alterations shewed that he had contemplated an alteration of it in favour of his wife.

The third party adopted the argument of the second parties with regard to the alleged revocation by the operation of the *conditio.* On the effect of the pencil alterations she maintained that these ought to receive effect. A settlement altogether in pencil was valid.[4] This was a rough holograph will, which might quite well be in pencil. The explanation of *Lamont* v. *Magistrates of Glasgow*,[5] and that class of cases, was that in them the question was whether a formal trust-deed was to be regarded as in part revoked by pencil jottings made upon it by the granter after he had taken it away with him for consideration as to how he should alter it. The presumption was that such jottings were deliberative only.

Argued for the fifth parties;—The *conditio* came into operation upon the birth of a child to the testator. Its effect was absolutely to revoke the will. No doubt in the earlier cases, such as *Colquhoun* v. *Campbell*,[6] there were dicta to the effect that if the testator survived the birth of a child for a sufficiently long time, the presumption arising from the *conditio* might be rebutted and the will might revive. There was however no reported case to this effect, no indication of opinion as to what length of time it was necessary for the testator to survive his child, and it was difficult to see how in any circumstances such a conclusion could be reached. It would involve an inquiry into the circumstances and intention of the testator, in which parole evidence would be led to determine the validity or non-validity of his will. It had been said in *Colquhoun's*[7] case that in order to overcome the presumption the facts must be "as

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[1] Pattison's Trustees v. University of Edinburgh, Nov. 9, 1888, 16 R. 73; Lamont v. Magistrates of Glasgow, March 10, 1887, 14 R. 603; Petticrew's Trustees v. Pettigrew, Dec. 6, 1884, 12 R. 249; Brown v. Maxwell's Executors, May 21, 1884, 11 R. 821, per Lord Young, p. 826, and per Lord Craighill, p. 827; Williams on Executors, p. 112.

[2] Ersk. Inst. iii. 8, 46; Bankton's Inst. ix. 5 (p. 47); Colquhoun v. Campbell, June 5, 1829, 7 S. 709, 1 Scot. Jur. 248.

[3] Bankton's Inst. *supra.*

[4] Simsons v. Simsons, July 19, 1883, 10 R. 1247.

[5] 14 R. 603.

[6] Colquhoun v. Campbell, *supra.*

[7] Per Lord Glenlee, 7 S. p. 711.

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plain as a pikestaff" that the testator intended the succession not to go to the children subsequently born. In short, the only view consistent with legal principle was to hold the will absolutely voided by the *conditio*.[1] That being so, the result was intestacy, as a revoked deed could not be made a new will by mere pencil alterations unsigned by the testator.

At advising,—

LORD JUSTICE-CLERK.—The late Mr William Munro, banker in Dunoon, on the 5th of February 1884, wrote out and signed a holograph will. He was then a bachelor, and he left the bulk of his property "to his parents" and failing them to his "nephew," under the burden of the payment of certain legacies.

Mr Munro afterwards married, and at some time unknown after his marriage he took this will and with a pencil scored out the word "parents" and inserted in its stead the word "wife," and also scored out the word "nephew" and inserted instead the word "daughter." That must certainly have been done after his first child had been born, and before any of the other children had been born, for he would not otherwise have written "to my wife should she survive me and failing her to my daughter." But that is of little consequence.

The question before us is whether this will shall stand as it is, or whether it shall stand as it was originally written, or whether it is invalid. These are practically the questions which we have to dispose of in the present case. Now, I think it is clear that this will as it originally stood came to an end by the fact of Mr Munro having married and having had a family, and having left a family, and that the doctrine *si testator sine liberis decesserit* applies. The will came to an end as a will in favour of the parents and nephew.

The next question is whether there being no valid original will at all, his taking this will and making these alterations on it in pencil constituted a new will. I am of opinion that it did not. It is not necessary to enter into questions which may be raised as to what may be done by pencil alterations. But finding a document of this kind with part of it cancelled and filled in in pencil and part of it left standing, the only conclusion I think one can come to is, that Mr Munro, knowing the law, for he was a writer and notary-public as well as a banker, was using it as the draft of a new will which he intended to make. He was going to alter his will. It is hardly to be supposed that he intended this original will, with the alterations on it, to be his last will, but rather that he intended to use it as the draft of a will giving new directions for the disposal of his affairs, and therefore I am of opinion that it did not constitute a new will. That being so, the estate must be dealt with according to the ordinary rules of law. The result is that the questions put in this case must be answered the first three in the negative and the last in the affirmative.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Answer the first, second, and third questions in the negative, and the fourth in the affirmative: Find and declare accordingly."

CUMMING & DUFF, S.S.C., Agents.

[1] Dobie's Trustee v. Pritchard, Oct. 19, 1887, 15 R. 2, per Lord Rutherfurd Clark, p. 4; *A's* Executors v. B and Others, Jan. 22, 1874, 11 S. L. R. 259.

No. 26.

Nov. 18, 1890. Earl of Wemyss v. Earl of Zetland.

EARL OF WEMYSS AND MARCH AND OTHERS, Pursuers (Reclaimers).—*Sol.-Gen. Pearson—Ure.*

EARL OF ZETLAND AND OTHERS, Defenders (Respondents).—*Jameson—C. J. Guthrie.*

Salmon-fishing—Fixed engine—Net.—A net of from 120 to 300 yards long and from 10 to 15 feet deep, made of very fine twine, with a light head-rope and cork floats along its upper edge, and a heavier rope along its lower edge, was used for catching salmon in the River Tay. The mode of using it was, shortly before high and low water of every tide, to row a boat across the stream, and to pay out one end of the net. When the net was all paid out it was cast completely adrift from the boat, and it remained in its position across the stream during the short period when the tide began to slacken, either at the ebb of high tide or at the first of the tide. The fish were caught by being entangled in the meshes of the net, and were immediately drawn up into the boat. As soon as the current began to get stronger from above or below, the net began to gradually assume a zigzag shape, and was then hauled into the boat.

Held (following *Masters of Allan's Mortification* v. *Thomson*, Nov. 14, 1879, 7 R. 221) that the net so used was not a "fixed engine," and that the mode of fishing was not illegal.

2D DIVISION. Lord Trayner. M.

THE EARL OF WEMYSS AND MARCH and others were proprietors of salmon-fishings on the River Tay and the River Earn, situated partly above and partly opposite to the fishings belonging to the Earl of Zetland, which extended for six miles on the south bank of the Tay near Newburgh. They brought an action against the Earl of Zetland and George Dunn and George Macvean, his tenants in his salmon-fishings, to have it found and declared that the defenders were "not entitled by themselves, or by others acting with their authority and consent, to fish in any part of the river or estuary of the Tay for salmon, or fish of the salmon kind, with nets of the description known as hang-nets or drift-nets." The summons contained further conclusions for interdict against their fishing with these nets, as they had been doing for several seasons.

The pursuers, after setting forth the particular mode of fishing which they alleged the defenders were practising, averred, *inter alia*, that during the time the nets were in the water they remained "stretched across the current of the stream, and they are used for the double purpose of taking fish and of keeping back fish not so taken, that they may be taken by the draught-nets that are used as soon as the turn of the tide makes such fishing available." The pursuers further averred that the nets seriously obstructed the free passage of the salmon up the river, were "illegal at common law, and contrary to the provisions of various Acts of the Parliament of Scotland," and that the portions of the river where the defenders fished were perfectly suited for net and coble fishing in the ordinary way.

It was admitted in the defences that the defenders Macvean and Dunn used drift-nets or hang-nets. The defenders founded on *Masters of Allan's Mortification* v. *Thomson*, 7 R. 221, the judgment in which, they averred, affirmed the legality of using precisely similar nets in the River Forth.

The pursuers pleaded;—(1) The said nets used or permitted to be used by the defenders as aforesaid, being substantially fixed engines adapted for the capture and obstruction of salmon and fish of the salmon kind, are illegal both at common law and under the statutes above libelled. (2) The said nets used by the defenders as aforesaid being illegal, and in violation of the rights of the pursuers as upper proprietors on the said river, the pursuers are entitled to declarator and interdict as libelled.

The defenders pleaded;—(1) The defenders should be assoilzied, in

respect that the said nets are neither fixed engines nor illegal obstructions to the passage of salmon. (2) The method of fishing complained of being merely a form of fishing by net and coble adapted to the character of the part of the river in question, the defenders should be assoilzied, with expenses.

On 28th June 1889 the Lord Ordinary (Trayner) assoilzied the defenders.*

The pursuers reclaimed, and on 21st January 1890 the Second Division recalled the Lord Ordinary's interlocutor, and remitted the cause to him, with instructions to allow the parties a proof of their averments.

Proof was led, and the following summary sets forth the mode of fishing practised by the defenders:—The nets used by the defenders were from 120 to 300 yards long, and from 10 to 15 feet in depth. They were made of very fine twine, and the meshes were from 2½ to 3 inches wide from knot to knot—that is, from 10 to 12 inches round. A light head-rope ran along the whole length of the top of the net, to which were attached cork floats at intervals of about 3 feet, and a similar though heavier rope was run along the bottom of the net. The purpose of these floats and of the latter rope was to keep the net in an upright position in the water, and to keep the upper side of the net always on the surface. In fishing with the nets, the practice was to begin fishing shortly before high or low water of every tide, when it began to slacken at the ebb of high water, or at the first of the tide. The boat with the net in it was rowed out into the stream. One end of the net, which might be called the far end, was then begun to be paid out into the channel where the fish were wont to run, and in water deeper than the depth of the nets, and at a distance from the side sufficient to secure such a depth of water as would keep the net from coming in contact with the bed of the river. When it was all paid out, the net was cast adrift, there being no connection between it and the boat, except when the fishing was conducted at night, when a small cord was attached to the net in order to prevent its being lost in the dark. The net was then in fishing position, and remained in its position straight across the channel for a short period, during which the water remained slack. When the floats indicated that a fish was entangled in the net, the boat left its position, and was rowed along the line of the net, and the fish was then taken out. As soon as the current from

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* "OPINION.—The defenders maintain that the mode of fishing complained of in this action has already been determined to be a legal mode, and that therefore they should be assoilzied. They refer to the decision in the case of *Masters of Allan's Mortification*, 7 R. 221. The pursuers say that that case can be distinguished from the present in two particulars. (1) They aver in this case that the net 'remains stretched across the stream,' while in *Allan's* case it was admitted that the free or river end of the net was swept down by the action of the tide, until it became parallel with the shore, which was just a slow sweep of the net. And (2), that in *Allan's* case it was admitted that net and coble was not a suitable mode of fishing the water there in question, while in the present case net and coble is not only suitable, but is practised. I do not think this case is distinguishable from *Allan's* case. It is obvious that the free end of the net complained of, unless fixed, which it is not said to be, must fall off towards the shore under the action of the tide, and cannot remain stretched across the river. The character of the net and mode of fishing in each case is the same. The net is never fixed or stationary while being used; it is always moving or drifting more or less.

"With regard to the second point, I agree with the opinion of Lord Shand in *Allan's* case. The legality or illegality of a certain mode of fishing is not to be determined by the consideration whether another mode of fishing is suitable or not."

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above or below grew stronger, it acted upon the net, which began to gradually assume a zigzag shape, bulging in the centre, and assuming the shape of the letter "S," and the net was then hauled into the boat. The net was in the water, from the time it was "shot," twenty minutes to three quarters of an hour, and during that period it drifted about 100 yards. It was further proved that at some of the places near Newburgh where the nets were thus used fishing by net and coble was possible, and had in fact been in former days practised.

The pursuers sought to shew that the hang-nets formed a complete obstruction to the salmon, while the defenders sought to shew that the fish were in the habit of going under, round, and over the nets.

On 23d May 1890, the Lord Ordinary pronounced this interlocutor:—"Having heard counsel for the parties on the evidence adduced . . . assoilzies the defenders from the conclusions of the action, and decerns."*

Argued for the pursuers;—It was proved that the nets were during the slack of the tide at high and low water stretched across the channel of the river in the run of the salmon as a complete barrier to their passage up the river. The nets in point of fact were for a period which might be stated as from five to ten minutes absolutely motionless relative to the water, and almost motionless relative to the land. They were therefore illegal.[1] The present case differed from the case of *Allan's Mortification*, relied upon by the defenders, in two important particulars. (1) In the Forth case, the opinion of Lord Deas[2] proceeded largely upon the fact that fishing by net and coble was not feasible, while in the present case, it was proved that such a mode of fishing was suitable and was practised. (2) In the Forth case, where the mode of fishing was carefully scrutinised, it appeared to be neither more nor less than net and coble fishing, but with a longer interval than usual between the successive "shots." In the present case there was nothing in the nature of a series of "shots." The whole time the net was actually being fished it formed a fence across the river, and was as permanent an obstruction to salmon as a loose net could be. The mode of fishing was then of that objectionable nature figured by Lord Westbury in the *Bermoney* boat case.[3] Indeed, it differed very little from the kind of hang-net fishing which was expressly interdicted by the Court in *Dirom* v. *Littles*.[4] Though it appeared from the report that one end of the net was in the latter case made fast, it also appeared that the other end was loose, and that the net was drawn diagonally across the channel. In any view, having regard to Lord Westbury's opinion above referred to, as well as to the dictum of the Lord Justice-Clerk (Hope) in *Ramsay's* case, the case of *Allan's Mortification* fell to be reconsidered.

Argued for the defenders;—This case was ruled by *Allan's Mortification*. Indeed, that case was really a stronger one in point of obstruction to salmon than the present. In it it was admitted that the boat moved with the net for the very purpose of keeping it straight across the run of

* "OPINION.—I am unable to find any material distinction whatever between the nets complained of in this action, and the manner in which they are used, and the nets the use of which was held in the case of *Allan's Mortification* to be legal. I think that case is decisive of the present, and I therefore, following that decision, assoilzied the defenders with expenses. I concur in the opinion delivered by Lord Shand in the case I have referred to."

[1] Ramsay v. Duke of Roxburghe, Feb. 9, 1848, 10 D. 661, per Lord Justice-Clerk (Hope), p. 669, 20 Scot. Jur. 217.

[2] Per Lord Deas, 7 R. 227.

[3] Hay v. Magistrates of Perth, Dec. 20, 1861, 24 D. 230, 34 Scot. Jur. 115, rev. May 12, 1863, 4 Macqueen, 535, 35 Scot. Jur. 463.

[4] Dirom v. Littles, Feb. 25, 1797, M. 14,282.

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the salmon, and that for a period of from one to two hours. Here nothing was done to keep the net straight, and soon after it was "shot" it began to zigzag and lose its straight position. Further, in the Forth case it was maintained that the fact that the net was fixed to the boat by a rope constituted it a fixed engine as in *Dirom's* case. Here, except at night, the net was not attached to the boat at all. The notion that where a net was said to be motionless or stationary relative to the water, it must therefore be said to be a fixed obstruction, was erroneous. A fixed obstruction could only be constituted by something fixed to the *solum* of the shore or to the channel of the river.

At advising,—

LORD JUSTICE-CLERK.—This is an action to have it found and declared that the defenders are not entitled to fish in any part of the River Tay for salmon or fish of the salmon kind with nets of the description known as "hang-nets" or "drift-nets," and for interdict against the use of such nets.

Now, the Lord Ordinary, having considered the case on the record, decided that there was no distinction between this case and the case of *Allan's Mortification*, and therefore he assoilzied the defenders from the conclusions of the action. In this Court we thought, on reviewing that interlocutor, that it would be advisable to have the matter in dispute cleared up by a proof, and that proof is before us.

Now, the conclusions of the present action are practically to the same effect as the conclusions in the case of *Allan's Mortification*. They are directed against placing drift-nets in the water. Is there any difference in the facts as now ascertained which shall make it necessary to hold that the use of such nets in this particular case is illegal?

In *Allan's* case the drift-nets were used, so far as I can see, practically in the same manner as they are used in this case, and this remark applies both to the nets themselves and to the mode in which the fish were captured. If there is any distinction it is one which does not arise from the mode of fishing or the way in which the appliance is used, but from the fact that the stream is in this case somewhat different in strength and action from the stream in *Allan's* case. It seems to me, however, that if we take the opinion delivered by Lord Westbury in *Hay* v. *Magistrates of Perth* and apply it to this case, we shall find that what was done here was in no way in contradiction to what were laid down by his Lordship as being the essential elements of fair river fishing, of which the symbols are net and coble. His Lordship says (4 Macq. App. 546), —"The proper conclusion is that the 'net and coble' is merely symbolical of the proper legal form of fishing, that legal form of fishing being by a net which is not to be fixed or stented, or in any manner settled or made permanent in the river, but is to be used by the hand, and is not to quit the hand, but is to be kept in motion during the operation of fishing."

Now, in *Allan's* case it is certain that the way in which the net was kept in motion was by the action of the tide or of the stream on the net. In this case also there is no doubt that the motion imparted to the net is imparted by the water, and by the water alone. I suppose that a net of this kind stretched in absolutely still water would be ineffectual, and though the stream and tide may cause the net not to swing round in exactly the same way as it did in *Allan's* case, still the effect of the tide and stream is to keep the net moving always, and to prevent its remaining in one fixed place across the river.

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These then being the facts, I am unable to see any distinction between this case and *Allan's* case. If the question were still open it might be a difficult one to decide, and I cannot say that my opinion would not lean in the direction of the decision in that case, because I think it was consistent with the deliverance of Lord Westbury which I have quoted. But I think it is sufficient for us in the decision of this case to find that there is no substantial difference of any kind between the facts of the two cases, and on that ground to hold that we must adhere to the Lord Ordinary's interlocutor.

LORD YOUNG.—I concur in adhering to the Lord Ordinary's interlocutor. I only wish to say this, that I do so solely because of the judgment in the case of *Allan's Mortification*. I am not prepared to say with the Lord Ordinary that I agree with the opinion delivered by Lord Shand in that case. I think the decision is not free from doubt, and I should have been very glad if your Lordships had seen fit to reconsider the subject of it in this case very carefully. I only therefore wish to guard myself against our decision being thought—if any future case should arise and go elsewhere, or this case go elsewhere—against it being thought that we are adding by our present judgment to the authority and weight of the case of *Allan*. I think we proceed—at least I do—on it entirely because it would not seem to your Lordships on the whole to be fitting for us to review that decision in the present case. I should like to say that I do not approve of any judgment of any Division as conclusive of Scots law. If it should happen to be thought wrong on further consideration either by the same Division or another Division, I am not of opinion that it is necessary to summon the whole Court, or that nothing but an Act of Parliament will correct an error that has been fallen into. The series *rerum judicatarum* would cease to be valuable if as soon as a judgment was pronounced the matter was to be considered as conclusively settled; and it is a matter of discretion in the circumstances whether in considering a point which has been a subject of decision either by ourselves or by the other Division we should call in a larger number of Judges to consider it or not. But here, clearly guarding against being supposed to add anything to the weight of that decision by our formal adherence, or that we are doing more than simply adhering, I concur in the Lord Ordinary's judgment being affirmed.

LORD RUTHERFURD CLARK.—I am of the same opinion, and think that we should adhere to the Lord Ordinary's interlocutor. I only wish to say further that I proceed solely upon the case of *Allan's Mortification*, and that like Lord Young I do not think that case is entirely free from doubt.

THE COURT adhered.

THOMSON, DICKSON, & SHAW, W.S.—H. G. & S. DICKSON, W.S.—Agents.

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Ramsay v. MacLay & Co.

ROBERT RAMSAY, Pursuer (Respondent).—*Rhind—J. Wilson.*
MACLAY & Co., Defenders (Reclaimers).—*Shaw—Mac Watt.*

Reparation—Slander—Innuendo—Threat to report matter to procurator-fiscal.—In an action of damages for slander the pursuer averred that his firm of Ramsay Brothers had been in the practice of collecting accounts for the firm of MacLay & Co., of which also he had formerly been a partner; that he had sold his interest in the latter firm to the other partners on 4th April 1889; that on 28th

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December 1888, and on 5th March 1889, the cashier of Ramsay Brothers had collected two accounts due to MacLay & Co. by a customer for £5, 5s. and £4, 4s. respectively, and that these sums had been credited to MacLay & Co.; that Ramsay Brothers had been sequestrated on 6th May 1889; that on 20th February 1890 the defenders had written to the pursuer—"We are surprised at having had no reply to ours of the 3d inst., regarding the a/cs of Wilson, Saline, which you collected and have not accounted for. It seems to us you do not realise the seriousness of your position in the matter, but should we be forced to insist on Mrs Wilson paying us the accounts she has already paid to you, and which is quite within our right, as she holds no receipt from us, and those she had from you are no legal discharge of a/cs due to MacLay & Co., she threatens to place the affair in the hands of her law-agent, and you may then find yourself in an awkward situation, as he will in all probability report to the fiscal. If you wish to save yourself from unpleasant consequences you will let us hear from you without delay"; that by this letter the defenders had falsely, calumniously, and maliciously represented that the pursuer, without any authority from MacLay & Company, had collected money due by a customer to them, and had dishonestly appropriated the same, or part thereof, to his own purposes, and been guilty of breach of trust and embezzlement.

The pursuer did not deny on record the liability of his firm to account, or their failure to do so, and, although allowed delay in order to explain what had become of the money, intimated that he had no explanation to give.

The Court *held* (1) that the pursuer was entitled to an issue, and (2) that the word "maliciously" should not be inserted in the issue (*diss.* Lord Young upon both points).

2D DIVISION. Lord Kinnear. M.

THIS was an action of damages for slander raised by Robert Ramsay, a partner of the firm of Ramsay Brothers, bottlers, Dunfermline, of which *he and his* brother John were the sole partners prior to the sequestration of the firm on 6th May 1889, against MacLay & Co., brewers, Alloa.

The pursuer made the following averments:—The pursuer and his brother John were sole partners of the firm of MacLay & Co. until November 1888, when Alexander Fraser and James Drummond joined the firm. While the pursuer and his said brother carried on business under the name of the said two firms, the firm of Ramsay Brothers acted as agents in Dunfermline and the surrounding districts for MacLay & Company, obtaining orders and receiving and discharging accounts in their name for that firm. After Mr Fraser and Mr Drummond were assumed partners that practice continued.

In April 1889 Fraser and Drummond agreed to buy up the interests of the pursuer and his brother in the firm of MacLay & Co., and in October 1889 a final settlement was made by certain payments to the pursuer and his brother.

On 28th December 1888 an account amounting to £5, 5s. by Mrs Wilson, Saline, to MacLay & Co. was collected by the cashier for Ramsay Brothers, and another account due by her to the same firm for £4, 4s. was collected by him on 5th March 1889.

(Cond. 3) "The defenders, on or about 20th February 1890, maliciously, and without probable cause, or any cause, wrote or caused to be written and delivered to the pursuer a letter in the following terms:—'Mr Robert Ramsay, Dunfermline.—Dear Sir,—We are surprised at having had no reply to ours of the 3d inst., regarding the a/cs of Wilson, Saline, which you collected and have not accounted for. It seems to us you do not realise the seriousness of your position in the matter, but should we be forced to insist on Mrs Wilson paying us the accounts she has already paid to you, and which is quite within our right, as she holds no receipt from us, and those she had from you are no legal discharge of a/cs due to MacLay & Co., she threatens to place the affair in the hands of her law-

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agent, and you may then find yourself in an awkward situation, as he will in all probability report to the fiscal. If you wish to save yourself from unpleasant consequences you will let us hear from you without delay." (Cond. 4) "The said letter is of and concerning the pursuer, and falsely, calumniously, and maliciously represented that the pursuer, without any authority from MacLay & Company, had collected money due by a customer to them, and had dishonestly appropriated the same, or part thereof, to his own purposes, and been guilty of breach of trust and embezzlement. . . . When the defenders wrote the said letter they had in their possession the receipts which had been granted by the cashier of the pursuer's firm to Mrs Wilson for the sums in question. They further knew that the pursuer's estate had been sequestrated, and that the pursuer had been discharged of all his debts due at the date of the sequestration. The defenders were, when writing said letter, well aware that they had no claim whatever against the pursuer for the said accounts,—that all matters between them had been finally closed months before. They had no occasion whatever to write to him in regard to the accounts. The actings of the defenders were wholly illegal and unwarrantable, and they were actuated in writing said letter by the desire, under the threat of criminal proceedings being instituted, to extort the said sums from the pursuer." (Cond. 5) "The estates of the said Ramsay Brothers and the pursuer were, as before stated, sequestrated upon 6th May 1889, under the Bankruptcy Statutes, and the sequestration was recalled under a deed of arrangement on 9th September 1889."

He further averred that, if the accounts referred to were not included in the settlement between the parties, this was the defenders' own fault. There was no averment that he had accounted, nor did he say that he was willing to account.

The defenders denied that the pursuer or his firm had ever acted as agents for MacLay & Co., and averred that these accounts had not been disclosed at the dissolution of partnership or at the subsequent settlement.

The defenders pleaded;—(2) The letter complained of will not reasonably bear the innuendo put thereupon by the pursuer, and the action should accordingly be dismissed. (3) The said letter was a privileged communication.

The Lord Ordinary (Kinnear) approved this issue:—"Whether the defenders wrote and sent, or caused to be written and sent to the pursuer a letter in the terms contained in the schedule hereto annexed" (*i.e.* the letter of 20th February 1890) "and whether the said letter is of and concerning the pursuer, and falsely and calumniously represents that he had dishonestly appropriated moneys belonging to the defenders, to the loss, injury, and damage of the pursuer?" *

The defenders reclaimed, and argued;—There was no dispute that a letter addressed to a person might found an action of damages at his instance,[1] but to found an action for damages in respect of slander there must be an averment that the charges were false.[2] There was no such averment here; there was no averment by the pursuer that he had accounted, or a statement that he was willing to account. In any event, the communica-

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* "NOTE.—The words of which the pursuer complains are not in themselves actionable; but the innuendo which he proposes is not inconsistent with their natural meaning. The case of *Mackay* v. *M'Cankie*, 10 R. 537, appears to me to be in point."

[1] Mackay v. M'Cankie, Jan. 27, 1883, 10 R. 537.

[2] Campbell v. Ferguson, Jan. 28, 1882, 9 R. 467.

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tion was one which the defenders were entitled to make, and there must be an issue of malice.[1]

The pursuer argued;—As regarded the necessity of putting malice in the issue, the better practice was that that should not enter the issue, but should be left to the Judge to direct the jury upon.[2] As regarded the innuendo, such an issue and innuendo would only be refused if the words would not reasonably bear the construction put on them by the innuendo,[3] a position which could not be taken up here, for the only meaning of the letter was that a criminal offence had been committed. If this had been a mere fashion of asking for the money the letter would have been written to the firm, and not to Robert Ramsay as an individual.

After the hearing the Court desired to be informed whether the moneys had been accounted for, or what explanation there was of their not having been paid. Counsel for the pursuer stated that the only explanation he could then give was that the cashier might have received the money and kept it. Subsequently he stated, as he had previously stated on record, that the two sums had been credited to MacLay & Co. in the books of Ramsay Brothers, but he did not say that he had accounted for them.

At advising,—

LORD JUSTICE-CLERK.—The question is whether the issue, with the accompanying innuendo which has been lodged for the pursuer, is to be allowed.

The case is rare in this respect, that the pursuer is complaining not of a slander uttered in public, but of a slander contained in a letter addressed to himself, which would not have obtained publicity unless he himself gave it publicity. Such an action is not known in England, but it is settled law that in this country the aggrieved party is entitled to sue for damages in respect of the injury done to his feelings.

Now, undoubtedly the defenders had good grounds for writing to inquire about the sum of money, for it had plainly been collected by the pursuer, and had not been accounted for to the defenders; it is not said to have been accounted for yet. But the question is whether the sting which they put into their letter is not such as to entitle the pursuer to an issue.

The letter certainly suggests very distinctly that if the pursuer did not take a particular course, the matter might be delivered over to the public authorities, with consequences which would be very unpleasant to the pursuer. That would not be actionable without the innuendo, but then I think that the innuendo can fairly be put as an interpretation on the language of that letter. It is for a jury to say whether, the letter being proved, the innuendo is also proved. I think the Lord Ordinary is right when he says that the innuendo is "not inconsistent with" the natural meaning of the letter. That being so, I think the case ought to go to a jury.

LORD YOUNG.—I am disposed to regard this as a case of first-rate importance. The dispute is a trifling one, but the letter which is complained of as a slander does not contain a single slanderous expression; it is a letter written by a clerk of the defenders' in the ordinary course of business, demanding payment of a debt which is due. Is that to found an action of damages?

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[1] Shaw v. Morgan, July 11, 1888, 15 R. 865; M'Lean v. Adam, Nov. 30, 1888, 16 R. 175.

[2] M'Bride v. Williams & Dalzell, Jan. 28, 1869, 7 Macph. 427, 41 Scot. Jur. 211.

[3] Fraser v. Morris, Feb. 24, 1888, 15 R. 454.

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It would be a strong thing in any case to make such a letter the foundation for an action of damages, and I should require a very exceptional state of facts before I could be persuaded to think it warrantable to send such a letter to a jury on mere general epithets—words of style—expressed as an innuendo.

Now, the state of facts here is this: Accounts due to the defenders had been uplifted and received by the pursuer or his cashier. It is admitted that both the accounts in question were due to the defenders, and to no one else. There was a question whether the pursuer by himself or cashier was entitled to receive the sums due under these accounts. That he had no title in a question with the defenders is certain. That his receipt to the debtor is good is equally certain, for he had been in use to collect such accounts, and the debtor had received no notice that his authority to do so had been recalled.

The case then is a case of a good discharge by a person who had himself no right to the debt. But the money had been uplifted, and when the true creditor asks the debtor for payment, the debtor exhibits receipts from the pursuer's cashier. The defenders then demanded payment from the pursuer, exhibiting these receipts from his own cashier, and liability is repudiated. The defenders then wrote the letter complained of.

Now, there is not a word in it which is not true: the money was uplifted, and was not paid over or accounted for. It was suggested at the bar by the pursuer's counsel that "perhaps the cashier kept the money." That suggestion was afterwards withdrawn, and it was admitted that the pursuer had got it. We allowed further time that information might be supplied to us to explain what he had done with it. The pursuer's counsel said he had no doubt that information could be got. After a fortnight's delay, however, we were told that the money could not be found or accounted for.

Now, no doubt the letter takes an unfavourable view of the conduct of the pursuer. But there is no misrepresentation of fact, and it is not slanderous to express an opinion that the matter is one for the consideration of the fiscal. I do not think it is slanderous on the part of any man, in the conduct of his business, misrepresenting no fact, and writing to the person himself against whom he has a claim, to say "Your conduct is unbecoming and requires investigation."

Where are we to stop? Suppose a letter written by a writer to the signet,—"My client informs me that you have uplifted money which is due to him, and have not accounted for it. That seems to me to be highly improper conduct, and unless I get an explanation of it I shall hand the matter to the procurator-fiscal." If that letter were made the ground of an action of damages for slander by an impecunious person, who thought he saw an opportunity of profit, would it be sent to a jury?

Or, when a Sheriff or Judge says that the circumstances of a case pending before him seem to be such that it will be his duty to send the papers to the Lord Advocate, has he uttered a slander, from the consequences of which he is only protected by the office he holds?

I think therefore, without hesitation, that both law and considerations of justice require that this action should be dismissed.

LORD RUTHERFURD CLARK.—I agree with your Lordship in the chair. I do not think that we can withhold this case from a jury.

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Shaw.—Your Lordships have not dealt with the question as to whether malice should go into the issue.

LORD YOUNG.—I should have said as regards that, that if the case is to go to a jury at all malice should certainly be put in the issue. If the complaint had been made to the procurator-fiscal it must have gone in. Why should it not now?

LORD JUSTICE-CLERK.—I omitted to notice the matter in my opinion, but it was considered at consultation, and Lord Rutherfurd Clark and I thought it should not go in.

LORD RUTHERFURD CLARK.—The Judge will of course direct the jury at the trial on that matter. Understand that I am very far indeed from saying that malice need not be proved.

THE COURT adhered.

WILLIAM OFFICER, S.S.C.—JAMES MARSHALL, S.S.C.—Agents.

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Nov. 20, 1890.
Simons' Trustee v. Neilson.

WILLIAM SIMONS (Mr and Mrs Simons' Trustee), First Party.—*D.-F. Balfour—Jameson.*
MATTHEW M. NEILSON AND OTHERS, Second Parties.—*Murray—C. S. Dickson.*

Succession—Husband and Wife—Married Women's Property Act, 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 6—*Marriage prior to Act—Jus relicti.*—By antenuptial marriage-contract, entered into in 1862, a wife conveyed to trustees her whole estate, heritable and moveable, for payment of the free yearly income to herself during her life, exclusive of her husband's *jus mariti* and right of administration, and after her death for payment to her husband of an alimentary liferent of it, which was to cease on his entering into a second marriage. On the death of the spouses the capital was to be conveyed and paid to the issue of the marriage, if any, and failing them, to the wife's "own heirs whomsoever." The wife predeceased her husband, and there were no issue of the marriage. She left no further writing disposing of her estate. The husband took no benefit from his liferent, and married a second time shortly afterwards. In a special case, to which the husband and the wife's next of kin were parties, *held* that the former was entitled, under section 6 of the Married Women's Property Act, 1881,* to take one-half of his wife's estate.

Question, whether on the assumption that the husband had not married a second time, and had been in the enjoyment of his liferent of his wife's estate, he would also have been entitled to claim his share of the fee under the Act.

1ST DIVISION. C.

ON 18th August 1862 William Simons, shipbuilder, Renfrew, entered into an antenuptial contract of marriage with Miss Mary Montgomerie Neilson, and the marriage took place next day.

By the contract, so far as it dealt with the wife's estate, it was provided,—"For which causes, and on the other part, the said Mary Montgomerie Neilson, with consent of her said promised spouse, hereby assigns, dis-

* The 6th section of the Married Women's Property Act, 1881, enacted,—"After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

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pones, conveys, and makes over to and in favour of . . . the whole estate whatsoever, heritable and moveable, real and personal, wherever situated, now belonging to her, the said Mary Montgomerie Neilson, or which she may acquire or succeed to during the subsistence of the said intended marriage, together with the whole writs, title-deeds, and vouchers thereof, but in trust always for the ends, uses, and purposes following,—that is to say, (first) for payment of the expenses of carrying this trust into effect; (second) for payment of the free yearly income of the said trust-estate to the said Mary Montgomerie Neilson during all the days and years of her life, exclusive of the *jus mariti* and right of administration of her said intended husband, and after her death for payment thereof to the said William Simons, in case he shall survive her, during all the days and years of his life, which income shall be purely alimentary, and shall not be assignable by her or him, or be affectable by her or his debts or deeds, or attachable by the diligence of her or his creditors, but providing always and declaring, as it is hereby expressly provided and declared, that, in the event of the said William Simons surviving the said Mary Montgomerie Neilson and entering into a second marriage, the said liferent above conceived in his favour shall thereupon cease and determine; (third) on the termination of the liferent above conceived in favour of the said spouses, and in the event of there being issue of the said intended marriage, the said trustees shall pay or convey to the child or children then alive, and to the issue of any child or children who may have predeceased, the capital of the said trust-estate so established by the said Mary Montgomerie Neilson, and that in such manner and in such proportions as the said Mary Montgomerie Neilson may have appointed by any writing under her hand, whether the said writing be probative or improbative, and, failing such appointment, the said trustees shall divide and pay or convey the said capital amongst such children and issue, share and share alike; . . . (fourth) in the event of the said intended marriage being dissolved by the predecease of the said William Simons, and there being no child or children or their issue then alive, the said trustees shall pay over or reconvey to the said Mary Montgomerie Neilson the whole estate above conveyed; (fifth) in the event of the said intended marriage being dissolved by the predecease of the said Mary Montgomerie Neilson the said trustees shall, on the cessation of the liferent above conceived in favour of the said William Simons, in case of there being no child or children or their issue then alive, pay or convey the capital of the said estate to any person or persons whom the said Mary Montgomerie Neilson may have appointed to receive the same by any writing under her hand, and, failing such writing, to her own heirs whomsoever."

Mrs Simons died, domiciled in Scotland, on 30th December 1888, without having executed any writing disposing of her estate, except the contract of marriage. There were no children of the marriage.

The income of Mrs Simons' estate was regularly paid to her during her lifetime. After her death, it had been collected, and was in the hands of her husband, as sole surviving trustee under the marriage-contract. Her estate, as given up in the inventory, amounted to £2004, 17s. 7d.

Mr Simons entered into a second marriage in August 1889.

A question having arisen as to his right to one-half of his first wife's estate, a special case, to which he was the first party and his wife's next of kin were second parties, was presented for the opinion and judgment of the Court.

The question submitted was:—"Is the first party, as husband of the late Mrs Mary Montgomerie Neilson or Simons, or otherwise, entitled to

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one-half of her free moveable means and estate, inclusive of that portion thereof falling under her contract of marriage?"

Argued for the first party;—The trust purposes provided for in the marriage-contract having lapsed, he was entitled to one-half of the estate which was *in bonis* of his wife at her death, and at her absolute disposal. The trust was a mere burden on her radical right.[1] The only distinction between the present case and that of *Fotheringham*[2] was that here there was a liferent provision in favour of the husband. But he had taken no benefit from that provision during the few months that he was a widower, and he forfeited all right to do so when he married again.

Argued for the second parties;—The 6th section of the Married Women's Property Act enacted that the husband's *jus relicti* thereby created should be put upon the same footing as the wife's *jus relictæ*. But here there was a marriage-contract provision which the Court would not readily presume to be altered by subsequent legislation. Under the marriage-contract the wife conveyed away all her estate, and at the date of her death there was nothing *in bonis* of her. Until that event occurred, it could not be said who was to be the fiar of the estate. At her death her heirs took, and her husband could not claim in that capacity.[3] As trustee the first party was bound to keep up the trust, and the case was in this respect distinguishable from *Fotheringham's* case, where there was no liferent provided to the husband. The husband could not have discharged his alimentary liferent,[4] and there was not an absolute right of property in the wife as in *Fotheringham's* case.

Lord President.—In this case the lady's estate was conveyed to marriage-contract trustees for the purposes of the marriage-contract, but not for any other purpose, and I think it is well established by the case of *Ramsay's Trustees* that if the purposes of the marriage-contract have either failed or are satisfied, then it will follow that the estate which has been conveyed in order to secure the provisions of the contract becomes absolutely the property of the person who conveyed it. I do not think it is possible to doubt that doctrine.

What then are the provisions of this marriage-contract? There are provisions for the children of the marriage, and there is an alimentary liferent in favour of the husband if he should survive his wife. Beyond these there are no other provisions except in favour of the lady. There were no issue of the marriage, and accordingly the provisions in favour of the children have failed. The fact that there was an alimentary liferent provided to the husband was not inconsistent with the fee of the estate remaining vested in the lady herself. A liferent alimentary is nothing but a burden upon the fee, and in no way affects the property of the fee, and therefore it appears to me that if Mr Simons had claimed and enjoyed the alimentary liferent, the fee would still have been in the wife as at the date of her death. The trust-conveyance would only have existed for the purpose of providing for the alimentary liferent. Accordingly, I think Mr Simons would have been entitled to enjoy the liferent, and to have made his present claim.

But Mr Simons did not claim the liferent. He has uplifted the marriage-con-

[1] Ramsay v. Ramsay's Trustees, Nov. 24, 1871, 10 Macph. 120, 44 Scot. Jur. 77.

[2] Fotheringham's Trustees v. Fotheringham, June 27, 1889, 16 R. 873.

[3] Inglis v. Inglis, Jan. 28, 1869, 7 Macph. 435, 41 Scot. Jur. 234.

[4] White's Trustees v. Whyte, June 1, 1877, 4 R. 786; Menzies v. Murray, March 5, 1875, 2 R. 507.

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tract funds, but that was only in his capacity as trustee, and it is only in that capacity that they are now in his hands. So far from asking the liferent, he has renounced or abandoned all claim to it, and accordingly the case is reduced to this: Whether the same simple principle which we affirmed in the case of *Fotheringham* applies. There is no mystery about the 6th section of the Married Women's Property Act, 1881. It is provided there that "the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland." Nothing can be clearer than that. The husband's right, where he is the survivor of the spouses, is to be exactly of the same nature as that of the widow where the wife is the survivor. The section then goes on,—"And subject always to the same rules of law in relation to the nature and amount of such share and interest"—that is, the circumstances of each particular case are to be taken into consideration, *e.g.*, whether the division is to be a bipartite or a tripartite one, according as there are or are not children of the marriage. The words which follow are,—"And the exclusion, discharge, or satisfaction thereof, as the case may be." There is no suggestion that there are words excluding, discharging, or satisfying the husband's claim under the 6th section of the Act, which accordingly extends to one-half of the estate vested in the lady at the time of her death, there being no children, and nothing to exclude, discharge, or satisfy the claim.

I need not repeat what I said in the case of *Fotheringham*. The two propositions which require to be made out are (first) that the estate was the property of the wife at the date of her death, and (secondly) that nothing has been done to discharge the husband's interest in the estate. These two propositions are completely made out in this case, and therefore I think that the provisions of the 6th section of the Act apply.

Lord Adam.—By her marriage-contract Mrs Simons conveyed her moveable estate to the marriage-contract trustees for certain purposes, one being that her husband, if he survived her, should have an alimentary liferent, and another that the capital should be conveyed to the children of the marriage if there should be any. The wife has predeceased her husband, who has not taken his aliméntary liferent, and there are no issue of the marriage. In these circumstances, I do not doubt that the principle of the case of *Fotheringham* applies. In the events which occurred the marriage-contract provisions were mere burdens upon the fee. I think that during the lifetime of the spouses the trustees held the estate for Mrs Simons, and for her alone. Upon the dissolution of the marriage the marriage-contract funds belonged to the wife, and were *in bonis* of her at the time of her death. I think it is clear that the 6th section of the Married Women's Property Act applies, and that the husband is entitled to the half of her moveable estate.

Lord M'Laren.—The section of the Married Women's Property Act of 1881 which is here founded on deals with the interest of the husband in his wife's estate, without distinction of the two cases where the marriage has been before and where it has been after the passing of the Act. The purpose of the section is to give identical interests to the husband and to the wife in the estate of the predeceaser. That object is accomplished without it having been thought neces-

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sary to deal specially with the rights of the husband as those existed at the date of the passing of the Act. The provisions of the section regarding the exclusion, discharge, or satisfaction of conventional claims have been deemed by the Legislature sufficient to meet the necessities of the case. In the present case there is neither satisfaction nor discharge, because the husband's second marriage has deprived him of his claim to a conventional provision, and accordingly the way is open to him to claim his *jus relicti* under the statute.

I desire to reserve my opinion as to the possible case where a husband married before the date of the Act claims a liferent of his wife's estate, and also a share of the fee of it, under the 6th section of the Act. I can see an answer to such a claim under the Act; and, besides, I do not think it would be consistent with our practice, in dealing with such claims at the instance of the wife, to allow legal and conventional provisions to be claimed concurrently. But it is not desirable to say more upon such a question at present.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Find and declare that the first party, as husband of the late Mrs Mary Montgomerie Neilson or Simons, is entitled, under the operation of the 6th section of the Married Women's Property (Scotland) Act, 1881, to one-half of her free moveable means and estate, inclusive of that portion thereof falling under her contract of marriage."

J. & J. Ross, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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Nov. 21, 1890. Barr & Sons v. Caledonian Railway Co.

WILLIAM BARR & SONS, Pursuers (Reclaimers).—*Lord-Adv. Robertson—Low—C. S. Dickson.*

CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—*D.-F. Balfour—C. J. Guthrie.*

Railway—Common carriers—Haulage contract—Liability for loss of traders' waggons.—A railway company conveyed a trader's waggons containing coal along their lines, and after delivery of the coal conveyed the empty waggons back to the collieries, the sole charge made being a rate of 1s. 7½d. per ton, whereas the rate for the conveyance of coal on waggons belonging to the company was 2s. On the return journey some of the waggons were destroyed through an accident to the train caused by a latent defect in the waggon of another trader, which was in the same train. *Held* that the railway company were not liable for the safe delivery of the waggons as under a contract of carriage.

Question, whether the railway company would have been liable for the safe conveyance and delivery of the coal as under a contract of carriage.

1ST DIVISION. Lord Trayner. C.

MESSRS BARR & SONS, coalmasters, Glasgow, were owners of the Allanton and other collieries in Lanarkshire, which were connected with the Caledonian Railway system by means of sidings or branch lines, and they were in the habit of employing the railway company to convey their waggons or trucks of coal from their collieries to various parts of Scotland.

In May 1888 the railway company undertook to convey five waggons of coal from the Allanton Collieries to the general terminus at Glasgow, and there to deliver the coal on board ship. The coal was so delivered, but on the return journey part of the train, of which the five waggons formed a portion, left the rails, three of the waggons being destroyed, and the other two being damaged. The accident was admittedly due to a latent defect in a waggon which was in the train and belonged to a trader other than Messrs Barr & Sons.

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Messrs Barr & Sons brought an action against the railway company for payment of the sum of £142, 3s. 3d., being £136, 10s., the cost of replacing the three destroyed waggons, and £5, 13s. 3d., the cost of repairing the others.

The pursuers averred that the defenders were and held themselves out to be "common carriers of coal and other minerals, and of waggons or trucks loaded with coal belonging to or provided by the traders or persons sending the coal. They carry, and undertake to carry, the coal, and the waggons loaded with coal, of any person who thinks fit to employ them, including the return of the empty waggons, and they have a regular service on their railways for the carriage thereof, and they perform all services incidental to the carriage, from the taking of delivery from the sender to making delivery to the consignee. . . ." (Cond. 6) "The services which the defenders undertook in regard to the said trucks of coal included the conveyance, and whole charge, control, and conduct of the same along their railway, the provision of sidings and cranes and other appliances necessary for delivering the coal into the ship, and the services, labour, and other incidents to the carriage and delivery, and also the return to the pursuers' colliery of the empty trucks."

The defenders admitted that they had been employed to haul the pursuers' waggons of coal to the general terminus, and the empty waggons back again, and that the haulage included the whole charge, control, and conduct of the waggons along the railway. They explained that it was impossible for them, by any ordinary inspection or by reasonable care and diligence, to have discovered the latent defect in the trader's waggon which had caused the accident, and that they were not responsible.

The pursuers pleaded;—(1) The defenders, as common carriers, *et separatim* under their contract with the pursuers, were bound to carry the said trucks and coal with safety, and having failed to do so, are liable in damages. (2) The pursuers' trucks having been injured by the breaking down of a waggon belonging to the defenders, or for which they were responsible, and while the said trucks were under their sole conduct and control, the defenders are liable in reparation.

The defenders pleaded, *inter alia*;—(2) The pursuers' statement, or the material portions thereof, being unfounded in fact, the defenders are entitled to absolvitor. (3) The defenders having used reasonable care and diligence in the inspection and haulage of the pursuers' waggons and of the other waggons composing the train (all the waggons of the train being those of traders) are entitled to absolvitor.

The Lord Ordinary (Trayner), on 28th November 1889, allowed a proof, and a reclaiming note by the defenders against the interlocutor allowing it was refused on 20th December following.

It appeared from the proof that the pursuers' pits were connected by branch lines belonging to them with the defenders' line of railway, and that they worked the traffic on the branch lines by engines of their own, the railway company taking on the loaded waggons to their destination when they were ready, the pursuers having no further charge or control over them, and none of their servants accompanying the waggons.* The

* Mr James Barr, one of the pursuers, deponed,—"When we have coals to send away they are loaded at the colliery, and we take them by our own engine to the end of the siding, which is ours, and the Caledonian take them on to their line when they are ready. Our output from the Allanton Colliery is from 450 to 500 tons per day just now. The whole of that traffic passes on to the Caledonian Railway. We have no connection with any other railway. We have about 300 waggons of our own. We have had waggons of our own for

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railway company issued from time to time schedules of "Rates for the conveyance of coal . . . in waggon loads of four tons and upwards from Allanton Colliery," in which there were two columns of rates per ton, one for "company's" waggons, and another for "traders'" waggons.* At the date of this action the rate to the general terminus in company's waggons was 2s. per ton, and in owners' waggons 1s. 7½d. per ton. At the general terminus at Glasgow the railway company's servants put the waggons on a crane which belonged to the company, and tipped them into the ship. 2d. per ton was charged for that, and added to the rate. The waggons were then brought back by the company to the pursuer's siding, but this was covered by the one charge.†

The Lord Ordinary (Trayner), on 11th June 1890, assoilzied the defenders.‡

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the last three or four years. We put on those waggons for the purpose of keeping our collieries working, and on account of the impossibility of getting a regular supply of waggons when we required them from the railway company. The Caledonian have coal waggons of their own. It is the practice with a great many coalmasters to have waggons of their own also. Owners' waggons are built to a specification issued by the railway company, and must be passed by the railway company. Before they take them on to their line the railway company examine them to see if they are according to specification and suitable to run on their system."

* The following was "Excerpt from General Instructions of the Caledonian Railway Company for the guidance of agents and others:—34. Traders' or private waggons must be treated in every respect the same as the company's waggons, and agents must see that they are properly emptied and despatched to the works of the owners."

The following were "Regulations as to the use of Vehicles" issued by the company:—"The owners of all vehicles brought upon the railway are required to keep them in good repair, and in every respect in good working condition, and to have them thoroughly greased and properly examined each journey, and put in proper working order before leaving. If in transit any slight defect should be observed, which, for the proper and safe working, it is necessary to repair before the vehicles are allowed to proceed further, the company will, with consent of the owners, make such repairs, and charge them with all expenses incurred in effecting the same; but should an examiner omit, or be unable to detect any damage, weakness, or absence of parts, the owners of the waggons will be still held liable for any expenses which may be incurred by accident arising therefrom; and further, the owners will be held liable for any damage done to other vehicles, or to property belonging to or in charge of the company, by reason of any accident resulting from the improper condition of any of their vehicles, or from their failure; the examination by the company's examiners being made solely with a view to the safe working of their traffic, and by which the responsibility of the owners is not annulled nor in anywise reduced. . . ."

† Mr Archibald Hillhouse, the general goods manager of the Caledonian Railway, deponed:—"When the traffic arises at a colliery the waggons are marshalled by the colliery people, and they bring them down to the end of the siding, and we take them away. Before the train starts on its journey, those particular traders' waggons are put along with our waggons or with some other traders' waggons, as we direct, and by our servants. It may be that the particular colliery waggons are sufficient for a train by themselves. . . . The duties which the company perform after taking possession of the waggons are the same whether the coal is in traders' waggons or in company's waggons, with this addition that the owners' waggon is returned empty direct to the pit, and with this difference, that we make a lower charge."

‡ "OPINION.—I think this case is in no material respect distinguishable from the case of *Watson* v. *North British Railway Company*, 3 R. 637. It is true

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The pursuers reclaimed, and argued;—The case of *Watson*[1] was distinguishable, because the railway company's liability there was rested on the contract of haulage, and not on that of carriage. Anything said by the Judges in that case as to the contract of carriage was *obiter*, as the question was not really raised. It was a case of "fault" or "no fault." If a railway whose business was that of common carriers undertook to convey goods to a destination, they could not rid themselves of an obligation as common carriers. As regarded both coals and trucks, the contract was one of carriage. The nature of the defenders' liability could not be altered by the way in which they performed the duty, so long as they held themselves out as common carriers. No doubt a common carrier might limit the sphere of his obligation; he might carry subject to specified conditions, but without any such special condition or bargain he was subject to the general law of common carriage.[2] There was no such special bargain here. If a railway company offered to carry traders' goods on condition that the traders provided the waggons, they were bound to use reasonable care in carrying them. The edict *nautæ caupones* was applicable to the common carrier, grounds of public policy suggesting this, because there was a difficulty in proving fault in a case of the kind, where, as here, there was

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that in *Watson's* case the pursuer averred that his contract with the railway company was a contract of haulage, while in this case the pursuers aver that the defenders undertook the employment of conveying the waggons of coal in question, 'as common carriers.' The difference in averment can make no difference in the result, unless the difference alleged is proved to have existed in fact, which in my opinion has not been proved. The contract proved in this case cannot be better described than in the words by which Lord Shand described the contract in *Watson's* case, viz., 'The railway company undertook to carry coals for the pursuer in his own waggons at certain rates.' That is the whole contract in both cases. That being so, and the pursuers not having proved (or even averred) that the damage for which they sue was occasioned by any want of reasonable care or diligence on the part of the defenders, the defenders are entitled, on the authority of *Watson's* case, to absolvitor.

"The pursuers contended that the defenders having contracted to deliver the coals in question on board the 'James Groves,' a vessel lying at the general terminus, Glasgow, distinguished this case from *Watson's*; and that such obligation to deliver shewed that the contract between the parties to this action was one for carriage, imposing upon the defenders a carrier's responsibilities. I am not of that opinion. Even under a contract of haulage the defenders would be bound to deliver or hand over the coals conveyed under that contract to some person at the terminus or station to which they were addressed. That they tipped the coals out of the waggon into the hold of a vessel does not seem to me to make any difference in the obligations of parties. Suppose, instead, the defenders had tipped the coals out of the waggon on to the road or siding, to which under the contract of haulage they had been brought. That fact would not have converted a contract of haulage into a contract of carriage. In loading the vessel the defenders were acting as stevedores, not carriers, and I suppose they may act as stevedores in supplement of a contract of haulage just as well as in supplement of a contract of carriage. The contract under which the coals were to be conveyed to the general terminus was completed before the tipping began.

"I was referred to the case of the *Aberdeen Commercial Company* (6 R. 67) as affecting the authority of the decision in the case of *Watson*, but I do not see that it does so in any way; or that in that respect or otherwise it has any bearing on the present case. . . ."

[1] Watson v. North British Railway Co., March 18, 1876, 3 R. 637.

[2] Johnson v. North-Eastern Railway Co., Nov. 14, 1888, 5 Times Law Reps. 68; Mallery v. Teoga Railway Co., 39 Barbour's American Reps.

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full custody and control.[1] There was here a complete handing over to the railway company of the control of the waggons during the journey, the company determining their route and superintending their marshalling, &c. There was no discrimination in the railway company's contract as to the nature of the services to be performed, and the Lord Ordinary was wrong in thinking that "the contract was completed before the tipping began." There were not two contracts, the first ending when the engine left and the delivery on board ship began. There was no distinction in the wording of the undertaking between carrying in the defenders' waggons and in traders' waggons. The unloading at the general terminus was incidental to the contract of carriage. The company would be under an obligation to deliver a package of goods, and a waggon was a package on its own wheels, and the specialty of the packing (which led to the differential rates) did not relieve the company from liability as under a contract of carriage. The charges here were made by the company as common carriers under the 43d section of the Caledonian and Scottish Central Act, 1865 (28 and 29 Vict. cap. cclxxxvii.) (and also secs. 38, 39, 40), in which conveyance and carriage seemed convertible terms.* The equivalent clause under the Railways Clauses Act, 1845, was the 79th, and the company charged in the present case under that clause as common carriers, and not as tolltakers under sections 86-90. In the case of the *Aberdeen Commercial Company*[2] a distinction was drawn by the Lord President between the case where the conduct of the train was in the hands of the trader himself and the case where it was in the hands of the company; in the latter case they were said to act as carriers.

Argued for the respondents;—The railway company's contract here was to provide a road and locomotives, and allow the pursuers to put their vehicles upon it. Where the vehicles and the locomotive power were both supplied by the company the contract was one of carriage, and to that case the 79th section of the Railways Clauses Act, 1845, and the 43d section of the special Act applied. There was no direct provision in the earlier Railway Acts for a contract like the present. The danger which the edict *nautæ caupones* was designed to meet was that of robbery. But such a danger had nothing to do with the case where the vehicles were, as here, provided by the owner of the goods. There was no case in any system in which it had been held that the edict applied where the vehicles had not been provided by those who provided the carriage, except, perhaps, the American case which had been cited,[3] but of which no report

[1] Bell's Comms. (7th edn.) i. 495, foot-note 3; Bell's Prins. 169 and 235; Smith's Leading Cases, i. 201; Great Western Railway Co. v. Bunch, Feb. 24, 1888, L. R., 13 App. Ca. 31.

* The 43d section of the Caledonian and Scottish Central Railways Amalgamation Act, 1865 (which Act applied in this case), provided that "it shall not be lawful for the company to demand in respect of the conveyance on the said railways of the several articles, &c. . . . any greater sum, including the charges for the use of carriages and locomotive power, and all other charges incidental to such conveyance (except a reasonable sum for loading, covering, and unloading of goods at any terminal station of such goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services or any of them are or is performed by the company), than the several sums hereinafter mentioned—that is to say," &c.

[2] Aberdeen Commercial Company v. Great North of Scotland Railway Co., Oct. 25, 1878, 6 R. 67, Lord President, p. 77; *cf.* also Highland Railway Co. v. Jackson, June 16, 1876, 3 R. 850; Scottish North-Eastern Railway Co. v. Anderson, July 8, 1863, 1 Macph. 1056, 35 Scot. Jur. 541 and 603.

[3] Mallery v. Teoga Railway Co., 39 Barbour's American Reps.

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was forthcoming. It might be that the case of injury to the goods was a different matter from that of injury to the vehicles, but where the empty vehicles had to be taken back to the original siding the only obligation was to draw the vehicles. The edict could not apply where, as here, no goods were being carried.[1] For instance, a train of new waggons belonging to the traders, and on their way to the traders' collieries, was not within the edict, and the present was a similar case. The charges which the railway company had power to make under their Act of 1865 were differential charges, applicable to different cases and circumstances. It was said, on the other side, that they were all charges for carriage, and the answer made to the defenders' argument was that, while it was contended that the contract was something less than one of carriage, nothing was said about the charges made for the carrying out of a contract of that kind. But all that the defenders guaranteed was the road and the haulage; they need never touch the goods themselves. It was said that the delivery at the general terminus was incidental to the services of a common carrier. But the defenders were not bound to provide a crane and hoist, and, as matter of fact, in the present case they charged for the use of these. Although the present question was not raised in the record in *Watson's* case, it was raised in the discussion, as was evident from Lord Deas' opinion, and the views expressed by the Judges in that case ought to be applied here. The cases of *Richardson*[2] and *Bunch*[2] illustrated the principles which were applicable to a contract like the present, and to one of carriage.

At advising,—

LORD PRESIDENT.—The material facts in this case may be stated very shortly.

The pursuers are in the habit of sending coals from their colliery at Allanton along the defenders' line of railway to various places of delivery. The coals are loaded at the colliery by the pursuers in waggons belonging to themselves, and the waggons so loaded are delivered to the defenders at the junction of the siding which connects the colliery with the defenders' main line. From that point the waggons are under the control of the defenders, who attach them to a general goods or mineral train consisting of waggons belonging partly to other traders and partly to the defenders, and are conveyed by the defenders' servants and by means of the defenders' engines to the place of destination, where the coals are delivered, and the pursuers' empty waggons are returned by the railway to the pursuers' colliery, as part of a train consisting as before partly of waggons belonging to other traders and partly of waggons belonging to the railway company. The charges for the conveyance of the coals is at a certain rate per ton per mile. But the rate is considerably smaller for coals conveyed in the coalowners' waggons, the reduction corresponding to the cost to the owners or the company of providing and maintaining the waggons.

The complaint of the pursuers is that on the 24th of May 1888 part of a train composed of five empty waggons belonging to the pursuers, which were being returned to the pursuers' colliery, and of other waggons belonging to other coal-

[1] Paxton v. North British Railway Co., Nov. 1, 1870, 9 Macph. 50, 43 Scot. Jur. 25.

[2] Watson v. North British Railway Co., March 18, 1876, 3 R. 637; *cf.* also Richardson v. Great Eastern Railway Co., May 10, 1876, L. R., 1 C. P. Div. 342; Great Western Railway Co. v. Bunch, Feb. 24, 1888, L. R., 13 App. Cases, 31.

owners and to the defenders, left the rails. It is proved that the cause of the disaster was a faulty waggon belonging to another coalowner; and the result was that three of the pursuers' waggons were destroyed, and the two others were injured. It is not, and in the circumstances could not be, alleged that any part of the coals in the pursuers' waggons was lost or injured. These coals were all safely delivered at the place of destination. The accident occurred after the delivery of the coals had been completed, and while the empty waggons were on their home journey. The claim of the pursuers is limited to £136, 10s., as the cost of replacing the three waggons which were destroyed, and £5, 13s. 3d. which will be required to repair the other two.

The pursuers do not allege or attempt to prove any negligence or fault on the part of the defenders, but rest their case entirely on the ground that the defenders are liable as common carriers for the injury to the pursuers' waggons.

It is not necessary for the decision of this case to consider whether the defenders were acting as common carriers of the coals contained in the pursuers' waggons, or whether in the circumstances they would have been liable as such for loss or injury of the coals in transit to the place of destination without any allegation of fault. The simple question is whether in the conveyance of the waggons as distinguished from the coals they undertook or were under the liability of common carriers.

Now, it is an essential element in the contract of carriage, whether by sea or land, under the edict, that the carrier shall be entitled to some remuneration or return for the obligation of safe carriage which he undertakes. But in the present case the railway company, so far as I can see, receives no price or consideration for conveying the waggons along the line of railway. They are willing to assume the position and liabilities of common carrier if the trader will pay them say 2s. per ton for the journey, and then they will convey the coals in their own waggons. But if the trader prefers to use his own waggons, and to load his goods in them in his own premises, the carrier gives the trader a deduction of say 4½d. per ton for the journey. Thus, the carrier, so far from making any charge for the conveyance of the trader's waggons, makes a deduction from his ordinary charge for carriage of coals in consideration of the trader furnishing waggons of his own. If the goods had been conveyed in waggons of the carrier he would have got a return for the use of these waggons, but that claim for a return or hire is abandoned in the existing contract, and the trader has his coals carried for 1s. 7½d. in place of 2s. per ton for the journey.

Further, the obligation of safe carriage, which in any view the defenders may have undertaken was, in my opinion, fully performed when the coals were delivered at the place of destination. The obligation of a common carrier is to deliver the goods entrusted to him in the like good order and condition in which he received them. Conveying the empty waggons back to the collieries and there placing them on the coalowners' siding is not an act of delivery in the sense of the edict, but the performance of an incidental obligation of the particular contract (a mixed and innominate contract), and so not part of the common law obligation of a common carrier, or of his obligation under the edict.

The case of the *Great Western Railway Co.* v. *Bunch* was cited by the pursuers as inconsistent with the opinion I have thus expressed. No doubt the judgment in that case assumed that a railway company is liable as a common carrier for passengers' luggage. But the ground of that assumption plainly was that the company regulated their charges for conveying passengers on the foot-

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ing that each passenger should be entitled to have carried in the same train with himself luggage up to a certain weight, and so the railway company not only charged for the conveyance of the luggage, but also took the entire possession and control of it during the journey.

I am of opinion with the Lord Ordinary that this case must be decided in conformity with the principle which lies at the foundation of *Watson* v. *The North British Railway Company*, a principle which was adopted by all the members of the Court who took part in its decision.

LORD ADAM.—This is an action brought by Messrs Barr & Sons against the Caledonian Railway Company to recover the amount of damage sustained by five waggons belonging to them, which were injured on the defenders' railway on 24th May 1888.

The pursuers are proprietors of the Allanton Collieries. These collieries are connected by branches or sidings, belonging to them, with the Caledonian Railway. The five waggons in question had been sent by the defenders, loaded with coal, to the general terminus, Glasgow, for delivery into a ship, lying there, called the "James Groves." At the time the accident happened the coal had been duly delivered, and the waggons were being taken back empty to the Allanton Collieries. They formed part of a train of forty empty waggons belonging partly to the Caledonian Railway and partly to other coalowners.

The accident happened in consequence of a latent defect in a waggon belonging to another coalowner.

It is not maintained that there was fault on the part of the railway company, but liability is sought to be enforced against them on the ground that at the time of the accident the waggons were being conveyed by them as common carriers, and that therefore they were bound to redeliver the waggons in the like good condition in which they had received them. The railway company, on the other hand, maintain that they were not acting as common carriers at the time, and that is the question for decision in this case.

The manner in which the work is carried on would appear to be that the waggons are brought down loaded from the pursuers' pits by their servants to the company's line, and are there handed over to the company, and remain in their entire custody and control until they are again returned empty to the pursuers.

The coal, as a rule, is unloaded from the waggons by the consignees. But this rule is not invariable, more especially when the waggons are sent to shipping ports, and in this particular case the company undertook to deliver the coals into the ship "James Groves" at the general terminus.

But whatever the services might be which the company were to render, one charge only was made, which embraced everything.

This charge was fixed by the railway company sending to the owners of collieries having connections with their line a schedule of rates per ton which they were to charge for the conveyance of coal in waggon loads of four tons and upwards from the owners' colliery to a list of places on their line specified in the schedule.

The schedule sets forth two rates, one when the coal is to be conveyed in the company's waggons, and the other when it is to be conveyed in traders' waggons.

The schedule in force at the time in question would appear to be that dated 13th April 1885. In it the rate per ton for conveying coal in the company's waggons to the general terminus is 2s., and in traders' waggons 1s. 7½d. The difference—4½d—clearly represents the charge made by the company for the

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use of their waggons, because it appears from the evidence that the other services rendered by the company were in each case the same.

But although only one charge is made, I think it is quite competent to analyse that charge in order to ascertain in respect of what services it is in point of fact made. An example of this will be found in the case of *The Great Western Railway Company* v. *Bunch*, L. R., 13 App. Cas. 31, where a passenger's fare was held to cover a charge for his luggage, so that the company were held liable as common carriers for its safety, although of course they were not liable as common carriers for his safety.

Now, in this case the services which the company undertook to render were to haul the waggons and their contents to the place of delivery, to deliver the contents to the consignees, to return the waggons to the owners, and to give the use of their line. We have not to decide whether the company would be liable as common carriers for injury to the contents of the waggons while *in transitu*, we have only to deal with the waggons, and it certainly appears to me that an undertaking by the company to haul waggons to a particular place, not to be delivered there, but to be hauled back when empty and redelivered to the owners, is not an undertaking of the nature of a contract of carriage which would make them liable for their safety as common carriers. I do not think that these services can be treated as merely incidental to the delivery of the coal. I think that the contract is essentially one of haulage and not of carriage, and therefore that the company are not liable as common carriers. In point of fact the coals had all been duly delivered before the accident happened.

The case most analogous to this which occurs to me is that of a person bringing a carriage to a public road and hiring horses to have it dragged to a particular place. The horse hirer in such a case would clearly not be liable as a common carrier. I do not see that it would make any difference in his liability in this respect whether or not he was left in sole charge of the carriage, or whether or not he undertook to deliver its contents; and the fact that the road in the one case is a public road and in the other the property of the company does not appear to me to make any difference.

But there is another ground on which I think the company are not liable, and that is, that they do not hold themselves out to the public as common carriers as regards such waggons. Mr Bell defines a common carrier thus (Bell's Princ. sec. 160)—"A common carrier is one who for hire undertakes the carriage of goods for any of the public indiscriminately from and to a certain place." It is obvious that it would be inconsistent with the working of the traffic of a railway, and the safety of the public, were a railway company to admit, or to be compelled to admit, to the use of their railway any carriage that might be brought to it indiscriminately, as Mr Bell says, by any of the public. The matter is, as might be expected, the subject of statutory regulation, and is provided for by the 110th and subsequent sections of the Railways Clauses Consolidation (Scotland) Act, 1845. By the 110th section it is provided that no carriage shall pass along or be upon the railway, unless it be of the construction and be in the condition which the regulations of the company for the time being shall require, or in case of dispute as shall be settled by arbitration. The pursuers aver on record that the five waggons in question are of a construction approved by the defenders, and suitable for running on their line. That may be so, but it is no answer to the fact that in the matter of the use of the railway by waggons other than the company's own, both the company and the owners are under statutory regulations. It

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appears to me that when waggons are admitted and used on a railway only subject to statutory regulations, that the common law liability of carriers with respect to them is necessarily excluded.

The Lord Ordinary in deciding the case has not distinguished between the waggon and its contents, holding that in both cases the contract was a contract of haulage and not of carriage, and I am disposed to think he is right. Two elements essential to fix liability on the company as common carriers would appear to be absent in a case like the present, viz., entire responsibility for the soundness of the carriage, and for the packing of the goods, and the effect of that would have to be considered. It is not, however, necessary to decide that question in this case. I may remark, however, that the loading of such waggons as those in question is also made matter of statutory regulation by the 115th and subsequent sections of the Railways Clauses Act. In conclusion I have only to say that I think that the law laid down by the Lord President and Lord Deas in the case of *Watson* v. *North British Railway Company* is right, and that it rules this case.

Lord M'Laren.—Whatever view may be taken of the legal character of the contract between Messrs Barr and the Caledonian Railway Company, it is evidently a complex contract, and not an ordinary contract of carriage of the coal and the waggons taken together. My view of the contract may be best illustrated by supposing the case of a railway company which, instead of running its own waggons, hires them from a waggon-builder at so much per month or so much per train-mile. The charge which the company would make for the carriage of coal in their hired waggons would then be calculated on an estimate of the total cost of the carriage, one of the elements being the hire of the waggons. For the conveyance of coal in the coalmasters' own waggons the company would be able to make an abatement from the carriage commensurate with the hire of the waggons, and its profit would then be the same whether the coal was carried in waggons provided by the company or in waggons provided by the coalmaster. In the present case the Caledonian Company provides its own waggons, but these waggons can only be provided and maintained at a certain annual cost, and the company is therefore able to make an abatement from the price of the carriage of coal to coalmasters who provide at their own cost waggons suited for its transit by rail.

Such being the relations between the railway company and the coalmaster, it is reasonable to conclude that the responsibility of the railway company to the coalmaster for the safety of his waggons is similar in character and degree to the responsibility incurred by a company hiring waggons to the lessor. In other words, the obligation is to take due care of the vehicles, and the responsibility is for negligence. The difference between the two cases is that, in the case first supposed, the company pays rent or hire for waggons received on a contract of location, while, in the second case, the coalmaster receives a consideration for providing the waggons which are necessary for the carriage of the coal in the shape of an abatement of the price of the carriage. I think it is a just and convenient rule, and it is certainly in accordance with the best traditions of our jurisprudence, that in the case of innominate contracts the obligations of the parties and the responsibility for negligence should be the same as in the case of the nearest known contract. This principle would lead to two conclusions—(1) that the railway company is responsible for the safe carriage and delivery of the coal as under a contract of carriage; (2) that the company is responsible for

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the care of the waggons as under a contract of location. I do not mean that the contract is that of location, but the responsibility is the same, because the obligations of the parties are identical with those which would arise if the waggons were hired from a third party for a like purpose. The first conclusion is not necessary for the decision of this case, but I cannot in my own mind come to a satisfactory decision of the case without analysing the contract, and endeavouring to ascertain under what separate obligations the railway company received these waggons and their contents. It is to be kept in view that the waggons were being regularly run to and from the mines with coals for exportation, and, while so used, these waggons were taking the place of the rolling-stock of the Caledonian Company. The waggons were not being carried, but were being used as part of the apparatus for the carriage of goods over the company's line. This is quite different from the case of a railway carriage or waggon received by a railway company for delivery at a distinct place, and for which freight is paid. In such a case, if the waggons were injured on the journey, the question of the liability of the railway company would not be governed by our decision in the present case.

THE COURT adhered.

DRUMMOND & REID, W.S.—HOPE, MANN, & KIRK, W.S.—Agents.

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DUGALD CAMPBELL (Trustee of the West of Scotland Property and Investment Building Society), Petitioner.—*Rankine.*

Nobile officium—Property—Title.—Where the feudal title to certain heritable subjects stood in the name of an incorporated company which had been dissolved, the trustee appointed in the statutory instrument of dissolution, which gave him power to sell, applied to the Court for authority to execute and deliver dispositions of the heritable subjects which he had sold without completing a feudal title in his person. The Court *refused* the petition.

1st DIVISION. C.

THE WEST OF SCOTLAND PROPERTY INVESTMENT BUILDING SOCIETY was established in 1860 under the Act 6 and 7 Will. IV. cap. 32, and was incorporated in 1886 under the Building Societies Act, 1874 (37 and 38 Vict. cap. 42).

The society was dissolved by instrument of dissolution made on the 21st, and registered on the 29th February 1889, in terms of the 32d section of the Building Societies Act, 1874.*

* The Building Societies Act, 1874 (37 and 38 Vict. cap. 42), sec. 32, enacts,—"A society under this Act may terminate or be dissolved. . . . 3. By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth (*a*) The liabilities and assets of the society in detail; (*b*) The number of members, and the amount standing to their credit in the books of the society; (*c*) The claims of depositors and other creditors, and the provision to be made for their payment; (*d*) The intended appropriation or division of the funds and property of the society; (*e*) The names of one or more persons to be appointed trustees for the special purpose, and their remuneration. Alterations in the instrument of dissolution may be made with the like consent, testified in the same manner. The instrument of dissolution and all alterations therein shall be registered in the manner provided for the registration of rules, and shall be binding upon all the members of the society. . . .

"General orders for regulating the proceedings of the Court under this section may be from time to time made by the authority for the time being empowered to make general orders for the Court. Notice of the commencement and termina-

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The instrument of dissolution contained, *inter alia*, the provisions quoted below.*

At the date of its dissolution the society was infeft in certain heritable subjects. The trustee having sold these subjects the purchaser objected that the trustee was unable to give a valid title in respect that the company having been dissolved it could not grant a conveyance of subjects in which it was infeft at its dissolution, and that no provision was made in the Buildings Societies Act for such a case.

The trustee, in these circumstances, presented this petition, in which he prayed the Court "to grant warrant to, and authorise and empower the petitioner, Dugald Campbell, as trustee foresaid, without completing a feudal title in his person, on payment of the purchase prices, to execute and deliver dispositions, or other necessary and proper conveyances, of the several heritable subjects belonging to the West of Scotland Property Investment and Building Society, now dissolved, to the person or persons purchasing such heritable subjects."

Argued for the petitioner;—The society had been dissolved, and there was no statutory vesting of the property in the trustee. The Act of Sederunt, March 7, 1882, did not apply to cases of dissolution by instrument of dissolution. The only course open was to make the present application to the Court, for the Act of Sederunt might have been made applicable, and what the Court could do by Act of Sederunt it could also do under the present application.

Lord President.—Mr Campbell, the petitioner in this case, is the trustee appointed to wind up the affairs of the West of Scotland Property Investment and Building Society. The society itself was established under the Act 6 and 7 Will. IV. cap. 32, but at the date of its dissolution another Act—the Building Societies Act of 1874—was in operation, and it is this Act which regulates the manner in which the dissolution is to proceed, and determines the effects of such a dissolution. The 32d section of the Act enacts that a society under the Act may terminate or be dissolved in a variety of ways, and in particular—"3. By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." The Act then goes on to give a number of particulars which are to be set forth in the instrument of dissolution, and, among other things, "(*e*) the names of one or more persons to be appointed trustees for the special purpose, and their remuneration." The society was dissolved on 21st February 1889 in the manner to which I have specially

tion of every dissolution or winding-up shall be sent to the registrar, and registered by him."

* " . . . (Fourth) After payment of the claims of depositors and other creditors the funds and property of the society shall be appropriated and divided among the members thereof in the proportion of the amount standing to each member's credit in the books of the society. (Fifth) Dugald Campbell, accountant in Greenock, is hereby appointed trustee for the special purpose of dissolution, and shall be remunerated by a commission of two and one-half per cent on the free funds divisible among the members. (Sixth) Full powers are hereby conferred on said trustee, with advice, direction, and control of the committee hereinafter named, to sell by public or private sale the heritable subjects belonging to the society, to call up and receive payment of all sums due to the said society by bonds and dispositions in security, and to exercise the powers of sale therein contained, to grant discharges thereof, and dispositions following thereon; and generally all powers necessary for the realisation and distribution of the assets competent to a trustee by the law of Scotland."

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referred, and the instrument of dissolution provides, in its fourth head, for the division of the society's funds among its members after meeting the claims of its creditors. By the fifth head Dugald Campbell is appointed trustee, with a remuneration of 2½ per cent on the free funds. Then follows the sixth head, which is, perhaps, the most important of all:—"(Sixth) Full powers are hereby conferred on said trustee, with advice, direction, and control of the committee hereinafter named, to sell by public or private sale the heritable subjects belonging to the society; to call up and receive payment of all sums due to the said society by bonds and dispositions in security, and to exercise the powers of sale therein contained, to grant discharges thereof, and dispositions following thereon; and generally all powers necessary for the realisation and distribution of the assets competent to a trustee by the law of Scotland."

It appears from the statements in the petition that the trustee has sold certain heritable properties belonging to the society, but he is met by the difficulty that, in consequence of the dissolution of the society, he cannot give the purchasers a good title, and therefore he asks the Court "to grant warrant to and authorise and empower the petitioner, Dugald Campbell, as trustee foresaid, without completing a feudal title in his person, on payment of the purchase prices, to execute and deliver dispositions, or other necessary and proper conveyances, of the several heritable subjects belonging to the West of Scotland Property Investment and Building Society, now dissolved, to the person or persons purchasing such heritable subjects."

Now, the office of this petitioner is entirely statutory. He is given power to sell heritable estate, and also to grant discharges of real burdens, but no power has been given him to do either of these things without completing a proper feudal title in his own person. One thing is quite clear, that the statute must either have given him power to sell and dispose of these subjects without making up a feudal title in his own person, in which case our intervention is unnecessary, or it has withheld that power, in which case we cannot give him the assistance which he here asks for, for I am unaware of any jurisdiction in this Court to dispense with the ordinary forms of conveyancing in the case of dissolved companies of this kind. There is no creation of any such jurisdiction by statute, and it is not a case in which there can be any appeal to the *nobile officium*, because it is a matter depending entirely on the construction of the words of the statute. If we were to grant this power, it might turn out that what we had done was after all of no avail. It could not possibly shut the mouth of a purchaser from stating the objection that the trustee had no title to convey. That would be quite open hereafter, notwithstanding anything we might do in the way of granting this petition. In short, the question, if it is to be tried at all, must be tried in a totally different form from this, and in a way which will bind the parties who may be interested. I am for refusing the petition.

LORD ADAM.—I am of the same opinion. I have been unable to understand the grounds upon which this petition has been brought. The Court, as we know, are in use to grant authority to judicial factors to sell heritable property because they are officers of Court, and we also grant authority to gratuitous trustees and others to sell and to make up title where they have power to come to us under statute; but I am not aware of any precedent or principle for anyone, whether a person appointed to wind up an estate or a private individual, coming to us and asking for authority to sell property without complying with the

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ordinary feudal forms, unless there is a statute authorising us to do that. I therefore entirely agree with your Lordship.

LORD M'LAREN.—I understand that the property, with reference to which this question arises, was vested in the company itself, and that the difficulty is due to the circumstance that the company is now dissolved. That raises a question between an intending seller and an intending purchaser. The estate must be taken in some way from the company, and there are well-known means of trying the question whether the seller is able to give a good title to the purchaser, but the way of doing it is not by a summary petition. I agree with your Lordship that we have no power to make the title any better than it is in the existing state of the titles; we have no authority to grant such a power as is asked, or to put the trustee, for the purpose of realisation, in any better position as regards his ability to dispose of the subjects than he is under the authority given to him by the statute.

LORD KINNEAR.—I am entirely of the same opinion. It is to be observed that the petitioner does not ask us for power to sell; all that he asks is that we should empower him, having sold, to give to his purchaser a disposition without completing a feudal title in his own person—that is to say, we are to decide in this petition, to which the purchaser is not and cannot be a party, that he is bound to accept such a title as the petitioner is in a position to offer him. I quite agree with your Lordship that it is impossible we could grant such a prayer as that. The petitioner can suggest nothing to shew that he is, in making this application to the Court, in a different position from that of any other seller whose title for one reason or another may be open to challenge. He is in the same position as any private person—no better and no worse, and therefore, as your Lordship pointed out, he is in this dilemma, he either has a good title to convey, and in that case he does not need our authority, or he has not a good title to convey, and in that case we are not in a position to give him a good title.

THE COURT refused the petition.

JOHN C. BRODIE & SONS, W.S., Agents.

No. 31.
Nov. 25, 1890.
Tod.

HENRY TOD, Petitioner (Appellant).—*Craigie.*

Executor—Appointment.—In a holograph settlement a testator appointed a person, naming him, "judicial factor, to carry out the purposes of this trust." *Held* that the person so named was entitled to be confirmed as executor-nominate.

2D DIVISION.
Sheriff of Edinburgh.
M.

ARCHIBALD HENDERSON, jeweller in Edinburgh, died on 23d October 1890, leaving a holograph settlement, by which he left his whole property in thirds to the families of a deceased sister and two brothers. He then provided,—"I appoint Mr Henry Tod, 45 North Castle Street, or his partner, Mr Rutherford, judicial factor, to carry out the purposes of this trust."

Mr Tod having presented a petition to the Sheriff of Edinburgh for confirmation as executor-nominate, the Sheriff-substitute (Rutherfurd) refused the prayer.*

* "NOTE.— . . . It is not uncommon in practice to confirm as executor-nominate a person upon whom executorial powers are conferred, though not expressly named executor by the deceased. But in this case the testator has named a 'judicial factor,' whose office differs from that of executor-nominate in this important respect, that the factor finds caution, while the executor-nominate does not."

The petitioner appealed, and the Court, without calling for argument, recalled the Sheriff-substitute's interlocutor, and remitted to him to grant the prayer of the petition. No. 31. Nov. 25, 1890. Tod.

J. STUART WATSON, W.S., Agent.

WILLIAM ADAM, Pursuer (Respondent).—*C. J. Guthrie—M'Lennan.*
J. & D. MORRIS, Defenders (Reclaimers).—*Asher—Salvesen.*

No. 32. Nov. 26, 1890. Adam v. J. & D. Morris.

Ship—Master—Cargo—Excepted perils—Duty of master in regard to goods damaged by excepted perils—Intimation to consignee.—There is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods entrusted to him, and, in the event of loss or deterioration resulting from accidents covered by the exceptions in the charter-party, to take reasonable measures in order that the loss or deterioration may be minimised.

On the arrival of a steamship in port, the engineer, after filling the boiler, omitted to shut the sea-cock, the water thus making its way into the hold and wetting the cargo, which consisted of oil-cake. The shipmaster, who had previously to the accident lodged a protest in common form against wind and weather, instead of at once intimating the accident to the cargo-owner delayed doing so, and afterwards, with the assent of the shipowners, falsely represented to him that the wetting must have been due to over-straining at sea. In an action of damages by the cargo-owner against the shipowners, *held* that although the accident in question was within the exceptions of the charter-party exempting the defenders from liability for "the accidents of navigation, . . . even when occasioned by the negligence" of their servants, yet, as the master had neglected the duty of at once communicating the fact of the accident to the pursuer, thereby depriving him of the power of preventing further damage by immediately removing the cargo, the defenders were liable for the damage caused by the delay.

Opinions that the *onus* of proving that the damage to cargo had not been increased by the neglect of the master to communicate the fact of the accident to the pursuer was upon the defenders.

Ship—Seaworthiness—Modern appliances.—Observations (*per* Lord Kyllachy) as to how far the want of recent appliances in the equipment of a vessel will render her unseaworthy.

1ST DIVISION. Ld. Kyllachy. C.

BY charter-party, dated Dundee, 11th October 1889, entered into between Mr William Adam, chemical manufacturer, Burghead, and Messrs J. & D. Morris, shipbuilders, Newcastle, it was agreed that the s.s. "Jubilant," of Newcastle, should proceed to Hull, and there load a cargo of about 150 tons of oil-cake, and proceed therewith to Burghead. The obligation to deliver the cargo was subject to the usual exceptions "the act of God, perils of the sea, . . . and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners), not answerable for any loss or damage arising from explosion, bursting of boilers, breakage of shafts, or any latent defects in the machinery or hull not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager."

The "Jubilant" left Hull on 14th November, having shipped (1) 130 tons special oil-cake, "a few mouldy cakes, and a few broken," and (2) 168 bags of gypsum, weighing 16 tons 16 cwt., for which bills of lading were granted.

She arrived at Burghead on Monday, 18th November, but, on delivery of the cargo being tendered, Mr Adam declined to take some 40 tons of the oil-cake which had been stowed on the ceiling—*i.e.*, the floor in the bottom of the hold—and damaged by water.

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Mr Adam thereafter brought an action of damages against the Messrs Morris for the loss thereby sustained, which, it was admitted, was due to the fact that the bilge-cock had been, through the negligence of the crew, allowed to stand open after water had been pumped from the sea into the boilers in Burghead Harbour, on 19th November, by means of the donkey-pump, worked by a donkey-engine, and fed by a pipe which divided into two branches—one communicating with the sea, through which water from the sea was pumped up for filling the boilers, and the other communicating with the bilge, through which water that had got into the bilge was pumped out. The water had consequently flowed down the bilge-pipe into the hold, and had risen there to a depth of three feet upon the cargo. The pursuer further averred,—"In order to obviate these dangers, there are two very simple expedients which are in common use, and which are considered indispensable to the classification of any sort of vessel as seaworthy in Lloyd's register. Without one or other of them a ship is unseaworthy and unfitted for any voyage whatever. The first of these expedients is the placing on the neck or upper extremity of the bilge-pipe of a 'non-return valve,' that is, a valve which opens freely when water is being sucked up from the bilge, but which closes absolutely against water entering the pipe from above. The other expedient is the insertion at the junction of the sea-pipe and the bilge-pipe of a 'two-way cock,' so constructed that when the passage from the sea-pipe to the donkey-pump is open, that to and from the bilge-pipe is necessarily closed, and *vice versa*. Neither of said appliances existed on board the 'Jubilant,' but instead thereof she had only ordinary hand-cocks of a defective and antiquated pattern on her sea-pipe and bilge-pipe, and these were so constructed as to furnish no safeguard against the flooding of the hold and the wetting of the cargo therein, the safety of hold and cargo thus being made to depend entirely on the vigilance of the mariners in closing the cocks. . . . Further, the said vessel was defective and unseaworthy in respect that there was no sounding-pipe from the deck to the hold to enable the master of the vessel to ascertain at any time the state of the water in the hold." It was stated that it was also the duty of the defenders to have had a supply of dunnage on the ceiling of the hold, in order to raise the cargo above the parts likely to be wetted, and to enable the water to run freely away. It was also averred, by way of amendment after the closing of the record,—"Further, when the flooding of the cargo was discovered by the master and crew on the date of its occurrence, it became their duty, as custodiers of the cargo in the port of discharge, forthwith to inform the pursuer of the occurrence, or themselves to take steps to prevent further injury to the cargo. This they failed to do, and the defenders are responsible for said failure."

The pursuer also made a claim for payment for storage of the damaged goods.

The defenders averred that the damage was within the causes excepted in the charter-party, and that the vessel was well found and fitted.

The pursuer pleaded, *inter alia*;—(2) The pursuer having sustained loss, injury, and damage as condescended on, through the negligence and breach of contract of the defenders or those for whom they are responsible, is entitled to reparation as concluded for, with expenses.

The defenders pleaded, *inter alia*;—(2) The pursuer having sustained no loss for which the defenders are responsible, they should be assoilzied, with expenses.

It appeared from the proof that, on the vessel's arrival at Burghead, the captain lodged a protest against wind and weather, "on Saturday, 16th, vessel shipping large quantities of water," causing her to put into Fraser-

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burgh for shelter on Saturday morning; that, although the captain knew of the accident on the evening of the 19th, the pursuer only discovered the damage the next afternoon after he had begun to discharge the oil-cake; and that, on applying to the captain, engineer, and crew, he could obtain no information from them; that he then had the cargo surveyed, and it was not discharged until Friday the 23d and following days, the pursuer having meantime declined to accept delivery of the damaged portion. Communications were proved to have passed between the captain and his owners (which are fully set forth in the opinions of the Judges) shewing that the captain intended to conceal the fact of the accident from the pursuer, and that he had represented the damage to be due to another cause, and that the owners did not disapprove of this being done.

The pursuer led evidence to prove that no coasting vessel ought to be without dunnage—however large the space was between the ceiling and the skin. Several skilled witnesses were also examined to prove his averments as to the want of proper appliances to prevent the flooding which had taken place.*

The Lord Ordinary (Kyllachy), on 5th June 1890, pronounced the following interlocutor:—(After findings as to the cause of damage, &c.)—"Finds that in these circumstances the pursuer thought it necessary to have a survey before taking further delivery, and that it was found impossible to have this survey till Thursday: Finds that the result of this survey was to leave the damage still unexplained, but that the damaged oil-cake was on the Friday and Saturday discharged and stored, and afterwards sold by mutual consent, reserving all questions of liability: Finds that the oil-cake was before being damaged of the value at Burghead of £8, 10s. per ton: Finds that the quantity damaged was 40 tons 16 cwts., and that the same fetched a total price (less expenses of sale) of £37, 2s. 8d.: Finds that the admission of sea water to the hold by the negligence of the engineer is admitted to have been an accident of navigation in the sense

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* James Laing, consulting engineer and ship surveyor, Aberdeen, deponed to the necessity of non-return valves on board a trading vessel such as the "Jubilant" "If non-return valves were adopted, the existing arrangements could be made perfectly safe without altering the cocks. If there were non-return valves on the forehold-pipe and the engine-room bilge-pipe, the result would be that while water could be pumped up these pipes from the engine-room bilge and from the forehold, no water could pass down through them to those places. Non-return valves are so constructed that they will open upwards but not downwards, so that if water was to pass down those pipes it could not get past the valves. That is quite a usual arrangement, and has been in use for many years for donkey-pumps. I don't think the 'Jubilant' is properly fitted as regards her pipe and cock arrangements for any purpose. . . . . You might have water coming in in large quantities without anybody knowing anything about it, and flowing into the hold without any perceptible noise. I would not consider a ship so fitted 'tight, staunch, and strong, and every way fitted for a voyage.' I don't think she could be properly called seaworthy. . . . Lloyd's surveyors would never pass a vessel fitted with an arrangement like this. Their rule is that the arrangement must be such as not to permit water from the sea to come into the vessel by an act of carelessness or neglect. . . . I am also aware of the Board of Trade instruction to surveyors, that if water can run from the sea into the bilge there must be non-return valves. . . . The necessity for one or other of these arrangements is not affected by the size of the vessel. . . . An arrangement that might suit a tug or trawler would not necessarily suit a vessel carrying a perishable cargo; but no trawler, even, would be allowed to be fitted up with this arrangement if it were classed at Lloyd's, as they often are." There was other corroborative evidence to the same effect.

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of the charter-party, and for which, in the absence of other default, the shipowners are not liable: Finds that the pursuer has failed to prove that the vessel was unseaworthy, or other than 'tight, staunch, and strong, and every way fitted for the voyage': Finds that he has also failed to prove that the use of dunnage in such cargoes is usual or necessary in such steamers, or that the same would have materially reduced the damage, or that the shipowners failed otherwise in their obligation of proper stowage; Finds, however, that it was the captain's duty to have at once informed the pursuer of the damage to the oil-cake, and also of the manner in which it had been caused, and that the shipowners are responsible for such part of the damage to the oil-cake as was due to the captain's concealment of those particulars: Finds that if the truth had been at once told, it would have been possible to have removed the 40 tons of damaged oil-cake in the course of a few hours, and that if this had been done the oil-cake would still have been worth not less than £6 per ton: Finds that the damage beyond this amount was due to the captain's concealment of the accident which had occurred: Finds in these circumstances that the pursuer is entitled to damages to the extent of £207, 13s. 4d., being the difference between the price of the 40 tons 16 cwts. at £6 per ton and the price which the said oil-cake realized: Finds that he is also entitled to the expenses of storage, being £5, 12s. 8d.," &c.*

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* "OPINION.—In this case the question is as to the liability of the defenders, the owners of the steamship 'Jubilant,' for damage caused to a cargo of oil-cake by the admission of sea water to the hold of the vessel while she lay at Burghead Harbour in the month of November last.

"It is not disputed that the sea water found its way into the hold through the negligence of the defenders' servants. But it is, on the other hand, admitted that the accident is to be considered an accident of navigation, and that for such accidents the shipowners are under the charter-party not responsible, unless and in so far as it can be shewn that the damage was due to the unseaworthiness of the vessel, or to the shipowners' failure to provide proper stowage, or to some default on the part of the captain or crew after the accident had occurred.

"The pursuer, the owner of the cargo, maintained that the vessel was not seaworthy—that is to say, was not, in the words of the charter-party, 'tight, staunch, and strong, and every way fitted for the voyage,'—and he maintained this upon the ground that she was not provided with what he contended were certain usual and simple appliances for guarding against such negligence as occasioned the accident.

"It was not, however, disputed that—assuming ordinary care on the part of the master and crew—the vessel was seaworthy enough. And, in these circumstances, the defenders (the shipowners) claim that the case falls within the principle laid down by the House of Lords in the case of *Steel* v. *Craig*, 5 R. (H. L.) 103, L. R., 3 App. Cas. 72. And in this I am of opinion that the shipowners are right. I do not say that under his general obligation to provide a seaworthy ship a shipowner may not be bound to provide those aids to navigation and precautions against accident which have come to be universally used, and upon which accordingly persons chartering a vessel may be entitled to rely. Reference was made in the course of the argument to the mariner's compass, and to the ordinary safety-valve in steam-boilers, as illustrating this obligation. But I am not satisfied upon the proof that the automatic appliances of whose absence the pursuer here complains are as yet universal or even common in vessels of the class to which the defenders' vessel belongs. And it is, I think, noteworthy that, while the Board of Trade have and exercise the power to stop vessels on the ground of unseaworthiness, they do not insist as a condition of seaworthiness upon the introduction of such appliances as those referred to. On this part of the case, therefore, my opinion is with the shipowners.

"I am also in favour of the shipowners on the question of stowage. The pursuer's complaint is, that dunnage was not used in stowing the oil-cake.

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The defenders reclaimed, and argued;—The Lord Ordinary had found that the damage which the pursuer had suffered was referable to the concealment of the captain. But the defenders were not responsible for the captain's misrepresentation. This was very like the cases in which it had been held that the owners were not responsible for the damage caused to a third party through the granting of a false bill of lading by the captain for the benefit of his owners.[1] The case of *Notara*[2] had no application to the present. There, at the time of the accident, the master had exclusive custody of the cargo. Here the vessel had reached port, and there was no duty of disclosure to the consignee, because the latter was present upon the spot, and it was his duty at once to take steps to have his cargo discharged. The obligation upon him was to take delivery and pay full freight. He could not refuse to touch the goods, but was bound to have them discharged *quam primum*, although he might set off any claim of damages he had as against the freight.[3] In point of fact he had refused to take delivery and had had the cargo surveyed. The evidence was to the effect that, even if he had had the cargo removed at once, the wetting could not have been prevented. Further, even if the pursuer had known as early as possible that the accident had occurred, it did not appear that he would have acted otherwise than he did. There was nothing to support the Lord Ordinary's view that if immediate information had been given the cargo could have been landed more quickly than was the case, or that the damage would have been reduced.

But while there is some conflict of evidence on this subject, the pursuer has, in my opinion, failed to prove that dunnage is either usual or necessary in coasting steamers such as the 'Jubilant,' making such voyages as the voyage in question.

"It remains, however, to consider whether the damage complained of was not at least greatly aggravated by the failure of the captain and the crew to communicate to the pursuer, as soon as they themselves knew it, the fact of the accident, and the manner of its occurrence. I cannot doubt that in this matter it is the duty of the shipowner, and those representing him, to act fairly and honestly by the shipper—to do all in their power to minimise damage, and generally, when damage occurs, to do their best in the interests of the shipper. If it were necessary to appeal to authority on that point, the case of *Notara and Another* v. *Henderson and Others*, Feb. 16, 1872, L. R., 7 Q. B. 225, mentioned at the debate, appears to me to be a sufficient authority. And that being so, it seems to me that the true and only serious question in the case is, whether and how far the damage done to this oil-cake might have been prevented if the captain and engineer had duly disclosed to the pursuer (1) the fact of the flooding of the oil-cake, and (2) the manner in which that flooding had occurred. Upon that question my opinion is with the pursuer. It is, I think, the fair result of the evidence, that if immediate information had been given, the damaged oil-cake could, and in ordinary course would, have been removed from the hold in a few hours, and, if so removed, could and would have been so treated as to make the damage comparatively slight. I think that the delay which occurred was the fair and natural result of the concealment which the captain and the crew practised, and that but for that delay the oil-cake, instead of realising on an average less than £1 per ton, would have realised about £6 per ton. I therefore propose to find the shipowners liable for the damage claimed to the extent of the difference represented by those two figures.

"I think the pursuer is also entitled on the same principle to the expense of storage as claimed by him. . . ."

[1] Grieve, Son, & Co. v. König & Co., Jan. 23, 1880, 7 R. 521; *cf.* also British Mutual Banking Co. v. Charnwood Forest Railway Co., March 21, 1887, L. R., 18 Q. B. D. 714.

[2] Notara v. Henderson, 1872, L. R., 7 Q. B. 225.

[3] Maclachlan on Shipping, 469.

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Argued for the respondent;—Upon the question of unseaworthiness: The view of the Lord Ordinary upon this branch of the case was not borne out by the evidence. The antiquated character of the pumps, safety-valves, &c. rendered the vessel unseaworthy. A principal was always liable for the fraud of his agent while acting within the scope of his authority.[1] There was a duty upon the captain of this vessel to see to the safety of the cargo, and if any damage occurred at once to apprise the consignee. As representing the owners he was equally bound with the pursuer to use diligence in the discharge of the cargo, and loss for delay caused by him must fall upon them.[2] Here he had failed to use the necessary diligence, and the evidence shewed that he and the owners had conspired to conceal the true state of the fact from the consignee. In answer to the argument that even if the true state of the fact had been disclosed the cargo could not have been sooner landed and the result would not have been different, it was for the reclaimers to prove this, and they had not done so. They had not even called the captain of the ship.

At advising,—

LORD PRESIDENT.—The vessel "Jubilant," of Newcastle, sailed from Dundee under a charter-party, by which she was taken bound to proceed to Hull, and there take in a cargo of oil-cake (about 150 tons), and being so loaded to proceed therewith to Burghead on being paid freight at a certain rate in full of all port charges and pilotages. The vessel performed her voyage in terms of the charter-party, and arrived at Burghead on 18th November 1889. The first thing the master did when he arrived in port was to note a protest, in which he stated that he had "experienced foggy weather from time of leaving up till Friday night, 15th, and had strong wind and heavy sea from N.N.W. on Saturday the 16th, vessel shipping large quantities of water. Put into Fraserburgh for shelter on Saturday morning 9 A.M. on same day, and sailed from there on Sunday, 17th, at 10.30 P.M., and arrived at Burghead on Monday the 18th at 7.30 A.M."; and in the interest of all concerned he notified a protest in the usual manner. Now, the meaning of the protest was that any damage which had been sustained was the result of stormy weather. That is the ordinary meaning of a protest, and unless something else is expressed that is always what a protest is understood to mean.

After the vessel arrived in port an accident took place through the fault of the engineer, who, while engaged in pumping water into the boiler, left what is known as the sea-cock open, and the water consequently made its way into the hold of the vessel, and thereby damaged to a considerable extent the cargo belonging to the pursuer. The accident which thus happened was clearly within the exceptions stated in the charter-party, which exempts the shipowners from liability for loss arising, among other things, from "accidents of navigation . . even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." The engineer being in the service of the owners they are not liable for damage occasioned by his negligence, but his negligence is not the matter complained of in this action. What the pursuer complains of is that the master of the ship, although he was aware of what had occurred, not only refrained from communicating to him that

[1] Houldsworth v. City of Glasgow Bank, July 4, 1879, 6 R. 1164, affd. March 12, 1880, 7 R. (H. L.) 53.

[2] Ford and Others v. Cotesworth and Another, Dec. 17, 1868, L. R. 4 Q. B. 127.

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such an accident had occurred, but fraudulently attributed the wetting of the cargo to a different cause.

It appears to me that the pursuer has succeeded in this part of his case. There is a great deal of evidence which it is unnecessary for me to go over, but there are one or two documents to which I think it necessary to refer, and which I think are quite sufficient to establish this part of the pursuer's case.

On the 20th of November 1889 the master telegraphed to the defenders, who are the owners of the vessel, in these terms:—"No discharging cake. Unfortunately engineer left sea-cock open last night, and spoiled part cargo. Merchant does not know this yet, but noted protest on arrival," the last clause signifying that the master had noted a protest on the arrival of the vessel. On the same day the master followed up his telegram by a letter, in which he said,—"If the weather permits us to work I will be all out to-morrow, as the merchant is only taking the good cake off the top, and then start with the damaged, therefore I cannot say what quantity there will be, as the water has been six inches on the engine-room floor, therefore the water has been the full length of the ship, and that means a good deal of damaged, but I have not mentioned to anyone about the sea-cock being neglected; therefore the only chance for us is to hold to the protest, and having to put into Fraserburgh by stress of weather, as I have told the merchant the ship must have got strained, and then taken up in smooth water, as she is nice and tight." He there states distinctly that he made a misrepresentation in point of fact as to the cause of the damage, and that statement the defenders allow to be made without challenge, and thereby make *it* their own. In the course of further correspondence this is made even more clear by a passage in a letter from the owners to the master, in which, referring apparently to a proposal which had been made by the latter to assign a different cause for the damage to the cargo in the log-book from that which had already been assigned, they say,—"Yours of yesterday with B/L to hand. You must not on any account alter the log-book,"—that is, the log-book is to stand with the statement under 18th November, that the master had noted a protest in common form against wind and weather, and had ascribed the damage to stormy weather met with at sea instead of to the true cause, viz., the engineer's negligence, which was known both to him and the owners. These documents, I think, establish beyond dispute, not only that the master concealed from the merchant the real cause of the damage, but that he ascribed it, with the knowledge and assent of the defenders, to a different cause altogether from the true one.

That being so, it is very difficult to see how it is possible to differ from the statement made by the Lord Ordinary that in this matter the duty of the shipowners and their representatives was to act fairly and honestly by the shippers, and that if they neglected this duty they must be held liable for the consequences. The conduct of the master does not fall within the same category as that of the engineer. It is the duty of a master, when an injury has been caused to cargo by an excepted cause, to repair by all the means in his power the mischief which has been done, and to land the cargo in as good a condition as the circumstances will admit. The neglect of this duty does not fall within the exceptions in the charter-party. It is a plain duty required of the master to the shipowners and the merchant and all concerned. Not only did the master in this case not fulfil that duty, but he violated it in the most gross manner.

The Lord Ordinary has referred to one authority, though his Lordship thought

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it almost unnecessary to appeal to authority because the principle was so very apparent, but the doctrine is so very clearly expounded in that case—*Notara and Another* v. *Henderson and Others*, L. R., 7 Q. B. 225—by Mr Justice Willes that I think it worth while to ask your Lordships' attention to one or two short passages in his judgment. He describes the duty of the master to which I have been referring "as a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability." That is precisely the duty which I have been endeavouring to describe, and it occurred in circumstances quite analogous to the present case, because the bill of lading in that case contained a clause quite as strong in its terms as the clause in the charter-party here. His Lordship goes on further to say,—"The exception in the bill of lading was relied upon in this Court as completely exonerating the shipowner, but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care, which want is popularly described as 'gross negligence.'" That appears to me to be the sound doctrine applicable to a case such as the present, and it is precisely in point. Applying that doctrine of law to this case it is perfectly plain that the master not only failed in the exercise of reasonable diligence and care, but grossly and purposely violated his duty.

But it is said that, although that is the case, the cargo was in the circumstances so thoroughly damaged before it could have been got out that no damage, or at least, if any, only very slight damage was in point of fact sustained by the pursuer in consequence of the master's conduct, and that the judgment of the Lord Ordinary on that point is wrong. What the Lord Ordinary says is this—"It is, I think, the fair result of the evidence, that if immediate information had been given the damaged oil-cake could, and in ordinary course would, have been removed from the hold in a few hours, and if so removed could and would have been so treated as to make the damage comparatively slight." In that view of the evidence I concur.

Apart, however, altogether from that view of the evidence, I think the contention of the defenders may be met by another answer, to the effect that it is not in the mouth of the master or shipowners to say that the goods could not have been removed in a few hours. It is not in the mouth of the person who has deprived the merchant of the power of removing his goods to say that. It was the conduct of the master which made the removal of the goods an impossibility. We cannot tell—nobody can tell—how much of the cargo might have been saved but for that conduct, because we do not know the appliances or the number of workmen that might have been employed, and it depends on these facts whether the cargo could have been removed in time or not. Therefore I think, on the whole case, the defenders are not entitled to make the answer to the pursuer's claim that the cargo could not have been removed in time, because they, or rather their representatives, failed to give him the opportunity of trying to remove it.

On the merits of the case, therefore, I think the decision of the Lord Ordinary is in accordance with justice and authority.

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LORD ADAM.—This is an action of damages brought by a cargo-owner against shipowners for injury done to the cargo on a voyage from Hull to Burghead, and before the cargo came into the pursuer's hands. There is no question that the cargo was damaged to a large extent, nor is there any question as to the immediate cause of the damage. We know that the ship arrived at Burghead on 18th November, and that while it was lying there on 19th November the engineer opened the sea-cock for the purpose of filling the boiler, and that having had a dispute with the captain he went on shore without remembering to shut the sea-cock, with the consequence that the sea water got into the vessel to the depth of 3 feet. The mistake of the engineer was the immediate cause of the damage, and so far as the direct damage is concerned, it is admitted that the pursuer has no claim to be compensated for it, in respect of the clause in the charter-party which declares that the shipowners shall not be liable for the negligence of the "master, mariners, or other servants of the shipowners." But then, as I understand the position taken up by the pursuer, it is this—he admits that to some extent the damage was due to the negligence of the engineer, but denies that the entire damage was due to that cause, maintaining that part of the damage was due to conduct of the master for which the shipowners are responsible, and this raises the controversy between the parties.

The conduct of the master which is complained of is this—and there is no dispute about the facts—that the master, though aware on the night of the 19th of November of the accident which had occurred, and of the water being in the hold of the vessel, failed to communicate to the pursuer, when it came to his knowledge, I do not say the cause, but even the fact of the accident, and left him to find out the wet state of the cargo for himself, which he did the following (Wednesday) afternoon. The pursuer further says that when he did discover the fact that water was in the hold, the master made a direct allegation of a false character as to the cause; and this appears to be the case from the correspondence between the master and the shipowners, for the master first telegraphs to the shipowners informing them of the accident, and saying that the merchant does not know of it yet, and then in a letter written the same day says that he has told the merchant the ship must have got strained. So that we have it under the hand of the master not only that he concealed the truth, but that he made a direct misrepresentation to the merchant as to the cause of the accident, and the pursuer maintains that the extra damage beyond that necessarily caused by the inroad of water was caused by the master's conduct, for the reason that if the master had disclosed to him the state of the cargo, as was his duty, it would only have been damaged to a very small extent, and would not have been totally destroyed.

With regard to the duty of the master in the circumstances which arose, I agree with the principles laid down in *Notara's* case, and expressed in the passages read by your Lordship. It was said, however, in the course of the argument, and with truth, that the circumstances of that case were not the same as the present, the difference being that in the *Notara's* case the injury to cargo happened in the course of the voyage, the circumstances there being that the vessel, having put into a port for repairs, was in that port when the accident took place. It was held that in such circumstances it was the duty of the master to endeavour to diminish any loss resulting from the accident.

In this case the fact that the ship had finished its voyage makes no difference as to the master's duty in the circumstances, for the cargo was still in his custody,

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The instrument of dissolution contained, *inter alia*, the provisions quoted below.*

At the date of its dissolution the society was infeft in certain heritable subjects. The trustee having sold these subjects the purchaser objected that the trustee was unable to give a valid title in respect that the company having been dissolved it could not grant a conveyance of subjects in which it was infeft at its dissolution, and that no provision was made in the Buildings Societies Act for such a case.

The trustee, in these circumstances, presented this petition, in which he prayed the Court "to grant warrant to, and authorise and empower the petitioner, Dugald Campbell, as trustee foresaid, without completing a feudal title in his person, on payment of the purchase prices, to execute and deliver dispositions, or other necessary and proper conveyances, of the several heritable subjects belonging to the West of Scotland Property Investment and Building Society, now dissolved, to the person or persons purchasing such heritable subjects."

Argued for the petitioner;—The society had been dissolved, and there was no statutory vesting of the property in the trustee. The Act of Sederunt, March 7, 1882, did not apply to cases of dissolution by instrument of dissolution. The only course open was to make the present application to the Court, for the Act of Sederunt might have been made applicable, and what the Court could do by Act of Sederunt it could also do under the present application.

Lord President.—Mr Campbell, the petitioner in this case, is the trustee appointed to wind up the affairs of the West of Scotland Property Investment and Building Society. The society itself was established under the Act 6 and 7 Will. IV. cap. 32, but at the date of its dissolution another Act—the Building Societies Act of 1874—was in operation, and it is this Act which regulates the manner in which the dissolution is to proceed, and determines the effects of such a dissolution. The 32d section of the Act enacts that a society under the Act may terminate or be dissolved in a variety of ways, and in particular—"3. By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." The Act then goes on to give a number of particulars which are to be set forth in the instrument of dissolution, and, among other things, "(*e*) the names of one or more persons to be appointed trustees for the special purpose, and their remuneration." The society was dissolved on 21st February 1889 in the manner to which I have specially

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tion of every dissolution or winding-up shall be sent to the registrar, and registered by him."

* " . . . (Fourth) After payment of the claims of depositors and other creditors the funds and property of the society shall be appropriated and divided among the members thereof in the proportion of the amount standing to each member's credit in the books of the society. (Fifth) Dugald Campbell, accountant in Greenock, is hereby appointed trustee for the special purpose of dissolution, and shall be remunerated by a commission of two and one-half per cent on the free funds divisible among the members. (Sixth) Full powers are hereby conferred on said trustee, with advice, direction, and control of the committee hereinafter named, to sell by public or private sale the heritable subjects belonging to the society, to call up and receive payment of all sums due to the said society by bonds and dispositions in security, and to exercise the powers of sale therein contained, to grant discharges thereof, and dispositions following thereon; and generally all powers necessary for the realisation and distribution of the assets competent to a trustee by the law of Scotland."

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referred, and the instrument of dissolution provides, in its fourth head, for the division of the society's funds among its members after meeting the claims of its creditors. By the fifth head Dugald Campbell is appointed trustee, with a remuneration of 2½ per cent on the free funds. Then follows the sixth head, which is, perhaps, the most important of all:—"(Sixth) Full powers are hereby conferred on said trustee, with advice, direction, and control of the committee hereinafter named, to sell by public or private sale the heritable subjects belonging to the society; to call up and receive payment of all sums due to the said society by bonds and dispositions in security, and to exercise the powers of sale therein contained, to grant discharges thereof, and dispositions following thereon; and generally all powers necessary for the realisation and distribution of the assets competent to a trustee by the law of Scotland."

It appears from the statements in the petition that the trustee has sold certain heritable properties belonging to the society, but he is met by the difficulty that, in consequence of the dissolution of the society, he cannot give the purchasers a good title, and therefore he asks the Court "to grant warrant to and authorise and empower the petitioner, Dugald Campbell, as trustee foresaid, without completing a feudal title in his person, on payment of the purchase prices, to execute and deliver dispositions, or other necessary and proper conveyances, of the several heritable subjects belonging to the West of Scotland Property Investment and Building Society, now dissolved, to the person or persons purchasing such heritable subjects."

Now, the office of this petitioner is entirely statutory. He is given power to sell heritable estate, and also to grant discharges of real burdens, but no power has been given him to do either of these things without completing a proper feudal title in his own person. One thing is quite clear, that the statute must either have given him power to sell and dispose of these subjects without making up a feudal title in his own person, in which case our intervention is unnecessary, or it has withheld that power, in which case we cannot give him the assistance which he here asks for, for I am unaware of any jurisdiction in this Court to dispense with the ordinary forms of conveyancing in the case of dissolved companies of this kind. There is no creation of any such jurisdiction by statute, and it is not a case in which there can be any appeal to the *nobile officium*, because it is a matter depending entirely on the construction of the words of the statute. If we were to grant this power, it might turn out that what we had done was after all of no avail. It could not possibly shut the mouth of a purchaser from stating the objection that the trustee had no title to convey. That would be quite open hereafter, notwithstanding anything we might do in the way of granting this petition. In short, the question, if it is to be tried at all, must be tried in a totally different form from this, and in a way which will bind the parties who may be interested. I am for refusing the petition.

LORD ADAM.—I am of the same opinion. I have been unable to understand the grounds upon which this petition has been brought. The Court, as we know, are in use to grant authority to judicial factors to sell heritable property because they are officers of Court, and we also grant authority to gratuitous trustees and others to sell and to make up title where they have power to come to us under statute; but I am not aware of any precedent or principle for anyone, whether a person appointed to wind up an estate or a private individual, coming to us and asking for authority to sell property without complying with the

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ordinary feudal forms, unless there is a statute authorising us to do that. I therefore entirely agree with your Lordship.

LORD M'LAREN.—I understand that the property, with reference to which this question arises, was vested in the company itself, and that the difficulty is due to the circumstance that the company is now dissolved. That raises a question between an intending seller and an intending purchaser. The estate must be taken in some way from the company, and there are well-known means of trying the question whether the seller is able to give a good title to the purchaser, but the way of doing it is not by a summary petition. I agree with your Lordship that we have no power to make the title any better than it is in the existing state of the titles; we have no authority to grant such a power as is asked, or to put the trustee, for the purpose of realisation, in any better position as regards his ability to dispose of the subjects than he is under the authority given to him by the statute.

LORD KINNEAR.—I am entirely of the same opinion. It is to be observed that the petitioner does not ask us for power to sell; all that he asks is that we should empower him, having sold, to give to his purchaser a disposition without completing a feudal title in his own person—that is to say, we are to decide in this petition, to which the purchaser is not and cannot be a party, that he is bound to accept such a title as the petitioner is in a position to offer him. I quite agree with your Lordship that it is impossible we could grant such a prayer as that. The petitioner can suggest nothing to shew that he is, in making this application to the Court, in a different position from that of any other seller whose title for one reason or another may be open to challenge. He is in the same position as any private person—no better and no worse, and therefore, as your Lordship pointed out, he is in this dilemma, he either has a good title to convey, and in that case he does not need our authority, or he has not a good title to convey, and in that case we are not in a position to give him a good title.

THE COURT refused the petition.

JOHN C. BRODIE & SONS, W.S., Agents.

No. 31.
Nov. 25, 1890.
Tod.

HENRY TOD, Petitioner (Appellant).—*Craigie.*

Executor—Appointment.—In a holograph settlement a testator appointed a person, naming him, "judicial factor, to carry out the purposes of this trust." *Held* that the person so named was entitled to be confirmed as executor-nominate.

2D DIVISION.
Sheriff of Edinburgh.
M.

ARCHIBALD HENDERSON, jeweller in Edinburgh, died on 23d October 1890, leaving a holograph settlement, by which he left his whole property in thirds to the families of a deceased sister and two brothers. He then provided,—"I appoint Mr Henry Tod, 45 North Castle Street, or his partner, Mr Rutherford, judicial factor, to carry out the purposes of this trust."

Mr Tod having presented a petition to the Sheriff of Edinburgh for confirmation as executor-nominate, the Sheriff-substitute (Rutherfurd) refused the prayer.*

* "NOTE.— . . . It is not uncommon in practice to confirm as executor-nominate a person upon whom executorial powers are conferred, though not expressly named executor by the deceased. But in this case the testator has named a 'judicial factor,' whose office differs from that of executor-nominate in this important respect, that the factor finds caution, while the executor-nominate does not."

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The pursuer reclaimed, and argued;—It was a mistake to say that the iron here in question was stored in the proper sense of the word. The whole arrangements of the Dock Commissioners shewed that. They did not hold themselves to be responsible for goods left in their sheds any more than for goods left on the open quay. The iron therefore was truly in the actual custody and possession of Ommundsen; it was not stored, or if stored, it was in a store which, for the present purpose, must be regarded as Ommundsen's. The arrestments therefore were good in his hands, if the iron was the property of the defenders,[1] which it was. For although the defenders were indebted to the English company, and the price of the iron when it was sold was to be imputed to that debt, yet, until sold, it remained the property of the defenders. It did not affect the validity of arrestments to found jurisdiction, which were not to be followed by a furthcoming, that ultimately on an accounting no debt should be found

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to its being sold, and the price applied in part payment of a debt due by the defenders to Williams' company. On the arrival of the ship in Bo'ness, Williams sent the bill of lading to Ommundsen, with instructions to take delivery of the iron, and to warehouse it to his (Williams') order. Ommundsen did so, and warehoused the iron in a shed belonging to the Bo'ness Dock Commissioners, of which shed the Commissioners keep the key, and for the use of which they charge a rent. The iron was not warehoused in Williams' name, neither was it warehoused in that of Ommundsen. In fact no name was mentioned. But there seems no doubt that Ommundsen could have got possession of the iron at any time, and that the Dock Commissioners at first at least looked to him for the rent. On the other hand, there seems equally little doubt that the iron was deposited with the Dock Commissioners by Ommundsen acting as Williams' agent; that it was thus held by the dock company on behalf of Williams; and that Ommundsen, at the date when the arrestments were laid on, was neither in actual possession of the iron, nor answerable therefor to the defenders, with whom he had no contract, and of whom he knew nothing.

"In these circumstances, I hold the arrestments to have been ineffectual, and I do so irrespective altogether of the defenders' contentions (1) that the property of the iron had passed to Williams, and (2) that at all events the iron had been specially appropriated so as to exclude any arrestment of it *in specie*. It may be that the arrestment would have been good if laid on in the hands of the Dock Commissioners. It may be that it would have been good in the hands of Ommundsen, if Ommundsen had had the iron in his own store. It might also have been a good arrestment if the iron had been consigned by the defenders to Ommundsen; or if he had been employed by or on behalf of the defenders; or had in any other way become liable to account to the defenders for the iron or its proceeds. But, as the facts stand, Ommundsen was I think merely in the position of an intermediary between Williams, the defenders' debtor, and the Dock Commissioners, the custodiers of the iron; and that being so, he stood in no relation either to the defenders or to the iron which, in my opinion, justified an arrestment in his hands.

"The pursuer founded on the case of *Appin's Creditors*, M. 749. But that case seems to me to illustrate the present case by contrast. The arrestments there sustained were laid on (1) in the hands of Fraser, who was the agent of and accountable to the common debtor, and (2) in the hands of Brodie, in whose warehouse Fraser had stored the furniture which was the subject of the arrestment.

"The pursuer desired to have it noted that the account, No. 94 of process, which bears that the warehouse rent was rendered to and discharged by Williams, is not in the handwriting of the collector to the Dock Commissioners, and is not admitted by them to have been rendered or discharged by any authorised official. The account, it may be explained, was not produced at the proof, but being called for was sent by Williams to the clerk of the process."

[1] Appin's Creditors, 1760, M. 749.

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to be due to the defenders. It was enough that a debt due to the defenders was arrested.[1] That principle applied here.

Argued for the defenders;—The iron here in question was not in the actual possession of Ommundsen. The store of the Dock Commissioners might not be very elaborately managed, and they might run a considerable risk of giving out goods to the wrong person, but they could have refused to give up the iron to Ommundsen. It was in their possession, therefore not in his. At the most he was only constructively in possession, and in that case it was not enough to shew that the subjects said to have been arrested were the property of the defenders; it must also be shewn that the arrestee was under a liability to account for them to the defenders.[2] Here Ommundsen was under no liability to account to anyone. His connection with the iron ended when he put it into the store of the Commissioners. Any subsequent dealings which he had had with it were on separate and fresh instructions from Williams. It might be that he could have got it out of the store whenever he wished; but it was not enough to validate arrestments that the arrestee had *de facto* the power of getting access to the subjects alleged to have been arrested; he must have a legal right to the possession of them,[3] which Ommundsen, looking to his whole dealings with Williams, had not. But, admitting Ommundsen to have been constructively in possession, his liability to account was to Williams, and not to the defenders. The arrestments therefore had attached nothing due by the arrestee to the defenders. But, further, the iron was not, *quoad* the present question, the property of the defenders, for Williams, as the consignee under the bill of lading, was the legal owner, whatever rights the defenders had in equity;[4] and, even if it was the property of the defenders, it was not subject to arrestment by creditors, for it had been specially appropriated to Williams towards the extinction of the defenders' debt to his company.[5]

Lord President.—The question in this case is whether certain arrestments in the hands of Adolph Ommundsen, commission-agent, Bo'ness, were effectual to found jurisdiction against the defenders, whom I will call the Swedish company. It appears to me that there are two insuperable objections to these arrestments.

The first question which we have to consider is whether Ommundsen, the arrestee, was the debtor of, or accountable in any way to, the common debtor, the Swedish company, assuming that he was in possession of the iron. The second question is whether he was *de facto* in possession of the iron, and accountable for it to anyone whatever.

The first question depends entirely upon the relation which existed between the Swedish company and Ommundsen. Now, the evidence upon this subject is, I think, conclusive. The bill of lading for the iron was in possession of a Mr Williams on behalf of his company, which I may call the English company, and it appears to me that it gave him a right of property in the goods to which it refers for the purpose of a *pro parte* extinction of a debt due by the Swedish

[1] Baines & Tait, March 15, 1879, 6 R. 846.

[2] Bell's Comm. ii. 70, sec. 2; Campbell v. Faikney, 1752, M. 742; Mitchell v. Scott, June 29, 1881, 8 R. 875; Graham, March 11, 1869, 7 Macph. 640, 41 Scot. Jur. 332.

[3] Bell's Comm. ii. 72 (75 in 5th edn.)

[4] Glyn, Mills, & Currie v. East and West India Docks Company, Nov. 19, 1880, 6 Q. B. Div. 475.

[5] Hutchison, Mackenzie, & Co. v. Finlay, Oct. 29, 1868, 7 Macph. 27, 41 Scot. Jur. 22.

company to the English company. The Swedish company was largely indebted to the English company, and the bill of lading was not of sufficient value to extinguish that debt, or nearly so, but the price of the iron when sold was intended to be imputed towards the extinction of the debt. Now, that being so, it is difficult to understand how the relation of debtor and creditor could have subsisted between the supposed arrestee Ommundsen and the Swedish company, because if Ommundsen was in possession of the goods at all he was in possession for behoof of Williams and the English company, and was accountable to them, and to them alone. Therefore there could not possibly be the relation of debtor and creditor between the Swedish company and the arrestee. That appears to me to be the first, and at the same time a fatal and most insuperable objection to the arrestments.

But, in the second place, was Ommundsen really in possession of the iron at all, or accountable for it to anyone? His position seems to have been of this nature. He was employed as ship's broker by the captain of the ship which had brought the iron to Bo'ness, and after ascertaining that the iron belonged to Williams as representing the English company, he, Ommundsen, communicated with Williams asking how he proposed to take delivery. Williams distinctly replied,—"The iron belongs to me as representing the English company, and I desire you to take delivery of it, and store it." These are the instructions which Ommundsen received, and they are the instructions of the only person who had any right to the iron. What then did Ommundsen do? He sent the iron from the ship to the warehouse of the Bo'ness Harbour Commissioners, and there stored it, certainly not for himself (for he never pretended he had any right to it, nor had he *de facto* any right to it), but on behalf of Williams and under his instructions.

It is said that it was not a proper case of storage, and that the store of the Harbour Commissioners was not a regular store. I do not see the relevancy of that averment at all. The position of the Harbour Commissioners was just as independent as if they had been regular storekeepers. The goods when placed in their premises were under their lock and key, and could not have been removed without their authority, and they made a charge for storage. Then the question is, in whose custody or possession was the iron while under the lock and key of the Harbour Commissioners? That question, I think, admits of only one answer. It was in the custody and possession of the Harbour Commissioners for behoof of the English company, and no one was entitled to remove it out of that custody excepting the English company. It follows, therefore, of necessity that no arrestments could be effectually used in Ommundsen's hands. He never had any proper possession of the iron, for the only contact he had with it was while taking it from the ship under the instructions of the true owner and placing it in the warehouse to the orders of the true owner.

I think therefore that we must adhere to the interlocutor of the Lord Ordinary.

LORD ADAM.—It appears to me that the relation of debtor and creditor did not exist as between Ommundsen and the Swedish company, and in order to effectual arrestments that relation must subsist. The facts are these. The iron was sent to Bo'ness by the Swedish company to the English company, the former being indebted to the latter. In the bill of lading, accordingly, the iron is made deliverable to Williams, the agent of the English company. Intima-

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tion of the arrival of the iron having been made to Williams he sent the bill of lading to Ommundsen to get delivery of the iron, and Ommundsen took delivery, and having got possession of it he put it in the storehouse of the Harbour Commissioners according to his instructions. How could the receipt of the iron make Ommundsen liable to account for or deliver it to the Swedish company? He had no connection with the Swedish company whether the iron was in his possession or in the possession of the storekeepers. The only thing he had to do was to account to Williams, and to nobody else. No doubt there may have been questions of accounting between the English and the Swedish company, but what had Ommundsen to do with that? He had therefore no obligation to account to the Swedish company, and how in that case there could be the relation of debtor and creditor I am entirely unable to see. That is, in my opinion, sufficient for the decision of the case, and I agree that we ought to adhere to the Lord Ordinary's interlocutor.

LORD M'LAREN.—The iron that is said to be arrested at the instance of the pursuer Mr Young came to this country under a bill of lading deliverable to John Williams of Birmingham, or to his order. Now, if this action had been at the instance of a creditor of Williams, and if Williams had entrusted the possession of the iron to Ommundsen, a question would have arisen, perhaps of some nicety, whether the iron was arrestable as in the possession of Ommundsen, or whether it was arrestable as in the possession of the Bo'ness Harbour Commissioners, because I conceive that an argument might be maintained that where a storekeeper is under an absolute and unqualified obligation to deliver to a person who has deposited goods with him, these goods may be held to be constructively in the possession of the depositor, and therefore arrestable in his hands. On the other side it would be said that it is a more convenient rule to hold that the goods are arrestable only in the hands of the person who is brought nearest to them, that is, who has actual physical possession of the goods. But it is unnecessary that we should give a decision upon this question, because the conditions necessary to raise it do not exist in this case. Here the raiser of the action is not a creditor of Williams, and Williams never entrusted the possession of this iron to Ommundsen. The only evidence we have as to the property of the iron in addition to what is disclosed by the bill of lading is the evidence of Mr Williams, who states that the iron was sent to him as secretary of an English company owning property in Sweden, in reduction of the debt due to it by the Swedish company. That admission seems to me in no way to qualify the proprietary title to the iron as disclosed by the bill of lading. On the other point, whether Ommundsen had such possession of the iron as would make it arrestable in his hands, I agree with your Lordship that Ommundsen was only employed for the performance of a particular service, viz., causing the iron to be warehoused to the order of Williams himself. That service being done, the employment came to an end, and the iron was never in Ommundsen's possession at all. It does not appear that Ommundsen thereafter acted otherwise than as a mere negotiator as to sales, or that he had authority to effect sales, but only to receive orders. Therefore, for the reasons given by the Lord Ordinary, and also in the view that the true possessor of the iron was Mr Williams or the English company which he represented, I am of opinion that no property has been attached in the hands of Ommundsen, and that the action ought to be dismissed.

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LORD KINNEAR.—I am of the same opinion. It is perfectly clear that the supposed arrestee here was under no obligation to deliver the goods said to have been arrested to the common debtor, or to account to the common debtor in any way for them. It therefore appears to me to follow that the arrestments were ineffectual.

THE COURT adhered.

HENRY & SCOTT, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

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Nov. 28, 1890.
Hart v. Anderson's Trustees.

JOSHUA HAMILTON HART, Complainer and Reclaimer.—*Asher*—*C. J. Guthrie.*

MRS JEAN TOWNS OR ANDERSON AND ANOTHER (Anderson's Trustees), Respondents.—*Murray*—*C. S. Dickson.*

Diligence—*Meditatio fugæ*—*Stat.* 43 *and* 44 *Vict.* (*Debtors Act*, 1880), *cap.* 34, *sec.* 4—*Contingent debt.*—The Debtors Act, 1880, after enacting that no person shall be imprisoned for civil debt except in certain cases, provides,—"Nothing contained in this Act shall affect or prevent the apprehension and imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum.*"

Held that the rule of the common law that a debtor cannot be apprehended as being *in meditatione fugæ* if imprisonment is incompetent on account of the debt which he owes, applies to cases in which imprisonment has been rendered incompetent by the above Act.

Question (*per* Lord Justice-Clerk) whether such diligence could in any case be used in respect of a contingent debt.

Opinion (*per* Lord Young) that it could not. *M'Gill* v. *Ferrier*, March 9, 1838, 16 Sh. 934, *doubted.*

2D DIVISION. Ld. Stormonth Darling. I.

ON 13th November 1890 one of the Sheriff-substitutes for Kincardine (Brown) granted warrant to apprehend Joshua Hamilton Hart, "and to commit him to the prison of Aberdeen, therein to be detained until he find caution acted in the books of Court *de judicio sisti* in any action for payment of the debt mentioned in said petition to be brought against him at the pursuers' instance in any competent Court within one month from this date."

This warrant was granted on a petition by the testamentary trustees of the late John Anderson of Leithfield and Bridgeton, setting forth that Hart, by a missive of lease, dated 11th July 1890, had taken the house and shootings of Bridgeton, belonging to the petitioners, at a rent of £60 from 1st August to Martinmas 1890, and by a lease, dated in July and August 1890, agreed to take the same subjects on a lease for ten years from Martinmas 1890 at a rent of £125 per annum. The lease provided for a break in the option of either party after the third year.

They further stated that Hart had refused to pay the £60 due, or to give security for payment of the rent for the next ten years, and that they were about to raise an action against him for payment of the rent.

They then averred;—"The pursuers have been credibly informed, and in their conscience believe, that the defender is *in meditatione fugæ*, and about immediately to leave Scotland, and go to England, or elsewhere furth of Scotland, without making payment of the said rent, or making any provision for the due payment thereof, and the present proceedings have thus been rendered necessary."

After proof the Sheriff-substitute granted the warrant set forth above.

Hart, having been apprehended and put in prison on this warrant, brought a suspension "to suspend the said pretended warrant, and the whole grounds and warrants thereof, and to grant warrant for charging

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the Magistrates of Aberdeen and the keeper of the said prison to set the complainer at liberty." He set forth the procedure stated above, denying that he was *in meditatione fugæ*, and stating that when he was apprehended he was in course of making arrangements for payment of £60. After his incarceration a bond of caution for £60 was tendered by his agent.

He pleaded;—(1) The whole proceedings complained of, and the warrant of incarceration, ought to be set aside, in respect that the debt in question being liquid, and the respondents being empowered by the terms of the said lease to charge the complainer to pay any sums due by him, they were not entitled to apply for or obtain the *fugæ* warrant under suspension. (2) The complainer not having been *in meditatione fugæ*, and it not being proved that he was, the warrant of imprisonment ought to be suspended. (3) The said warrant ought to be suspended, in respect of the said offers of payment and caution referred to in statements. (4) Generally the whole proceedings complained of being irregular, unwarrantable, and oppressive, ought to be set aside, with expenses.

The respondents pleaded;—(4) The complainer having been *in meditatione fugæ*, and the warrant complained of having been regularly granted and regularly enforced, the said warrant is not subject to suspension, and the note should be refused.

The Lord Ordinary (Stormonth Darling), on 24th November, refused the note.*

The complainer reclaimed, and argued;—The case of *M'Gill* did not

* "NOTE.—The complainer has been imprisoned as *in meditatione fugæ* on a warrant to commit him to the prison of Aberdeen, 'therein to be detained until he find caution acted in the books of Court *de judicio sisti* in any action for payment of the debt mentioned in said petition to be brought against him at the pursuers' instance in any competent Court within one month from this date' (15th November). The debt mentioned in the petition consists (1) of £60 of rent for the house and shootings of Bridgeton from 1st August to Martinmas last; and (2) of rent at the rate of £125 per annum under a current lease of the same subjects for ten years from Martinmas last.

"There can be no doubt of the landlord's right to sue at once for the first of these debts; I should have thought that he had no right to sue (within a month) for the second,—were it not for the judgment of the whole Court in the case of *M'Gill* v. *Ferrier*, March 9, 1838, 16 S. 934 (10 Scot. Jur. 418), in which it was held by a majority that an application by a landlord against a tenant under a nineteen years' lease, which had fifteen years still to run, to have the tenant imprisoned as *in meditatione fugæ* till he found caution *de judicio sisti* to the amount of the whole future rents of the lease, the terms of payment being first come and bygone, was competent and legal. Professor Bell in his Principles, section 1232 (*c*), expresses his disapprobation of this decision, and both the writers on the law of landlord and tenant agree with him (Hunter, ii. 349; Rankine, 318, note 13). My own opinion is in accord with theirs, but I feel myself bound to follow the decision, especially as if I granted liberation I should be defeating the landlord's diligence, without the possibility of effectual redress by way of reclaiming note. This might be the case even as regards the portion of the debt which is admittedly due, for if the warrant is bad as regards part of the debt, it is probably bad altogether (*Garrioch* v. *Wilson*, 1851, 13 D. 1377, 23 Scot. Jur. 639; *M'Cubbin* v. *Fulton*, 1852, 14 D. 908, 24 Scot. Jur. 543).

"The complainer has a separate point, for which there is a good deal to be said, viz., that the formal lease under which he now holds the subjects contains the usual clause of consent to registration for execution, and that under this the landlord is entitled to charge him for payment of the rent due and unpaid at any term without the necessity of raising any action. But if *M'Gill* v. *Ferrier* is to be held as good law, it would seem to give the landlord a larger and earlier right of action, and therefore I do not feel justified in the face of that judgment in sustaining this plea to the effect of holding the warrant illegal."

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apply, for there was a break here at the end of the third year of the lease, so that in any event no caution could be asked for rent beyond that period. There must be an unconditional obligation for rent in order to let in the authority of *M'Gill's* case. But, secondly, the law had altered since 1838: imprisonment on account of civil debt was no longer competent;* and if imprisonment for debt was incompetent then apprehension of the debtor with a view to eventual imprisonment,—the view upon which *med. fug.* warrants proceeded,—was also incompetent.[1] The exception of *fugæ* warrants in the Act did not touch the common law, by which an inquiry had always been necessary to see if the remedy of imprisonment was available to the creditor for recovery of his debt. If, for instance, the debt was so small that imprisonment was incompetent, so was a *med. fug.* warrant.[2] The meaning of the statute was to save *fugæ* warrants for debts where imprisonment was still competent, *e.g.* debts due to Her Majesty. It was said on the other side that the warrant was a means of detaining the debtor till an action should be served on him, but he was a tenant of Scots heritage, and therefore amenable to the jurisdiction, and as the lease contained a consent to registration for execution no action was necessary.

The respondents' counsel stated at the outset of his argument in answer to the Court that he was willing to accept the £60 in full of his claims, if the complainer would renounce his lease, but the complainer's counsel stated that he had no instructions to pay anything. The respondents then argued;—The case was then to be taken on the footing, in spite of the complainer's statement in his petition, that he either could not or would not pay anything. It was therefore obvious that action would have to be raised against him, and it might be necessary to sequestrate him. Now, there would be no jurisdiction against him in the Sheriff Court for the former purpose on the simple fact of his being a tenant of heritage,[3] and, if he was not present in the territory of Scotland or carrying on business there, sequestration might be impossible. Hence there was a plain interest in the creditors to keep their debtor in Scotland, even although they could no longer imprison him after judgment in a petitory action. The present case, therefore, was not ruled by *Kidd's* case,[4] for there the creditor held an extract decree, and had therefore *parata executio;* hence the presence of his debtor in the territory could profit him nothing. Again, it was said that the debt was contingent, but that argument had been rejected in *M'Gill's* case, since the landlord might have found another tenant there, in which case no rent would have been due, or right to it might have been lost in respect of a *damnum fatale.* But the remedy had been allowed in a case where the contingency was much greater,[4] being the

* 43 and 44 Vict. cap. 34 (Debtors Act, 1880), sec. 4,—"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt. There shall be excepted from the operation of the above enactment,—(1) Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed; (2) sums decerned for aliment . . .

"Nothing contained in this Act shall affect or prevent the apprehension and imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum.*"

[1] Bell's Comms. ii. p. 449 (7th edn.), p. 558 in 5th edn.; Kidd v. Hyde, May 19, 1882, 9 R. 803.

[2] Marshall v. Dobson, Dec. 18, 1844, 7 D. 232, 17 Scot. Jur. 111.

[3] M'Bey v. Knight, Nov. 22, 1879, 7 R. 255.

[4] Davies v. Duncan, Feb. 9, 1861, 23 D. 532, 33 Scot. Jur. 268; see also Thom v. Black, Dec. 10, 1828, 7 S. 158.

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contingency as to the birth of a bastard then *in utero*, and its survivance for the whole period of liability. On the general question, the Statute of 1880 reserved *fugæ* warrants. The Act was not to affect them, but if the complainer's argument was allowed to prevail, the foundation of nine-tenths of such warrants was cut away by this Act, which professed not to affect them. The saving clause was in reality a substantive enactment.[1]

At advising,—

LORD JUSTICE-CLERK.—The warrant on which the complainer is detained is in these terms,—"To apprehend" the complainer "and to commit him to the prison of Aberdeen, therein to be detained until he find caution acted in the books of Court *de judicio sisti* in any action for payment of the debt mentioned in said petition to be brought against him at the pursuers' instance in any competent Court within one month from this date."

The petition states that the defender has failed to pay £60 of rent due at Martinmas 1890, and that he has failed to give security for payment of the rent of £125 for the next ten years.

The question which arises is, whether that warrant was a competent warrant in the circumstances. Objection is taken to it on two grounds. The first objection is, that the obligation is an obligation for a contingent debt for the subsequent years. The other objection is, that no such warrant is competent in reference to an action on a claim of debt of this kind in consequence of the provisions of 43 and 44 Vict. c. 34.

The respondent supported his right to have the warrant granted against the former objection by reference to the case of *M'Gill* v. *Ferrier*, a case decided by the whole Court by a majority of ten Judges to three, in which a warrant for a contingent debt was held to be competent, and that case was followed up by more than one case, and particularly one in which the contingency was with reference to the birth and survivance of a child, of which the person apprehended was said to be the father.

If we had to consider that question, I confess I should have great difficulty in following either of these decisions. It is, however, highly undesirable to express any opinion against that of the majority of the Judges on that point, unless it is necessary to do so.

Let us see, then, what decision must be given on the other point. Did the Act of Parliament of 1880 authorise, or did it not authorise such a warrant as we have here?

Now, the fourth clause of that Act abolishes imprisonment on account of civil debt, but it makes certain exceptions, viz., "taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed, or to be imposed," and also "sums decerned for aliment." The same clause provides,—"Nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum*."

Now, that provision comes in in a very peculiar way, and the question is, what did it mean? It is impossible to hold that it meant anything but that a warrant *in meditatione fugæ* was in future to be competent in such cases as those in which it was then competent. That takes us back to the law which was estab-

[1] Lords Deas and Mure in Mackenzie v. Balerno Paper Mill Co., July 12, 1883, 10 R. 1147.

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lished before the passing of that Act, *i.e.*, that warrants could only be granted in cases in which a creditor could make good his claim after obtaining judgment, by following that up by a charge and imprisoning his debtor. If a person against whom such a claim could be so enforced were shewn to be likely to leave the country, and so to deprive the creditor of that compulsitor, the creditor was entitled to a warrant till caution should be found, the cautioner being bound either to produce the debtor or to pay the debt himself. I do not think that the Act of 1880 was meant to go beyond that. Under the former law if the creditor's claim were not such as could result in imprisonment, then no warrant as *in meditatione fugæ* could issue. That law is not altered by the statute, it is only saved.

As regards the excepted cases—debts of a particular kind—he can still use this warrant, but to hold it to mean anything more would make the clause an enacting clause to the effect of enabling the creditor now to use a *meditatio fugæ* warrant for some other purpose than was sanctioned by the old law, for it was admitted that there was no case under the old law where such a warrant was granted to facilitate citation, or to enable a charge to be given. It was not questioned here that if the creditor is successful in his action, and obtains judgment, he will have, and can have, under this statute no power of incarcerating his debtor; that, which was the only ground for granting the warrant, is taken from him, and he has therefore no right to the warrant. I am therefore for suspending these proceedings.

LORD YOUNG.—We are asked to suspend the warrant here on a variety of grounds. The suspender has stated four pleas in law. I am not prepared to sustain any of them. The ground which your Lordship has taken was argued on a suggestion from the bench, and I think it is a good ground for judgment, but it was not put forward by the suspender.

If it were necessary to go into it, I should hold that the case of *M'Gill* was not well decided, and, if we had to consider it, I should have no great scruple or hesitation in going against that judgment, even although it was a judgment of the whole Court. It was not a unanimous judgment, it was given fifty-two years ago, and since that time it has been condemned by eminent text writers. Besides, a great deal has happened since.

But it is not necessary here to follow that case or to take it into consideration. The language of the Act of 1880 is perplexing, and at first sight it affords room for this strict logical reading,—"You are founding on the act of 1880 as rendering such a warrant illegal, but the Act says that nothing contained in it is to affect *fugæ* warrants; therefore, if all you can say is that there is something in that Act that is fatal to them, you are precluded from referring to it, and they must therefore stand as they did before." That argument, I think, is fallacious. It is not intended to alter the law as it existed in respect of *fugæ* warrants. The intention was to leave the law of *fugæ* warrants as it was. If there had been an intention to alter that law, other words would have been used.

Now the law of *fugæ* warrants was and is, unless the Act of 1880 has altered it, that these warrants were incidental and accessory to imprisonment. The law gave, directly or indirectly, the remedy of imprisonment to creditors; that was a remedy against the person of the debtor. A *fugæ* warrant was a precautionary measure, allowed to the creditor, where the debtor shewed signs of an intention to withdraw his person from the operation of that remedy. Accord-

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ingly it was decided, in *Marshall's* case, 7 D. 232, where the debt was under the amount for which the remedy of imprisonment was competent, that the incidental and accessory remedy of a *fugæ* warrant could not be allowed.

Now, did the Act of 1880 change that? It would require a positive enactment to do so, and there is no such enactment. These words must receive a reasonable interpretation. I put as an illustration a hypothetical case that some particular class of debts had been by that Act declared to be no longer recoverable. If a *fugæ* warrant had been applied for in connection with a debt of that class, the same strict logical argument would have been available, but to sustain such a plea would have involved an absurdity. We must pay attention to the good sense of the thing. There is no longer any remedy to the creditor against the person of the debtor, therefore I think the person of the debtor is not to be detained and secured till the debt is constituted, for when it has been constituted nothing can be done against the person of the debtor so secured.

LORD RUTHERFURD CLARK.—I am of the same opinion. I have already explained my views in the case of *Kidd*, and I need not repeat what I then said. I hold that by the common law a *meditatione fugæ* warrant can only be used as a means of enabling the creditor to use diligence against the person of his debtor, and therefore that it cannot be used for any purpose where such diligence is incompetent. It was argued that the Act of 1880 enlarges the right of the creditor so as to enable him to use this warrant for purposes for which it could not be used before. I do not think that the argument is sound. The statute enacts nothing. It merely reserves.

LORD TRAYNER.—I concur in the proposed judgment on the grounds stated by Lord Young. I concur in what he has said in criticism of the terms of the Act of 1880, and I am therefore for suspending these proceedings.

THE COURT recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to grant the prayer of the note.

SIMPSON & MARWICK, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

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Governors of Dollar Institution.

GOVERNORS OF DOLLAR INSTITUTION, Petitioners.—*Jameson*—*Cosens.*

School—Scheme by the Educational Endowment Commissioners—Alteration of Scheme—Educational Endowments (Scotland) Act, 1882 (45 *and* 46 *Vict. cap.* 59), *sec.* 20.—The 20th section of the Educational Endowments (Scotland) Act, 1882, enacted,—"In any scheme the Commissioners may provide for the alteration of the scheme, from time to time, by the Court of Session, upon application made, with the consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in this Act."

A petition to the Court of Session for the amendment of a scheme in which provision had been made, in terms of section 20, for its alteration, set forth that, at the time of the passing of the scheme, one teacher had been receiving a pension from the trustees who were superseded by the Governors, that a second was old and infirm; and that a third had lost her appointment through the passing of the scheme, and that the Governors desired to have power to continue the pension to the first, to make a retiring allowance to the second, and to grant compensation to the third. That the petitioners were "not contending for the general principle of power to compensate or pension," but only desired

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"authority to deal with the cases stated," and prayed the Court "to amend the scheme," "in order to make it applicable to the cases of" the persons named "by adding at the end of section 24 the following clauses:—'Provided that the Governors shall have power to grant a retiring allowance to such teachers as had served the trust for a long period, and were found to be old and infirm at the passing of the scheme; and provided also that the Governors shall have power to grant compensation to such teachers as may have lost their appointments through the passing of this scheme.'"

Held (*dub.* Lord M'Laren) that the petition was truly an application for power to make payments to certain persons, and not for an alteration of the scheme of the nature contemplated by the Act, and that it could not be granted.

1ST DIVISION. C.

DOLLAR INSTITUTION, or John M'Nabb's School, was administered at the date of the passing of the Educational Endowments (Scotland) Act, 1882, by a body of trustees under the Act 10 and 11 Vict. cap. 16. On 25th March 1887 a scheme for the management of the school, prepared by the Educational Endowments Commissioners under the above recited Act, came into operation. Prior to that date, the trustees had been in use to grant pensions as seemed fit to their teachers, although they had no special powers to do so. There was no provision in the scheme for payment of pensions or retiring allowances to teachers.

The old trustees were empowered by the scheme to continue to exercise all necessary acts of administration relative to the endowment, and to have all powers necessary therefor until the first meeting of the Governors under the scheme, and acting under these powers the trustees, at a meeting held on 4th July 1887 (the Governors not having all been elected at that date), resolved to give a pension to a Miss Crombie who had been for thirty-three years one of the teachers in the institution. The pension was paid by the Governors under the scheme, but at the audit of their accounts exception was taken to the payment, and it was disallowed. On appeal to the Scottish Education Department the payment was allowed. Subsequently Miss Crombie's case, and those of Mr Douglas, a teacher, who had been for thirty-nine years in the service of the institution, and who was unable from old age and ill health to perform his duties, but was receiving a reduced salary, and of Miss Snowdoune, who had been twenty-five years in one of the schools which was discontinued by the scheme, were referred to the Education Department, who suggested to the Governors to present an application to the Court of Session under section 51 of the scheme, which provided for alteration of the scheme, in terms of sec. 20 of the Educational Endowments Act, 1882 (quoted in the rubric).

The Governors then applied to the Scotch Education Department for their consent to an application to the Court of Session under sec. 51 of the scheme. The Department gave their consent to the application, "but only on the express understanding that such consent is given not as implying any opinion on the subject of the application."

The Governors accordingly presented a petition to the First Division of the Court of Session, the prayer of which was,—"to amend the scheme of the Educational Endowments (Scotland) Commission passed for the administration of the endowment known as the Dollar Institution, or John M'Nabb's School, in the parish of Dollar, and county of Clackmannan, in order to make it applicable to the cases of Miss Crombie, Mr Douglas, and Miss Snowdoune, by adding at the end of section 24 of said scheme the following clauses:—'Provided that (*a*) such pensions as may have been granted by the trustees of Dollar Institution, appointed by Act of Parliament, 1847 (10 and 11 Vict. cap. 16), are and shall continue to be a burden on the trust; provided also that (*b*) the Governors shall have power

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to grant a retiring allowance to such teachers as had served the trust for a long period, and were found to be old and infirm at the passing of the scheme; and provided also that (*c*) the Governors shall have power to grant compensation to such teachers as may have lost their appointments through the passing of this scheme.'"

It was stated in the petition;—"While the proposed amendment is here stated in general terms, the Governors, the petitioners, only desire your Lordships' authority to dispose under it of—under clause (*a*) the case of Miss Crombie; under clause (*b*) the case of Mr Douglas; and under clause (*c*) the case of Miss Snowdoune. That the petitioners are not contending for the general principle of power to compensate or pension, but only desire your Lordships' authority to deal with the cases stated."

The First Division remitted the petition to Mr George Gillespie, advocate, to inquire and report.

The report bore that the three individual cases in question were most deserving, and proper for the granting of such pensions as were proposed, and that there were ample funds to meet them. The subjoined extract gives the reporter's views upon the competency of the application.*

At advising,—

LORD PRESIDENT.—We are asked to exercise a jurisdiction which is conferred upon us by the 20th section of the Educational Endowments Act of 1882, which provides that "in any scheme the Commissioners may provide for the alteration of the scheme, from time to time, by the Court of Session, upon application made, with the consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in this Act." It appears to me that our jurisdiction in the matter is entirely a statutory jurisdiction, and that we cannot go

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* "I hardly think that the present application is an application of the character which the Legislature expected to be made under the 20th section. What seems to have been contemplated by that section was a permanent alteration in the scheme of management of the institution, or of the constitution of the governing body, which experience had been found to recommend. There is no such alteration sought here; all that is asked is that the Court shall grant special powers of a temporary nature for certain particular cases. Now, that being so, it is not to be expected that the proposal should be contrary to anything contained in the Act, in the sense of being forbidden by any of its provisions. Had there been a provision proposed for giving the Governors a general power of awarding pensions in the future, that would have raised a general question of principle, on which some instruction could be got from the Act, but there is no such proposal here.

"I may be allowed to refer to the practice of the Commissioners in framing schemes under the Act, that the Court may be aware of their views as to what the spirit of the Act allowed. After consultation with the Scottish Education Department, they refused, except in a few special cases, to give a general power of pensioning, or to sanction payment of pensions to teachers who were then in office, but who might be found by the new governing bodies to have become inefficient, and who might, for the sake of the school, require to be dismissed. On the other hand, where a school, or a department of a school, was shut up by a scheme, and an efficient teacher thereby deprived of his or her support, the Commissioners almost invariably made such compensation, temporarily or permanently, as the funds would permit, to the person so dispossessed; and in cases where the endowment was small, and could not afford to pay a pension, they sometimes suspended the operation of the scheme until the teacher should cease to hold office. . . ."

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beyond the letter of the statute. The argument which was addressed to us was a good deal founded upon considerations of equity, and upon the impoverished circumstances and want of means of the persons on whose behalf the application is made. But I am very much afraid that such elements are excluded by the terms of the clause of the Act which I have quoted. The Scottish Education Department have given their consent to the presenting of the application, but they have done so only under considerable reservation. They suggest that the Governors, "if persuaded of the necessity of such payments, should consider whether it would be well to proceed under section 51 of the scheme. But my Lords must, of course, reserve their own judgment in regard to any such proposal until it is before them." Then, upon a subsequent occasion, the Secretary of the Education Department writes,—"I am to inform you that my Lords are now prepared to give their consent to the governing body making an application to the Court of Session in terms of section 51 of the scheme, but only on the express understanding that such consent is given, not as implying any opinion on the subject of the application, but only in order that the question may be *duly* submitted to the judgment of the Court." Section 51 of the scheme, to which reference is made, is in identical terms with the 20th section of the Act of Parliament.

The petitioners explain that the object of the application is to obtain confirmation of a decision which was arrived at at a meeting of the governors on the 17th May 1887, and again on 4th July of the same year, at which it was resolved that "Miss Crombie, for thirty-three years one of the teachers in the institution, should receive a pension of £25 per annum on account of her long and faithful services." When the term of payment came the governors paid it. At the audit of their accounts exception was taken to this payment, and it was disallowed by the auditor. On appeal, however, to the Scotch Education Department, the payment was allowed, but the governors were informed that they must furnish the Department with a legal opinion in favour of the course pursued before any future liabilities of the kind objected to were created. The case came up again later, and was again brought under notice of the Education Department, who replied that before the question of remitting the disallowances (especially as regards the pension to Miss Crombie) could be disposed of, they would require to have a legal opinion on the question. An opinion by counsel unfavourable to the Governors was furnished to the Department, who replied in the terms which I have already quoted. It is made very clear upon the face of the petition that their object is to be enabled to make payment to certain individuals and to alter their scheme to that effect and no further. It is said that besides the case of Miss Crombie there are other two cases. In the first place, there is the case of Mr Douglas, about whom there is this statement,—"This is the case of a teacher who has been for thirty-nine years a faithful servant of the said institution, and who has not resigned, but has been compelled from old age and ill-health to cease from active work." It is proposed to continue to pay him his salary and to appoint another teacher to do his work. There is also the case of Miss Snowdoune, about which it is stated,—"This is the case of a teacher who has been for twenty-five years in the service of the said institution, being teacher in the Sheardale school, which belonged to and was under the administration of the said Dollar Institution Trustees. That the said school was discontinued under and by virtue of the provisions specified in section 22 of the said scheme, and the services of Miss Snowdoune were therefore dispensed with."

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What is proposed in regard to her is to give her "a sum equal to three years' salary, in respect of her long and faithful services, and the position in which she has unfortunately been placed owing to the operation of the said scheme."

The petition further bears that "while the proposed amendment is here stated in general terms, the Governors, the petitioners, only desire your Lordships' authority to dispose under it of—under clause (*a*) the case of Miss Crombie; under clause (*b*) the case of Mr Douglas; and under clause (*c*) the case of Miss Snowdoune. Thus the petitioners are not contending for the general principle of power to compensate or pension, but only desire your Lordships' authority to deal with the cases stated." The proposal therefore is to amend the scheme of the Endowment Commissioners, and to make it applicable to the cases I have mentioned by the addition of clauses making these pensions a burden on the trust. It is plain, therefore, as I have said, that the whole object of the application is limited to the purpose of enabling the Governors to deal with these three cases, and they desire to go no further.

It occurred to me when the case was argued that this was not really a competent proceeding under the 20th section of the Act, because it was not an alteration which would have a general effect, but only for the purpose of enabling the Governors to make payments to particular individuals which they had no power to do otherwise.

We have before us a very useful and suggestive report from Mr Gillespie—one passage in which I should like to quote. Mr Gillespie says,—"I hardly think that the present application is an application of the character which the Legislature expected to be made under that section. What seems to have been contemplated by that section was a permanent alteration in the scheme of management of the institution, or of the constitution of the governing body, which experience had been found to recommend. There is no such alteration sought here; all that is asked is that the Court shall grant special powers of a temporary nature for certain particular cases. Now, that being so, it is not to be expected that the proposal should be contrary to anything contained in the Act, in the sense of being forbidden by any of its provisions. Had there been a provision proposed for giving the Governors a general power of awarding pensions in the future, that would have raised a general question of principle." I entirely adopt the view which Mr Gillespie takes. I think this is not an application for the purpose of obtaining a general power of awarding pensions, and if any proposal be made to have a general pension fund created, there may be very good reason for considering such a scheme upon its merits. But the present application is one brought under colour of the statute in order to obtain confirmation of a proposal to give certain pensions to individuals which otherwise the Governors have no power to bestow.

LORD ADAM concurred.

LORD M'LAREN.—I have doubts in regard to the proposed decision, and incline to the view that the powers of the Court are as wide as those of the Endowed School Commission. But I do not wish to be understood as dissenting in this individual case.

LORD KINNEAR concurred with the LORD PRESIDENT.

THE COURT accordingly refused the petition.

TAIT & CRICHTON, W.S., Agents.

ROBERT COCKBURN MILLAR (Liquidator of the Property Investment Company of Scotland, Limited), Petitioner.—*H. Johnston.*

No. 36.

Nov. 29, 1890.

Millar.

Company—Winding-up—Prosecution by liquidator of action raised by third party—Sanction of Court.—An action was raised by the trustee in a sequestration in the interests and on the guarantee of a company registered under the Companies Acts. The defender in these actions was assoilzied, with expenses, in the Outer-House, and the pursuer reclaimed. Thereafter a winding-up order was pronounced, and the liquidator of the company petitioned the Court to sanction the prosecution of the reclaiming note by him either in his own name or in that of the original pursuer, and in the latter case to approve of his guaranteeing the pursuer his expenses. The liquidator stated that he had been advised by counsel that the judgment of the Lord Ordinary was such as ought to be brought under review. The Court *authorised* the liquidator to prosecute the reclaiming note in his own name, holding that having obtained the opinion of counsel he was justified in insisting in the reclaiming note, but that, as an officer of Court, he ought to be master of the process.

1st DIVISION. C.

THE estates of John Richardson, a shareholder in the Property Investment Company of Scotland, Limited, were sequestrated in April 1889 upon the petition of the company, who had obtained decree against Richardson for £660, being the amount of unpaid calls due upon his shares, and had charged upon the decree. Mr William Albert Davis was appointed trustee in the sequestration.

In March 1890 the trustee raised actions against Richardson's wife and the representatives of his daughter, for the purpose of having alienations of property by him in favour of his wife and daughter set aside on the ground that they had been granted in order that he might evade payment of his calls due to the company.

These actions were truly raised on behalf of the company, who were Richardson's chief creditors, the only other claims in the sequestration being one for £3, 3s. 2d., and a contingent claim for £400 by another company in respect of future calls on shares held by Richardson.

Previously to the raising of the actions the manager of the company gave the following letter of guarantee to the trustee in the sequestration:—"On behalf of this company I hereby undertake, in the event of your raising proceedings to reduce the deeds granted by the bankrupt, and generally to ingather the sequestrated estates in terms of the creditors' instructions, to keep you skaithless of all responsibility and liability in the premises, including relief from all disbursements you may personally make in case of there being no funds in the sequestration ingathered by you from which you can obtain payment and relief. I also agree to pay you the usual fee for your trouble as the same shall be fixed by the commissioners, should no funds be ingathered by you."

On 25th and 29th July 1890 the defenders in the actions were assoilzied, with expenses.

The trustee reclaimed.

On 29th July 1890 a winding-up order was pronounced by the Court, Mr R. C. Millar being appointed liquidator of the company. Power was conferred on the liquidator to exercise the powers conferred by the 95th section of the Companies Act, 1862 (25 and 26 Vict. cap. 89).

On 6th November 1890 the liquidator presented this petition, in which, after narrating the foregoing circumstances, he stated,—"The official liquidator on entering upon his duties consulted counsel in reference to said proceedings and his duty in the circumstances, and he was advised that he might either move to be sisted as pursuer in room of the trustee in the sequestration, or might give the trustee a further indemnity for

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expenses, but that, in the former case, he must undertake to relieve the trustee of all expenses already incurred, and that, in the latter, the trustee was entitled to require that the official liquidator should undertake to relieve him of all expenses, both incurred and to be incurred, in the said actions, so that in either case the trustee might, in the event of a deficiency of funds to meet the whole claims against the company, which the official liquidator anticipated may occur to some extent, obtain a virtual preference for the expenses incurred by him prior to the date of the liquidation. At present the trustee has no preference over the other creditors of the company for these expenses. The expenses of both sides in said actions, to the date of the liquidation, are estimated to amount to £300. The official liquidator is advised by counsel that the judgments of the Lord Ordinary are such as ought to be brought under review of the Inner-House by reclaiming note; but that his power to guarantee the expenses of an action carried on, not in the name of the company, but in another name in its interest, with the possible consequence of incurring liability for expenses already incurred, is so doubtful as to render it proper for him to lay the circumstances before your Lordships, and ask special direction as to the course which he should adopt. Having full regard to the pecuniary issues at stake, the official liquidator is of opinion that in the interests of the company and its creditors a reclaiming note against the said judgments should be prosecuted."

The petitioner therefore prayed the Court "to sanction the prosecuting by the official liquidator of said reclaiming notes, either in his own name or in name of the said William Albert Davis, as trustee on the sequestrated estates of the said John Richardson, and in the latter case to approve of the official liquidator giving the said William Albert Davis a guarantee or indemnity for expenses of the said actions incurred and to be incurred or in such other form as your Lordships may direct."

At advising,—

LORD PRESIDENT.—The Court are of opinion that, having obtained the opinion of counsel advising the prosecution of these reclaiming notes, the official liquidator is well justified in proceeding to take them up. But we are also of opinion that this must be done in name of the official liquidator and not in that of the trustee in the sequestration.

The official liquidator must be master of the process, and, as the officer of the Court, the reclaiming notes must be taken up in his own name. This will involve relieving the trustee in the sequestration of the expense of the previous proceedings, but that, I presume, is a matter of course.

We shall therefore grant the prayer of the note, and sanction the prosecution by the official liquidator of the reclaiming notes in his own name.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Having heard counsel for the official liquidator on the note by him, No. 31 of process, no answers for William Albert Davis, trustee on the sequestrated estates of John Richardson, mentioned in the note, having been lodged, sanction the prosecution by said liquidator of reclaiming notes against the interlocutors of Lord Trayner, dated 25th and 29th July 1890, in the actions mentioned in the note, and decern."

MORTON, SMART, & MACDONALD, W.S., Agents.

No. 37.

Nov. 29, 1890.
Morrison's Trustees v. Macdonalds.

WILLIAM MACGREGOR AND OTHERS (Morrison's Trustees), Pursuers and Real Raisers.—*P. J. Blair.*
NORMAN MACDONALD AND OTHERS, Claimants (Reclaimers).—*Jameson—Cosens.*
MRS MARY MACDONALD OR CAMERON AND OTHERS, Claimants (Respondents).—*H. Johnston—D. Robertson—Lyell.*

Succession—Conditio si sine liberis decesserit.—Where one member of a class which has been instituted to a bequest has died before the date of the settlement, the *conditio* will not apply in favour of the children of that member.

A testator died leaving a settlement in which he bequeathed a legacy "to the lawful children of my now deceased sister Mary." The residue of his estate he directed to be divided among his brothers and sisters by name, the children of his deceased sister Mary, and two nephews by name, sons of another deceased sister. The settlement was dated four months before the testator's death, and one of his sister Mary's children had died fifteen years previously leaving children. *Held* that these children were not entitled to any share of the legacy or of the residue bequeathed to Mary's children.

2D DIVISION. Lord Trayner. M.

THE late Hector Morrison, who died in October 1888, left a deed of settlement dated 4th June of that year, by which he directed his trustees, *inter alia*, "to pay to the lawful children of my now deceased sister, Mary Morrison or Macdonald," a legacy of £1000; and farther, with regard to the residue of his estate, he directed that it should be paid to his brothers Donald and Neil, his sister Mrs M'Rory, the children of his deceased sister Mrs Macdonald, his sister Mrs M'Millan, and his nephews Murdoch and Farquhar M'Lennan "in such shares proportionate to the legacies bequeathed to each of them as before mentioned."

The testator's sister, Mrs Mary Macdonald, had nine children, one of whom, Mrs Margaret Macdonald, died in 1873, thus predeceasing the date of the truster's settlement by a period of about fifteen years.

A multiplepoinding was raised by Morrison's trustees to determine whether Margaret Macdonald's children were entitled to take a share of the bequest of £1000, and of the residue left to the "children" of their grandmother Mary Macdonald. Counter claims were lodged by the other legatees interested in the settlement.

Lord Trayner (Ordinary) repelled the claim of Margaret's children, and ranked and preferred the other claimants in terms of their claim.*

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* "NOTE— . . . A good deal might have been said in favour of this claim, looking to the liberality with which the *conditio* has been applied in recent years, had Mrs Margaret Macdonald been alive at the date of the settlement. But as she was then dead (a fact of which the testator is not said to have been ignorant), and was not therefore one of the persons instituted to the legacy, I think there is no room for the application of the maxim which sets up an implied conditional institution. 'There must be a legatee instituted in the first instance, otherwise there can be no conditional institution either under the express terms of the deed or under the implied condition' (per Lord Cowan in *Rhind's Trustees*, Dec. 5, 1866, 5 Macph. 109, 39 Scot. Jur. 120). The law appears to be settled against the validity of a claim made under circumstances similar to those I am now dealing with,—*Wishart*, 1763, M. 2310; *Sturrock*, Nov. 29, 1843, 6 D. 117, 16 Scot. Jur. 100; and *Rhind's Trustees, supra*, M'Laren on Wills, &c., i. 489. There is this farther view against any supposed or implied intention on the part of the testator to favour the present claimants, that he specially provided for the case of two nephews, while he made no provision for the present claimants, whose mother, the testator's niece, had died. The grounds on which I have held that the claimants are not entitled to any share of the legacy equally exclude them from any share of the residue."

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Nov. 29, 1890. Morrison's Trustees v. Macdonalds.

The unsuccessful claimants reclaimed, and argued;—It mattered not that one child of the family was dead; the whole family was instituted as a class, and took either directly or by representation in the person of the children of one deceased. That was the principle of the *conditio;* the person originally favoured must in every case be dead before the testator, who nevertheless did not provide for that event; that the death occurred before the date when the will was made was of no consequence, for every will spoke *a morte testatoris.* The Lord Ordinary's decision was not supported by the authorities cited. *Wishart's* case was simply a case as to the interpretation of the word "children." In *Rhind's* case the testator did not stand *in loco parentis* to the favoured family, and the family there were substitutes, not institutes as here.

The Court did not call for a reply.

LORD JUSTICE-CLERK.—I think both principle and authority, particularly the authority of *Rhind's Trustees*, are against this claim.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

THE COURT adhered.

TRAQUAIR, DICKSON, & MACLAREN, W.S.—MACRAE, FLETT, & RENNIE, W.S.—D. MACLACHLAN, S.S.C.—Agents.

No. 38.

Nov. 29, 1890. Forbes v. Whyte.

SIMON FORBES, Petitioner.—*C. S. Dickson.*
GEORGE WHYTE, Respondent.—*Party.*

Bankruptcy—Sequestration—Contingent Debt—Claim for expenses in litigation—Decree for interim execution pending appeal—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 14.—The 14th section of the Bankruptcy (Scotland) Act, 1856, enacts:—"Petitions for sequestration may be at the instance . . . of any one creditor whose debt amounts to not less than £50, or of any two creditors whose debts together amount to not less than £70 . . . whether such debts are liquid or illiquid, provided they are not contingent."

Held that a claim for the expenses of a Court of Session action for which the successful party had obtained decree for interim execution pending an appeal by his opponent to the House of Lords, was a "contingent" debt, and could not therefore support a petition for sequestration under the above enactment.

1ST DIVISION. Ld. Kyllachy. C.

(VIDE *ante*, 17 R. 895.)

In an action of reduction raised by George Whyte residing in Aberdeen against Simon Forbes, distiller, Peterhead, the Lord Ordinary on 9th July 1889 dismissed the action and found the pursuer liable in expenses. On a reclaiming note, the First Division adhered on 11th June 1890, and found the pursuer liable in additional expenses.

Whyte having appealed against these judgments to the House of Lords, Forbes presented a petition for interim execution pending appeal founding upon the 17th section of the Act 48 Geo. III. c. 151, quoted *infra* in the opinion of the Lord President.

On 16th July the Court ordained Whyte to pay Forbes the sum of £129, 18s. 10d. as the taxed amount of the expenses of the action and of the dues of extract, allowed the decree to go out and be extracted and execution to proceed thereon notwithstanding the appeal by the pursuer and that upon caution in common form to repeat the same in the event of the interlocutors being reversed in the House of Lords, and further granted warrant to messengers-at-arms to charge Whyte for payment upon the decree and to arrest his goods in payment of the said sum, and if Whyte failed to obey the charge to poind his goods.

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On 1st September Forbes found caution, and having extracted the decree, he presented a petition for sequestration of Whyte's estates in terms of the Bankruptcy (Scotland) Act, 1856, founding upon the debt due to him under the above decree. He stated that Whyte was notour bankrupt.

On 21st October, the Lord Ordinary (Kyllachy) refused the petition for sequestration and decerned.*

The petitioner reclaimed, and argued;—The debt in the present case was entirely different in kind and character from the familiar instances of "contingent" debt. Such were claims of unliquidated damages,[1] or cases where a person was bound as cautioner in an obligation[2] and in which it was obvious that the debt was contingent so far as he was concerned until the principal made default. Here the debt was presently due and was duly constituted by a decree of the Court which set out that diligence and execution were to proceed upon it. Sequestration was just a form of diligence following out the decree, and was equivalent to poinding and other modes of execution against a debtor's estate.[3]

The Court did not call upon the respondent.

LORD PRESIDENT.—I do not think it is necessary to call for any answer here. The question seems to me to be simply whether the debt upon which the petitioner has applied for sequestration is a contingent debt.

Now, it is a claim arising under a deliverance of this Court pronounced under the 17th section of the Administration of Justice Act of 1808, which provides that "when any appeal is lodged in the House of Lords a copy of the petition of appeal shall be laid by the respondent or respondents before the Judges of the Division to which the cause belongs, and the said Division, or any four of the Judges, thereof shall have power to regulate all matters relative to interim possession or execution and payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of the parties as they may

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* "NOTE.—The petitioning creditor's debt consists of a claim for the expenses of an action in the Court of Session, for which expenses he has obtained decree, which decree is under appeal to the House of Lords. In such circumstances, the Lord Ordinary cannot doubt that the petitioner's debt is *prima facie* contingent, and as such cannot found a petition for sequestration.

"The petitioner, however, maintains that, having petitioned the Court for interim execution pending appeal, and having obtained an order for such interim execution, his debt is put in the same position as if it were absolute. In short, he states that the Court, by allowing decree to go out and to be extracted, and execution to proceed thereon, have impliedly authorised sequestration under the Bankrupt Statutes. The Lord Ordinary has given careful consideration to this argument, but he is unable to give effect to it. The process of sequestration is not, in his opinion, a process of execution within the meaning of the Court's order. Although it has in certain respects the effect of a diligence, it is primarily a process of distribution, and is not in any proper sense a process of execution employed by the petitioning creditor for the recovery of his debt.

"On the whole, the Lord Ordinary considers that he must refuse the sequestration. He may add that it was admitted at the discussion that no instance can be found of sequestration following upon an order for interim execution pending appeal."

[1] Miller v. M'Intosh, March 18, 1884, 11 R. 729.

[2] Morrison v. Turnbull, &c., Jan. 28, 1832, 10 S. 259, 4 Scot. Jur. 264; Gordon v. M'Cubbin, June 14, 1851, 13 D. 1154, 23 Scot. Jur. 441.

[3] J. & W. Kinnes v. Adam & Son, March 8, 1882, 9 R. 698, per Lord M'Laren at *p. 701.*

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be affected by the affirmance or reversal of the judgment or decree appealed from."

This certainly leaves a very large discretion in the hands of the Court. Nothing is said about requiring bonds of caution for repayment in the event of decree being allowed to go out for payment of costs. In short it is left in the hands of the Court to decide what are to be the conditions on which any order is to be made.

It appears to me that the rational way to look at the present question is to ask one's self whether if an application had been made at the time when the petition for interim execution was presented to allow the party to apply for sequestration, it would have been granted. That would have depended entirely on whether the debt constituted by the order for interim execution is a contingent debt or not, and the same question arises now when we come to consider what effect is to be given to the order then made.

Now, it appears to me to be almost beyond the possibility of a doubt that the debt is a contingent debt. Contingency may be of this nature that the debt may never become due or payable. But one can quite understand that though the debt may not become absolutely due it may be payable *ad interim*, which is the position of the present debt.

It is not very easy to conceive cases arising under the ordinary operation of the law illustrating what I say, but I think the position of the debt may be illustrated by cases of special agreement, such as are often before us in the transactions of companies, the purchase and sale of estates for company purposes, where you find parties taken bound to pay a sum of money. In certain events the money will revert to them, and in certain events not one sixpence will go back to them. Is that not a contingent debt, though presently payable? That is exactly the condition of the debt here. Present payment is necessary, but there may be repayment, and that depends upon what may be the judgment of the House of Lords in the appeal.

I therefore entirely agree with the view of the Lord Ordinary.

LORD ADAM.—I am of the same opinion. I agree with your Lordship that the only question is whether or not this is a contingent debt. If it is, then there can be no further question, because the 14th section of the Bankruptcy Act of 1856 says that sequestration cannot be awarded in respect of a contingent debt.

It appears to me that when the decree of the Court of Session ascertained the amount of the debt, and that it was due, it was not ascertained by a final judgment that the debt was due, for the effect of the presentation of the appeal to the House of Lords was that it was no longer ascertained by a final judgment that the debt was due. The matter remained in suspense, the question whether any debt is due at all depending upon whether the judgment of the Court of Session is affirmed or reversed. If the judgment is affirmed, the debt will be finally ascertained by decree to be due, and its amount will be fixed. If, however, the contingency of reversal happens, it is equally clear that no debt will ever be due. That being so, it appears to me beyond all question to be a contingent debt. Then according to my view it is only because it is a contingent debt, and for no other reason, that the necessity for an application to the Court of Session for interim execution pending appeal arises. If the debt is clearly due and ascertained there is no necessity for it. But the Legislature thought it right that a party who

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has obtained a decree in his favour in the Court of Session should have the use of the money decerned for in the meantime till it is finally ascertained whether the debt is due or not. The object therefore of the application for interim execution does not in the least alter the nature or contingency of the debt. If in this case the judgment of this Court is reversed, the money for payment of which decree was granted will be repaid and no debt will be due to the petitioner. If that is the nature of the debt, I think it is a contingent debt, and I see no difficulty in the fact that the petitioner has been allowed the interim use of the money, and none the less is it a contingent debt because diligence may have been done upon it. The debt having been ascertained to be a contingent debt, the Bankruptcy Act is a barrier over which the Court cannot pass to grant decree of sequestration.

LORD M'LAREN.—The question here is whether the petitioning creditor has a title to apply for sequestration, and that depends upon the 14th section of the Bankruptcy (Scotland) Act, 1856, which while specifying the amount of the debt, &c., concludes with these words, "whether such debts are liquid or illiquid, provided they are not contingent."

We are familiar with the statute under which creditors who hold contingent claims are entitled to be ranked. But while it is allowed that in an existing sequestration the trustee should take cognisance of the contingent debt, it has not been thought proper that a contingent claim should be the foundation of sequestration, and I think the reason must be that the Judge applied to generally knows nothing of any debts excepting the petitioning creditor's debt, and the non-payment of a contingent debt does not constitute *prima facie* evidence of the debtor's inability to meet his obligations. If that be the reason of the statutory rule, I must say it applies strongly to a case of this description. In a certain sense no doubt this debt is due, because under statutory authority the Court has given decree for it notwithstanding an appeal to the House of Lords. But it is only interim execution, and there may be an order for repayment. I am of opinion that the interlocutor should be affirmed.

LORD KINNEAR.—I agree with your Lordship in the chair.

THE COURT adhered.

ALEX. MORISON, S.S.C.—PARTY—Agents.

No. 39.
Dec. 4, 1890.
Brown's Trustees v. Brown.

HUGH BROWN AND OTHERS (Brown's Trustees), First Parties.—*C. S. Dickson—Napier.*
ROBERT BROWN AND HIS CURATORS, Second Parties.—*C. S. Dickson—Napier.*
ISABELLA FINDLAY OR BROWN, Third Party.—*H. Johnston—Wallace.*

Succession—Heritable and Moveable—Conversion.—A testator conveyed his whole heritable and moveable estates (the former consisting of various house properties) to trustees, "to hold the rest and residue" for behoof of his children equally, share and share alike, and for payment of an annuity to his wife, "declaring always that my said trustees shall from time to time pay to my sons the interest or annual proceeds of the said shares," "and the principal of said shares provided to my said sons shall be payable to them respectively in five equal yearly instalments," the first "at the expiry of one year after the first term of Whitsunday or Martinmas which shall occur after my death."

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He further provided that, in fixing the amount of the annual proceeds to be paid to his sons his trustees should "always retain a sufficient sum" to meet and provide for the proportions of his wife's annuity; "and in fixing the principal sums to be paid to my said sons, my trustees shall always deduct the proportion" of the wife's annuity. The shares of daughters were to be held by the trustees for their behoof in liferent, and their children in fee. "And for the more effectually enabling my said trustees to pay my debts and manage and divide my estate as before mentioned, I authorise and empower them, if they judge proper, to sell and dispose of my whole subjects, heritable and moveable, above conveyed to them, at such times and in such manner, by public roup or private sale, as they may think proper." The testator further authorised the trustees to invest "the whole or any part of my estate, heritable and moveable," in certain securities, "declaring always that the trustees shall not be bound to alter, unless they see cause, the investment or securities of my estate as they may happen to be at my death, notwithstanding the same may not fall under any of the descriptions of securities above specified." The testator was predeceased by his wife, but was survived by six children. His moveable estate amounted to £225,000, and the heritage was valued at £35,000.

In the administration of the trust the trustees sold part of the heritage, and retained part at the request of the beneficiaries, and to await a rise in the property market.

Held that, in the circumstances, the exercise of the power of sale was indispensable to the execution of the trust, and that therefore the whole heritage must be treated as moveable succession.

2D DIVISION. M.

HUGH BROWN, merchant, Glasgow, died on 3d December 1870. He was predeceased by his wife, but was survived by his six children. He left heritable estate worth about £35,000, and moveable estate worth about £225,000.

By his trust-disposition and settlement, executed in 1865, before the death of his wife, Mr Brown conveyed his whole estate, heritable and moveable, to trustees. The purposes of the settlement were, *inter alia*, for payment of various legacies, and of an annuity to the testator's wife if she survived him. By the last purpose he directed that his trustees "shall hold" the whole residue of his estate, "heritable and moveable," for behoof of his whole lawful children, and the issue of such children as should die leaving lawful issue, subject to the following declarations and conditions, viz.:—"Declaring always that my said trustees shall, from time (*sic*), pay to my sons the interest or annual proceeds of the said shares provided to them as the same shall accrue, or at such periods, at least twice in each year, as my said trustees shall consider most suitable, and the principal of said shares provided to my said sons shall be payable to them respectively in five equal yearly instalments, commencing the first yearly instalment at the expiry of one year after the first term of Martinmas or Whitsunday which shall occur after my death; but in fixing the amount of annual proceeds so to be paid to my said sons, my said trustees shall always deduct the proportion of said annuity payable to my said wife; and, in fixing the principal sums to be paid to my said sons, my said trustees shall always retain a sufficient sum, of which they shall be sole judges, to meet and provide for the proportions of annuity provided to my said wife." The shares of daughters were to be held by the trustees for their behoof in liferent, and for their children in fee. "And declaring always that the above provision in favour of my children shall be in full of all claim of legitim," &c., "and if any of them claim their legal provisions, or repudiate or challenge the above-written provisions, conditions, and declarations, then he or she shall forfeit all right to my whole property before conveyed, the same going, in that case, to augment the fund for division among my other children: And for the more effectually enabling

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my said trustees to pay my debts and manage and divide my estate as before mentioned, I authorise and empower them, if they judge proper, to sell and dispose of my whole subjects, heritable and moveable, above conveyed to them, at such times and in such manner, by public roup or private sale, as they may think proper."

After the death of the testator the trustees entered upon the management of the trust-estate. In 1871 they sold subjects at Gourock, forming a small portion of the heritage, for £1100. In 1872 they sold the truster's house in Park Circus, Glasgow, for £6500. In 1874 they sold a property in West Regent Street, Glasgow, for £15,000, and in 1875 they sold a ground-annual in Pollokshaws for £4400. In all, their sales of heritage up to 1875 amounted to £27,000. The remainder, a property in Glasgow worth about £10,000, and a ground-annual of £62, 11s. 3½d., they decided, on the instructions of the beneficiaries, and in the hope of a rise in the property market, to retain in the meantime unsold.

In 1878 Robert Brown, one of the sons, died, leaving a widow and one child. The widow claimed terce and *jus relictæ* out of his estate.

In 1890 a question arose between Mrs Robert Brown, on the one hand, and her son and his curators on the other, as to the effect of Hugh Brown's settlement. Mrs Robert Brown maintained that that settlement operated conversion of the heritage, while her son and his curators maintained that it did not.

A case was stated to the Court putting the question, "Did the said trust-disposition and settlement operate conversion of the heritage?"

The trustees of Hugh Brown were first parties; Robert Brown, the son, with his curators, was the second party; Mrs Robert Brown was the third party.

Argued for the second party;—The settlement of Hugh Brown contained a mere power of sale. It was not disputed that a mere power would not operate conversion. Conversion was not indispensable to the working out of Hugh Brown's trust. That was shewn by the fact that his trustees held his properties and realised them in part only according to the state of the property market. The attitude of the beneficiaries had been held important in considering such questions, and had here operated reconversion.[1] The case of *Sheppard*[2] was in point.

Argued for the third party;—The question was one of intention. The deed shewed that the testator's intention was that the heritage should be converted. The course of holding part of it unsold had been taken as on the instructions of the beneficiaries, and in the hope of a rise in the property market. The deed directed the sons' "principal sums to be paid" in "five yearly instalments." The history of the trust was not unfavourable to the third party. The trustees seemed always to have recognised that there was conversion, but that the purposes of the deed, while they required conversion, would be satisfied if they were gradually carried out.[3]

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[1] Grindlay v. Grindlay's Trustees, Nov. 8, 1853, 16 D. 27, 26 Scot. Jur. 29; Williamson v. Paul, Dec. 15, 1849, 12 D. 372, 22 Scot. Jur. 92.

[2] Sheppard's Trustee v. Sheppard, July 2, 1885, 12 R. 1193; Hogg v. Hamilton, June 7, 1877, 4 R. 845; Duncan's Trustees v. Thomas, March 16, 1882, 9 R. 731; Aitken v. Munro, July 6, 1883, 10 R. 1097; Buchanan v. Angus, May 15, 1862, 4 Macq. 374.

[3] Buchanan v. Angus, *supra*; Advocate-General v. Blackburn's Trustees, Nov. 27, 1847, 10 D. 166, Lord Fullerton, p. 185; Advocate-General v. Williamson, Jan. 23, 1840, 13 D. 436, aff. March 16, 1843, 2 Bell's App. 89; Boag v. Kilkinshaw, June 27, 1872, 10 Macph. 872; Baird v. Watson, Dec. 8, 1880, 8 R. 233.

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LORD JUSTICE-CLERK.—There is no doubt that the decisions on this question of conversion are not quite satisfactory as guides in dealing with such a case as this. It appears that the majority of the seven Judges who decided the case of *Sheppard*, 12 R. 1193, decided in favour of the view that conversion had not taken place in deference rather to the decision of Lord Westbury and the other noble and learned Lords in *Buchanan* v. *Angus* (4 Macqueen, 374), than according to the views to which they would, but for that decision, have been inclined to give effect. At all events they would, but for that case, have had great difficulty in deciding the case of *Sheppard* as they did.

It appears to me that in such questions as the present, the first thing to be examined is the language of the deed itself. There is nothing in the decisions to indicate that if a testator by the expressions which he uses, and by the whole scope of his settlement makes it clear that he intended to convert the quality of his estate, there can be any doubt that his intention so expressed must have effect. And so far as I can find from the decisions quoted from the bar there has been no case in which a testator used the words "pay" or "payment" and "sums," and no other words, where the decision has been against conversion. Where the word "pay" has been held immaterial to the question, it has been always accompanied by other words such as "convey" more consistent with the quality of the estate remaining heritable. Probably the case which most nearly approaches the present upon this point is that of *Baird*, 8 R. 233, where the direction as to residue was to "pay and convey the same" equally among certain beneficiaries.

Now, looking at this deed, I think it is not possible, reading it as a whole (and I have so read it more than once with some care), to avoid coming to the conclusion that the testator intended conversion of his heritable estate. Without going over the various clauses in detail, I may say that I am particularly struck with the passage in which the testator directs that the principal of the shares provided to his sons shall "be payable to them respectively in five equal yearly instalments," and further directs that "in fixing the principal sums to be paid to my said sons, my said trustees shall always retain a sufficient sum, of which they shall be sole judges, to meet and provide for the proportions of annuity provided to my said wife." I think these passages, among others, are quite inconsistent with the view that the testator intended that his heritable estate should remain in a heritable form.

If I have rightly interpreted the intention of the testator, it follows that in order to carry it out conversion is necessary. I am therefore of opinion that the question in the case must be answered in the affirmative.

LORD YOUNG.—I am of the same opinion. There is no doubt as to what is the principle of the law of conversion. The question arises as to a man's will. It is whether the testator directed his money to be turned into land by buying land, or it may be his land to be turned into money by selling land. The estate is to be considered as of that character, land or money, to which he intended it to be converted. That is the whole law and principle of the matter.

Now, that question when raised on any will must be determined on the true construction of that will. If on that true construction the land is to be made money or the money land, there is no doubt as to what is the law. The direction may indeed be an implied direction, and if the terms of the will be

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such that a Court, addressing itself to the question of intention, is satisfied that the subject is intended to be converted, that will be held to be done. There is no different mode of collecting the intention of the testator between the case of conversion and any other case in which intention requires to be considered. We know nothing about that intention except from the will, and reading the will with the view of discovering what that intention is on this subject of conversion, we have to satisfy ourselves whether it was intended or not. Such being the intention, no authority can give us much aid, unless it be an authority which aids with some rule for the ascertainment of the intention. But for that purpose I am afraid no authority does give us any better help than we derive from reading the deed itself according to the ordinary meaning of its language.

Now, reading this will with a view to ascertain Mr Brown's intention, I am of opinion that he intended his heritable estate to be converted into money. The practical question is limited to a part of the heritage only, the whole being worth about £35,000, and constituting a comparatively small part of his means, for his moveable estate was about £225,000. Now, of that heritage, worth £35,000, the trustees, in the pursuance of his intention, have sold a part worth £27,000, and this question as to intention is limited to the remainder. It would be curious if he did intend to convert it to the amount of £27,000 and not to the whole amount. It is not a case of any other necessity than the due execution of the purposes of the will. But it is said, while no question is raised as to the intention leading to the conversion of the portion worth £27,000, that we cannot collect a similar intention as to the residue which the trustees retained till a better price could be got for it. I cannot assume that. I think the testator's intention was that that also should be sold when the trustees, in the exercise of their judgment, thought it best to sell it. His directions are such that it is difficult to imagine a man who could think they could be executed without a sale, though of course a man might if he liked direct a piece of heritable property to be conveyed in 100 *pro indiviso* shares. I cannot impute any other intention to this testator, who gave such directions as he did, than that there should be a sale. I collect from the purposes of his will that he intended to convert both the heritage worth £27,000, as to which no question is raised, and also the remainder.

Lord Rutherfurd Clark.—Having in view the decisions in the two cases of *Sheppard* and *Duncan*, I feel difficulty. But your Lordships are agreed that conversion took place, and I do not differ. I think that we may hold that the exercise of the power of sale was indispensable to the execution of the trust.

Lord Trayner.—I am of opinion, looking to the terms of the settlement of Mr Brown, that it was indispensable to the proper execution of the purposes of the trust thereby created that the power of sale which is contained in it should be exercised. The trustees could not have carried out, and cannot carry out, the trust purposes without selling heritage. I gather from that that it was the intention of the truster that his heritable property should be converted into money. I am therefore of opinion that the question should be answered in the affirmative.

The Court answered the question in the affirmative.

Hamilton, Kinnear, & Beatson, W.S.—Lindsay & Wallace, W.S.—Agents.

No. 40.

Dec. 5, 1890. Governors of Logan and Johnston School.

THE GOVERNORS OF THE LOGAN AND JOHNSTON SCHOOL OF DOMESTIC ECONOMY, Petitioners.—*Napier.*

School—Scheme by the Educational Endowment Commissioners—Alteration of scheme—Retiring allowance to teacher—Educational Endowments (Scotland) Act, 1882 (45 *and* 46 *Vict. c.* 59), *sec.* 20.—Petition by governors of school for amendment of a scheme of the Endowment Commissioners by adding a clause giving power to the governors, with consent of the Scotch Education Department, to make compensation to teachers in schools discontinued by the scheme, *granted.*

The governors of an educational endowment, appointed under a scheme framed under the Educational Endowments Act, 1882, in terms of their scheme discontinued a school. The teachers had been in office for many years, and the governors were desirous of giving them some compensation. There was no power under the scheme to make such allowances, but the governors presented a petition to the Court to amend the scheme by conferring such a power. The Court *amended* the scheme by the addition of a clause empowering the governors, having regard to the circumstances of any particular case, and with consent of the Scotch Education Department, to make reasonable compensation to teachers or other officers in schools discontinued under the scheme.

2D DIVISION. M.

FOR many years prior to 1890 a school, in which girls, the children of poor parents, received an elementary education and were taught sewing, was carried on in Glasgow by certain trustees under the name of the Logan and Johnston School.

In 1890 the trustees were superseded by a body known as the Governors of the Logan and Johnston School of Domestic Economy, incorporated under a scheme prepared by the Commissioners acting under the Educational Endowments Act, 1882, and approved by an Order in Council.

By the scheme it was provided,—"The Governors shall, within twelve months after the date of this scheme, discontinue the school presently maintained by the Logan and Johnston Trustees, and may either sell or let the school buildings at a fair rent as to them may seem best, or they may utilise the said ground and buildings in such manner as may seem to them best for the purposes of this scheme; or, notwithstanding the provisions hereof, they may, on obtaining the authority of the Scotch Education Department, continue the school until such time as may be fixed"; and under subsequent sections of the said scheme provision was made for the petitioners maintaining a school of domestic economy in buildings to be erected or acquired by them.

Section 37 of the scheme (following upon the provisions of the 20th section of the Educational Endowments Act, 1882) provided,—"It shall be in the power of the Court of Session to alter the provisions of this scheme upon application made to them, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in the Educational Endowments (Scotland) Act, 1882."

On 21st November 1890 the Governors presented a petition to the Second Division, stating that at 1st July 1890 they discontinued the school previously maintained by the trustees, and dispensed with the teachers. There were four teachers, three of whom had been employed in the school for twenty, nineteen, and twelve years respectively.

The petitioners stated that, in view of the length of service of these persons and of the usual practice of making some compensation to teachers whose services are so dispensed with, they considered that it would be reasonable and proper to make some compensation to those teachers, but that their scheme, unless amended, did not contain power to them to do so.

They obtained the consent of the Scotch Education Department to the

presentation of the petition, but the Department "declined to commit themselves to any opinion on the subject of the proposed change." No. 40.

In these circumstances they prayed the Court to amend the scheme by the addition of the following words, viz.:—"And the Governors, having regard to the circumstances of any particular case, may, with consent of the Scotch Education Department, make such compensation as they think just and reasonable to teachers or other officers in schools which are discontinued under this scheme." Dec. 5, 1890. Governors of Logan and Johnston School.

The case of the *Dollar Institution*[1] was cited when the case was called in the Single Bills, but there was no argument.

THE COURT, without delivering opinions, pronounced this interlocutor:—"The Lords . . . do amend the scheme prepared by the Commissioners appointed under the provisions of the Educational Endowments (Scotland) Act, 1882, constituting the Logan and Johnston School of Domestic Economy, approved of by Her Majesty the Queen by an Order in Council, dated 8th February 1890, by adding to the end of section 25 of the said scheme the following words:—'And the Governors, having regard to the circumstances of any particular case, may, with consent of the Scotch Education Department, make such compensation as they think just and reasonable to teachers or other officers in schools which are discontinued under the scheme,' and decern."

WEBSTER, WILL, & RITCHIE, S.S.C., Agents.

ANNE JOHNSTONE, Pursuer (Appellant).—*A. S. D. Thomson.* No. 41.
JANE DRYDEN, Defender (Respondent).

Dec. 6, 1890. Johnstone v. Dryden.

Process—Expenses—Caution for expenses—Pursuer in receipt of parochial relief.—In an action for declarator of property in a Sheriff Court the Sheriff ordained the pursuer, who was in receipt of parochial relief, and who did not apply for the benefit of the poor-roll, to find caution for expenses. Caution not having been found, the Sheriff assoilzied the defender. The pursuer appealed. No appearance was made for the defender, and from the pursuer's statements it seemed that she had acted for some time as proprietor of the subjects. The Court *recalled* the Sheriff's judgment, and *remitted* to him to proceed with the cause.

Observations on *Hunter* v. *Clark*, July 10, 1874, 1 R. 1154, and *Macdonald* v. *Simpson*, March 7, 1882, 9 R. 696.

2D DIVISION. Sheriff of Dumfriesshire. I.

IN an action brought in the Small-Debt Court of Dumfriesshire by Mrs Anne Johnstone, residing at Lockerbie, against David Ogilvy for payment of the rent of a small house and garden at Hightae, Mrs Jane Richardson or Dryden, Lochmaben, appeared, and stated that she represented, under a power of attorney, Matthew Richardson, residing in America, who claimed to be proprietor of the subjects. In consequence of this appearance the Sheriff-substitute sisted the action to allow the question of right to be determined.

In April 1890 Mrs Johnstone raised an action in the Sheriff Court of Dumfriesshire against Mrs Dryden, as mandatary for Matthew Richardson, for declarator that she was proprietrix of the small house and garden.

The defender, besides her defences on the merits, averred,—"The pursuer is notour bankrupt, has for several years been relieved of rates and taxes on the ground of her poverty, and has been receiving parochial relief from the parish of Applegarth"; and pleaded;—(2) The pursuer being in the lower rank of life, being a pauper, and having taken no steps to be placed on the poor's-roll, which would have had the effect of eliciting

[1] *Supra*, Nov. 28, 1890, p. 174.

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a report whether there was a *probabilis causa*, should be ordered to find caution for expenses.

The pursuer admitted that she was in receipt of parochial relief to the amount of 1s. a-week, but *quoad ultra* denied the defender's statement.

On 23d May 1890 the Sheriff-substitute (Hope) pronounced this interlocutor:—"Finds that the pursuer, being a pauper, is bound to find caution for expenses as a condition precedent to her being allowed to proceed with the case: Therefore sustains the second plea in law for the defender, and before further judgment appoints the pursuer to find caution for expenses within eight days."

On 9th September 1890, caution not having been found, the Sheriff-substitute (Campion) assoilzied the defender.

On appeal the Sheriff (Hope) varied the interlocutor of 23d May by substituting the words "in the circumstances" for the words "being a pauper," and *quoad ultra* affirmed that interlocutor and the interlocutor of the Sheriff-substitute of 9th September.

The pursuer appealed.

No appearance was made for the defender.

The pursuer argued;—A litigant was not obliged to find caution merely because of the fact that he was in receipt of parochial relief. That had been decided in the Second Division in *Macdonald's* case,[1] which was later than the case of *Hunter*[2] in which the First Division (according to the report) held that a person in receipt of parochial relief who refused to apply to the reporters on the *probabilis causa* in order to sue *in forma pauperis*, must find caution for expenses.

Lord Justice-Clerk.—I think that the case of *Macdonald*, which seems to be the last decided case upon this question, is an authority for this proposition, that it does not follow as a matter of course from a pursuer being in receipt of parochial relief that he is not entitled to sue an action except on condition of either establishing a *probabilis causa* and so suing *in forma pauperis*, or finding caution for expenses. The case of *Hunter* v. *Clark* does indeed appear to be an authority to the effect that such a pursuer, if he cannot establish a *probabilis causa*, must find caution for expenses, but I see that the Judges who decided *Macdonald* v. *Simpson* considered that there must have been special circumstances in the case of *Hunter* v. *Clark* which led to the Court exercising its discretion in the manner in which it was there exercised.

Now, there are certain peculiar circumstances in the present case which are not favourable to a judgment ordaining the pursuer to find caution. To begin with, the defender does not choose to appear to defend the judgment she obtained and to state to us circumstances which would justify it. In these circumstances I think we are entitled to regard the statements of the pursuer as a substantially accurate account of the facts. Now, from these statements it seems that the pursuer had long enjoyed the right to certain heritable subjects. She let them and sued her tenant in the Small-Debt Court for the rent. The answer made to her was that she had no title, that someone else had a title. So far the case does not appear to be that of a person who has absolutely no estate. Now, the Sheriff sisted the small-debt action (I do not think discreetly) for the raising of a declarator of title, and the pursuer brought such a declarator, in order to establish a title, which had hitherto not been disputed. The defender maintained that in that action she must find caution because she had obtained

[1] Macdonald v. Simpson, March 7, 1882, 9 R. 696.
[2] Hunter v. Clark, July 10, 1874, 1 R. 1154.

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prochial relief, and as she failed to do so he assoilzied the defender. I think that judgment was not justifiable in the circumstances.

I think that we should follow the case of *Macdonald* v. *Simpson*, and decide that the pursuer need not find caution as a condition of insisting in the action.

LORD YOUNG.—I think that the case of *Macdonald* rules this case. It is indistinguishable from it. I need not add more, as it would be merely to repeat my opinion in *Macdonald's* case.

LORD RUTHERFURD CLARK.—I agree. At the same time I think it right to say that I doubt whether I am correctly reported in the case of *Macdonald* v. *Simpson*, in so far as I am represented as concurring in the judgment.

In the special circumstances of this case I am of opinion that we ought not to ordain the pursuer to find caution.

LORD TRAYNER.—I agree, because there is no appearance by the defender. I do not proceed upon the general ground which has been stated by other members of the Court, that a person who is acknowledged to be a pauper in receipt of parochial relief, and has not chosen to apply for the benefit of the poor's-roll and to satisfy the reporters on *probabilis causa* that he ought to be allowed the benefit of the poor-roll, may be allowed to sue without finding caution. On that matter I adopt the opinion of the Lord President in *Hunter* v. *Clark*.

THE COURT recalled the interlocutor appealed against, and remitted the cause to the Sheriff to proceed.

IRVINE & GRAY, S.S.C., Agents.

No. 42.

Dec. 6, 1890.
Goodwin v. Industrial and General Trust, Limited.

JAMES GOODWIN AND OTHERS, Complainers (Reclaimers).—*Murray*—*Kennedy*.

INDUSTRIAL AND GENERAL TRUST, LIMITED, AND MATTHEW DEAN GOODWIN, Respondents.—*Asher*—*Ure*.

Bill of Exchange—Charge—Suspension—Caution—Partnership.—One of six partners of a trading firm, which had sold its business to a limited company, granted a promissory-note, to which he signed the firm name as well as his own. The other partners having been charged to pay brought a bill of suspension. The respondents averred that the complainers had adopted the promissory-note. *Held* that, as the firm's signature could not bind the partners after the dissolution of the firm, and it lay upon the respondents to prove their averments of adoption, the bill should be passed without caution.

Bill-Chamber. 1ST DIVISION. Ld. Stormonth Darling. C.

THE firm of James Goodwin & Company, engineers and ironfounders, Motherwell and Ardrossan, consisted of six partners, one of whom was Mr Matthew Dean Goodwin. It had carried on business for twenty-five years prior to 1889.

In April 1889, the business of James Goodwin & Company, along with that of the Coats Iron and Steel Company, were sold to a limited company, under the name of Goodwin, Jardine, & Company, Limited.

On 17th and 18th October 1890, certain partners of the firm were charged, and others threatened to be charged, as partners and as individuals, at the instance of the Industrial and General Trust, Limited, to make payment to them of the sum of £7500, alleged to be due under a promissory-note bearing to be granted in favour of the chargers by James Goodwin & Company and Matthew Dean Goodwin, and dated 12th September 1889, payable six months after date.

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The partners, other than Matthew Dean Goodwin, brought a note of suspension of the charge, on the ground that the firm had ceased to exist, and the transaction and signature were unauthorised.

It was stated by the complainers that they had learned that it was arranged between three of the directors of the new company—one of whom was Mr Matthew Dean Goodwin—that, as £20,000 of the debenture capital of the new company had not been taken up, the £20,000 should be taken up in equal quantities by the two old firms, and that this should be effected by borrowing on the security of each £10,000 of debentures £7500 from the Industrial Trust, Limited. The promissory-note, which was the subject of the suspension, was granted for the loan. In these circumstances, it was averred that Mr Matthew Dean Goodwin's action was *ultra vires;* that he had no authority, express or implied, to bind the firm; and that the loan for which the promissory-note was granted was not a transaction within the line or scope of any business ever carried on by James Goodwin & Company; and further, that the charges unless suspended would operate notour bankruptcy, and so damage the credit of the new company, in which the complainers had a large interest.

The respondents averred, *inter alia*, that the complainers had adopted the transaction in question by giving authority, in a letter dated 16th July 1890, for the realisation of the £10,000 debentures held by the respondents in security.

The complainers, in answer, stated that said letter was granted by them only on the understanding that no proceedings should be taken against them.

The complainers pleaded, *inter alia;*—(2) The signature of "James Goodwin & Co." to the promissory-note charged on having been unauthorised by the complainers, and, *separatim*, the said loan not being within the line or scope of business carried on by James Goodwin & Company, the chargers are not entitled to enforce the same against the complainers, or any of them. (3) The firm of James Goodwin & Company having ceased to exist prior to the granting of the said note, the said signature did not bind any party other than Matthew Dean Goodwin, and the said note is not a legal ground or warrant for diligence against the complainers, or any party other than the said Matthew Dean Goodwin.

The respondents pleaded, *inter alia;*—(2) The promissory-note in question having been granted with the authority of the complainers, or having been subsequently ratified by them, suspension ought to be refused. (4) The complainers having by their actings condescended on, and particularly by the said letter of 16th July 1890, adopted the said promissory-note, are not now entitled to repudiate liability to pay the same.

The complainers submitted that the note ought to be passed without caution or consignation, but stated that, if necessary, they were willing to find caution.

The Lord Ordinary on the Bills (Stormonth Darling), on 31st October 1890, passed the note upon caution.

The complainers reclaimed, and argued that the note ought to be passed without caution.

LORD PRESIDENT.—The charge in this case upon the bill for £7500, was given against James Goodwin & Company, and also against Mr Matthew Dean Goodwin, the gentleman who signs the note, and the other partners of the firm, who now appear as complainers. The complainers are not in this case bound by their own signatures, and the question comes to be whether they are bound by the signature of Matthew Dean Goodwin. That is a question upon the merits,

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and it depends upon several considerations, but more particularly upon this, whether Mr Matthew Dean Goodwin had authority from the other partners of James Goodwin & Company to sign or accept bills. Now, I think one fact is perfectly clear, that he had no such authority, because this was a dissolved company at the time he signed the bill. Mr Asher has argued that it does not necessarily follow that the company of James Goodwin & Company is dissolved because its estate has been sold to another party. I confess I am not able to follow that contention. There may be contracts of a peculiar nature for the sale of the goodwill or the assets of a company which may not amount to a dissolution of the company. There may be such contracts, but where the sale is of the simple nature of which it here appears to be, and the whole business and interest of the company is transferred to a third party, the necessary result in law is that the original firm ceases to exist from the time that the sale is made. It certainly cannot carry on business in its own name, because it is already dissolved into fragments, nor can it carry on business for behoof of the vendee. Well then, for what purpose does it exist? Is it possible to say that it exists for any other purpose than that of winding up? And if that be so, nothing that any of the individual partners can do after the sale can bind his copartners, unless it be done in the course and for the purpose of winding up.

Now, the present obligation, constituted by the signature of Mr Matthew Dean Goodwin, is certainly not an obligation in the course of winding up, or for the purpose of winding up, but for another purpose altogether, viz., for the constituting of a new obligation and for the borrowing a sum of money, and investing it in a particular way. It follows, therefore, that that signature is not binding upon the other partners of the dissolved company.

It is said that the dissolution of the company was unknown to the respondents, but it does not appear to me that that is of very much importance in the present question. The important fact, to my mind, as to whether this note is to be passed on caution or otherwise, is that, in point of fact, the signature of Matthew Dean Goodwin is not, in law, binding upon the parties complainers. There is another way, no doubt, in which the signature of Matthew Dean Goodwin might be made binding, and that is if it could be shewn that the complainers adopted the instrument as their writ and obligation. But there is nothing alleged against them which would shew that they so adopted it. On the contrary, what we have before us leads to an opposite result, and goes to shew that, as soon as they were made aware of what had taken place, they acted on the understanding that it was not their writ, and consistently took up the position that they would not admit liability. This leads to the conclusion that unless the respondents can shew that the complainers have rendered themselves liable they will not be able to make the charge good against them individually. Upon that ground I should be prepared to hold that the note ought to be passed without caution.

It is fair also to consider the consequences upon the complainers of passing the note only upon caution. It has been represented by Mr Murray, and apparently with good reason, that if the complainers were compelled to find caution this would lead to a sequestration of their estates. This is a very serious consequence, because, but for this unfortunate complication of matters it does not appear that the complainers are insolvent or verging on insolvency, and it is therefore very hard to say that, because they are charged upon this obligation of Mr Matthew Goodwin, they are, in effect, to be made bankrupt and sequestrated

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because they are unable to find caution. I am therefore for recalling the interlocutor and remitting to the Lord Ordinary to pass the note without caution.

LORD ADAM.—We are at present sitting in the Bill-Chamber, and the question of caution or no caution is one which is entirely for the discretion of the Court. What is at the bottom of this case—and, I think, the most cardinal fact in it—is that the bill in question was signed by one of the partners after the dissolution of the firm. I think we had from the respondents what was equivalent to an admission in regard to this—although the admission is not made in terms. The business and goodwill of the old firm had been sold, and had passed into new hands; and I agree with your Lordship in thinking that, under these circumstances, the old firm must be held to have been dissolved before the bill was granted. Accordingly, we start with that fact, which is really made matter of admission. If the granting of the bill had been a matter which had taken place in the winding-up, and if the transaction had appeared upon the face of it to have been of that nature, the question might have been a different one; but it is clear that the present transaction has nothing to do with the winding up, and that the signature of the partner who signs the bill does not bind the other individual partners who are charged upon it.

Upon these admitted facts, I do not think the case is one for summary diligence. If the transaction can be shewn to have been adopted by the other partners, that would be a good answer to the complainers, but, in a suspension the moment such a plea becomes the disputed matter in the case, it at once follows that the note must be passed without caution. The *onus* of proving adoption falls upon the respondents; and the note is passed in order to give them an opportunity of establishing their plea. If they fail, then the charge is suspended.

That is, I think, enough for the disposal of the case. But I agree further with your Lordship that other matters may be taken into consideration. The chargers in the present case have a great deal of the property of the concern in their hands. This amounts to something like consignation. It may be true that this property is not at once realisable, but it is none the less to be regarded as valuable consideration in a question of caution. We are also entitled to look to what has been represented to us as the likely result of our finding the complainers bound to give caution. It has been represented that the effect would be most disastrous; and giving weight to this and the other considerations which have been urged, I think that, in the exercise of its discretion, the Court ought to pass this note without caution.

LORD M'LAREN.—I agree with your Lordships that it is perfectly clear that when James Goodwin & Company transferred their business and capital to the new company, from that moment the authority of any partner to bind his former partners by putting his name to a negotiable instrument came to an end. Therefore, in order that the company or its partners may be made responsible under the promissory obligation of one of their number, it must be shewn that in point of fact, authority was given. That might be by the subsequent adoption of the instrument, or it might be that the transfer of the business was not made public, in which case the members of the old partnership would be liable on the principle that they continued to hold themselves out as carrying on business under the company firm. No case of this description is raised upon this record, and the only question is whether the promissory-note has been

adopted by the suspenders. The *onus* of establishing that proposition of course lies with the respondents. No. 42.

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So far as I am able to judge from the letters and documents before us, the suspenders were entirely ignorant of the existence of this promissory-note until their agent observed their names in the Register of Protests, in which the protest had been recorded with a view to immediate execution. I am therefore of opinion that the suspenders have shewn a *prima facie* case against the validity of the charge, and that they are entitled to have it suspended without caution.

LORD KINNEAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and remitted to him to pass the note without caution.

MACKERSY & MUNRO, W.S.—J. & J. ROSS, W.S.—Agents.

THE RIGHT HONOURABLE LORD BLANTYRE, Pursuer (Respondent).—*Low—Dundas.* No. 43.

THE TRUSTEES OF THE CLYDE NAVIGATION, Defenders (Reclaimers).—*Asher—Ure.*

Dec. 6, 1890. Lord Blantyre v. Clyde Navigation Trustees.

River—Navigation trustees—Powers and duties—Undertaking.—The undertaking of the Clyde Navigation Trustees was defined by the Clyde Navigation Consolidation Act, 1858, to embrace, *inter alia*, "The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry-slips, approaches, embankments or river dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained."

Under one of the recited Acts, the Act of 1840, the Trustees of the Clyde Navigation (sec. 11) were "empowered to make and maintain" a variety of works, including the quays of Erskine Ferry on the Clyde, which were authorised to be reconstructed.

By section 50 of the Act of 1840 it was enacted that "the said quays shall, at expense of the said trustees, be repaired, so that the working of the said ferry and quay shall be made as convenient, and the working thereof as easy as before" the operations of the trustees.

In an action by the proprietor of the quays at Erskine Ferry for declarator that the trustees were bound to maintain the quays, the defenders contended that their obligation under sec. 50 of the Act of 1840 was fulfilled once for all as soon as they had repaired the quays, and that sec. 11 imposed no obligation on them, but merely conferred a power. *Held* that the construction and maintenance of the quays constituted together an accommodation work intended to compensate the owner for interference with his property, and that the pursuer was entitled to decree.

1ST DIVISION. Lord Kinnear. C.

IN January 1889 the south quay of the Erskine Ferry on the Clyde was damaged through having been struck by a steamer. Lord Blantyre, the proprietor of the quay and ferry, called on the Clyde Navigation Trustees to repair the quay, and on their repudiating liability, brought this action concluding for declarator "that the defenders are bound to maintain and keep in repair the quays or slips on the north and south sides of the River Clyde at the East Ferry of Erskine, commonly called 'Erskine Ferry,' and whole other works at, or connected with, said ferry, made, executed, and constructed under the powers and provisions contained in the Act 3d and 4th Victoria, chapter 118, entitled 'An Act for further deepening and improving the River Clyde and enlarging the harbour of Glasgow, and for constructing a wet dock in connection with the said river and harbour,' and 'The Clyde Navigation Consolidation Act, 1858,'

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21st and 22d Victoria, chapter 149, now and from time to time as may be found necessary or expedient, and that at their own expense, and that the pursuer is not bound to maintain or keep the same in repair," and for decree ordaining the defenders to repair the said slips or quays.

The Erskine Ferry was one of ancient date, and the quay in question had been reconstructed and lengthened by the defenders since 1840, as part of the improvements in the navigation of the Clyde. The question mainly at issue was whether the maintenance and repair of the quay formed part of the undertaking of the defenders under their Acts. The material clauses of these Acts are given below.*

* The Clyde Navigation Consolidation Act, 1858 (21 and 22 Vict. cap. cxlix.), defined the undertaking of the Clyde Trustees thus (sec. 76):—"Subject to the provisions of this Act, and of any agreements authorised or confirmed by the recited Acts or this Act, and to the provisions and declarations of any conveyance granted to the Clyde Trustees, the undertaking of the trustees shall in terms of the recited Acts consist of," *inter alia*, "the construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry-slips, approaches, embankments, or river dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained, and the repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient; and subject to the provisions of this Act and the Acts herewith incorporated, the trustees are hereby authorised and empowered to carry on and complete the whole or such and so many of the said works as to them from time to time shall seem expedient, reserving always to the proprietors of lands adjacent to the river all rights to soil acquired from the river, and other rights competent to them at common law."

Among the recited Acts, the Act 3 and 4 Vict. cap. cxviii. sec. 11, enacted, —"That the trustees appointed by or under this Act shall be, and they are hereby empowered and authorised . . . to make, execute, construct, finish, maintain, and keep in repair the additional works upon, in, or along the river, and in connection with the said harbour, delineated or represented on the map or plan hereinafter mentioned [in sec. 12] and likewise the wet dock and other works and improvements hereby authorised to be made, and for these purposes to enter upon, take, occupy and use the several and respective lands, tenements, or other heritages upon, through, or adjoining to which the same are intended to be made, carried, executed, or constructed, within the boundaries or lines of works delineated on the said map or plan, or within the limits of the aftermentioned deviation, indemnification being always made to the owners, lessees, and occupiers of such lands, tenements, or other heritages in manner hereinafter provided; reserving always to the proprietors of lands adjacent to the said river all rights to soil or ground reserved to them by the said recited Acts, or this Act, or other rights competent to them at common law, except in so far as the same may be affected by the provisions of this Act. . . ."

Section 50 enacted,—"And be it enacted that nothing contained in this Act, or in any of the said recited Acts, shall affect, or be construed to affect in any degree the established ferries of," *inter alia*, Erskine West Ferry "on the said river, but the same shall be used and enjoyed in as ample and beneficial a manner as in times past, without being subject to the payment of any of the tolls, rates, or duties granted by any of the said recited Acts or this Act, and without being subject to any other jurisdiction than that to which they were subject previously to the passing of the said recited Acts and this Act; and also that a reasonable and sufficient space, unenclosed by walls, dykes, jetties, and other works shall be left on each side of the quays of the said ferries, for the free and convenient landing at all times of passengers, cattle, goods, and other things, . . . and the said several quays shall at the expense of the said trustees . . . be repaired, lengthened, altered, or reconstructed according to the advice and report of civil engineers of eminence, where such repair, lengthening, alteration, or reconstruction shall be rendered necessary by the

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The pursuer pleaded;—(1) The defenders being bound under their said Acts of Parliament to maintain and keep in repair the quays or slips of Erskine Ferry, and whole works thereat, so far as executed under the powers of their statutes, decree should be pronounced as concluded for, with expenses.

The defenders pleaded;—(2) In respect that Erskine Ferry piers form no part of the undertaking of the defenders under the said statutes, the defenders are not bound to maintain the same.

After a proof, the import of which sufficiently appears from the opinions of the Lord Ordinary and the Court, the Lord Ordinary (Kinnear) granted decree as concluded for.*

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works carried on by the said trustees for deepening the river, under and by virtue of the said recited Acts or this Act, and so as the said ferries and quays shall be made as convenient, and the working thereof as easy as before or as nearly so as may be."

Section 51,—"And be it enacted that at the East Ferry of Erskine it shall not be lawful for the said trustees to erect any embankment or dyke within 150 yards on either side of either of the ferry piers or quays, and that whenever the said trustees shall cut off any part of the north pier or quay of the said ferry they shall alter and reconstruct such north pier or quay so as to make it most convenient for and in a line with the pier and quay on the south side, and whenever the said trustees shall cut off any part of the projecting point of the shore above the said north pier or quay by which an eddy upwards is formed by the ebbing tide greatly facilitating the passage of the ferry boats, the said trustees shall so cut in upon the shore between the said point and the new north pier or quay as to form a bay similar to that which now exists, and thereby preserve as far as may be practicable the same eddy tide above the north pier or quay; and at the West Ferry of Erskine it shall not be lawful for said trustees to extend the embankments or dyke so as to interfere with the free and convenient passage of the said ferry."

* "OPINION.—The question raised by this action is, whether the defenders are bound to repair and maintain, as part of their undertaking, the quays and other works constructed by them, under the authority of Acts of Parliament, for the Erskine Ferry, of which the pursuer is proprietor. The maintenance of these works against ordinary wear and tear would appear to require a very trifling expenditure. But from their position in the river they are exposed to injury in consequence of vessels coming violently against them, and breaking or tearing away the stonework of the quays. They have, in fact, been materially damaged from this cause; and the pursuer maintains that the burden of repairing the damage must fall upon the defenders as part of the burden of general maintenance. The defenders, on the other hand, allege that the ferry quays are no part of their undertaking, that no obligation of maintenance is imposed upon them by their statutes, and that if the quays have been damaged by no fault of theirs, the loss must fall upon the pursuer, to whom they belong, according to the maxim *res perit domino*.

"The ferry, which is an ancient one, was provided with sufficient quays before the Clyde Navigation Acts came into force. But the pursuer's claim arises in consequence of alterations and reconstruction, which were rendered necessary by the operations of the Trustees under these Acts. His existing rights as against the Trustees depend upon the Act of 1858, which is the only Act now in force. But the quays in question were partly constructed under the previous Act of 1840, and it may be necessary to consider whether they formed part of the undertaking authorised by that Act.

"By the 11th section of the Act of 1840 the Trustees are empowered, *inter alia*, 'to execute, maintain, and keep in repair the additional works upon, in, or along the river delineated or represented on a plan' deposited in the Sheriff-clerk's office. The first point in controversy is, whether any alteration or reconstruction of the Erskine Ferry quays is included among the additional works so authorised, the pursuer maintaining that such alterations are delineated on the

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The defenders reclaimed, and argued;—The reconstruction of the quay in question did not form one of the additional works authorised by the deposited plan as works to be executed, and the defenders that the quays are shewn only as existing features of the river at the passing of the Act, and not as authorised improvements. The plan cannot be read without reference to the relative sections; but reading the plan and sections together, and with the aid of the evidence of the experts who have been examined, I cannot think it doubtful that a reconstruction of the piers of Erskine Ferry on both sides of the river is represented as among the works which the promoters proposed to execute. The exact character of the proposed alterations is more clearly stated in the statutory notices served upon the pursuer. But the indications of the plan and sections are entirely in accordance with the description of the notice. They appear to me to shew that the promoters of the Act desired to obtain power from Parliament to reconstruct the ferry quays, irrespective of any claim for reconstruction which might arise to Lord Blantyre in consequence of their other operations. I think the powers so desired were conferred by the 11th section of the Act, and that the Trustees, in the exercise of these powers, might have reconstructed the quays as part of their improvement scheme without the consent or against the opposition of the pursuer.

"But, assuming this to be so, the defenders maintain that the works executed under the Act of 1840 were not in fact executed by virtue of any power conferred by the 11th section, but at the instance of the pursuer himself, under the provisions in his favour, contained in the 50th section of the statute. If the reconstruction of the quays, as actually carried out, was in accordance with the design which the trustees took power to execute, it does not appear very material that they were not only authorised, but were also compellable to effect a reconstruction. But when the pursuer made his demand under the 50th section he could not have insisted, and did not in fact insist, upon the execution of such works as were actually constructed. The ferry had been rendered unworkable by an alteration of the water level consequent upon the trustees' operations, and all that he demanded, and all that he was entitled, as of right, to require of the trustees was the execution of comparatively insignificant works for the purpose of adapting the quays to the altered level of the water. But it was suggested that if the quays were to be altered at all, it might be more expedient to carry out the works authorised by the 11th section than to make a temporary alteration to satisfy the pursuer's demand, and another and larger alteration when the river should come to be widened at that point. The result was that the works as actually constructed went beyond what the pursuer could have demanded as of right, and were carried out in accordance with the parliamentary plan and sections of 1840, except that there was an insignificant difference in the surface gradient, and that the piers on each side of the river, as at first constructed, were 75 feet within the parliamentary line. The result of the pursuer's action of 1864 was to add 75 feet to each of the piers; and as now completed they are thus in conformity with the design authorised by the Act of 1840.

"The opinion which I have formed is, that the quays so constructed are part of the undertaking of the Trustees, and must be maintained as such. Everything they were authorised to do by the Act of 1840 was a purpose of the Act and a part of the undertaking. The analogous provisions of the Railways Clauses Act have been so construed (see *Wilkinson* v. *Hull Railway Company*, L. R., 20 C. D. 329; *Lord Beauchamp* v. *Great Western Railway Company*, L. R., 3 Ch. 745); and although the language of the statutes is not identical, the principle of construction adopted in these cases appears to be applicable. It is said that the quays were reconstructed for the accommodation of the pursuer alone. This is not exactly accurate, because the public using the ferry is equally interested with the proprietor in its efficiency, and also because the Trustees' plans for the widening of the river involved an alteration in the foreshore, and a consequent reconstruction of the north pier, irrespective of the necessities of the ferry. But if no one were interested but the pursuer, the maintenance of accommodation works may be just as much a purpose of the Act and a part of the undertaking

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Act of 1840. Even if it did, its maintenance and repair did not form part of the undertaking of the trustees. The 50th section of the Act of 1840, which imposed an obligation on the trustees, was fulfilled once the quays were reconstructed. The 11th section, which dealt with maintenance, empowered the trustees merely, did not oblige them. Repair and maintenance of the quay was no part of the undertaking.[1]

The pursuer's argument sufficiently appears from the opinion of the Lord Ordinary and the Court.

At advising, the opinion of the Court (LORD PRESIDENT, LORD ADAM, LORD M'LAREN, and LORD KINNEAR) was delivered by

LORD M'LAREN.—The summons concludes that the defenders, the Clyde Trustees, are bound to maintain and keep in repair the north and south quays of Erskine Ferry, and that the defenders should be ordained forthwith to repair these quays to the satisfaction of a person of skill to be named by the Court. The Lord Ordinary has granted the decree concluded for, and we are of opinion that Lord Blantyre is entitled to this decree.

The chief question for consideration is whether in the present condition of the channel of the Clyde these quays or piers are to be considered a part of the undertaking of the Clyde Trust, in which Lord Blantyre has such an interest that he may require the Clyde Trustees to keep the piers in repair.

This question of course depends on the terms of the Acts of Parliament which define and regulate the undertaking of the Clyde Trust. The Act from which the existing body of trustees immediately derives its authority is the Act of 1858; but the undertaking of the defenders as there defined (section 76) embraces,—"The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry-slips, approaches, embankments or river dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained." The plain import of this description is to define the undertaking by a reference to the plans and sections and authorising enactments of the Act of 1840.

The only clauses of the Act of Parliament of 1840 which it is necessary to consider are the 11th and the 50th and 51st. The 11th section empowers the Clyde Trustees to make and maintain the works which are "delineated or represented" on the map or plan thereafter referred to, and the 12th section amplifies this reference by setting forth the plan and sections and book of reference which together constitute the description of the new works intended to be executed under parliamentary authority. The plan and sections were exhibited at the argument, and we agree with the Lord Ordinary in holding that the piers of Erskine Ferry are those shewn as part of the proposed undertaking, and that the meaning of the markings on the plan is that these piers were to be rebuilt substantially in the form and manner in which they have been actually constructed.

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as the maintenance of works that are indispensable for the navigation of the river. The question depends upon the construction of the statutes; and it appears to me to be established that the quays in question are among the works 'shewn and described on' the parliamentary plans and sections of 1840, and part of the undertaking defined by the 76th section of the Act of 1858."

[1] Lord Blantyre v. Clyde Navigation Trustees, March 3, 1871, 9 Macph. (H. L.) 6, 43 Scot. Jur. 250; Lord Blantyre v. Clyde Navigation Trustees, March 7, 1881, 8 R. (H. L.) 47.

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"But, assuming this to be so, the defenders maintain that the works executed under the Act of 1840 were not in fact executed by virtue of any power conferred by the 11th section, but at the instance of the pursuer himself, under the provisions in his favour, contained in the 50th section of the statute. If the reconstruction of the quays, as actually carried out, was in accordance with the design which the trustees took power to execute, it does not appear very material that they were not only authorised, but were also compellable to effect a reconstruction. But when the pursuer made his demand under the 50th section he could not have insisted, and did not in fact insist, upon the execution of such works as were actually constructed. The ferry had been rendered unworkable by an alteration of the water level consequent upon the trustees' operations, and all that he demanded, and all that he was entitled, as of right, to require of the trustees was the execution of comparatively insignificant works for the purpose of adapting the quays to the altered level of the water. But it was suggested that if the quays were to be altered at all, it might be more expedient to carry out the works authorised by the 11th section than to make a temporary alteration to satisfy the pursuer's demand, and another and larger alteration when the river should come to be widened at that point. The result was that the works as actually constructed went beyond what the pursuer could have demanded as of right, and were carried out in accordance with the parliamentary plan and sections of 1840, except that there was an insignificant difference in the surface gradient, and that the piers on each side of the river, as at first constructed, were 75 feet within the parliamentary line. The result of the pursuer's action of 1864 was to add 75 feet to each of the piers; and as now completed they are thus in conformity with the design authorised by the Act of 1840.

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The 50th section of the Act of 1840 may be described as a provision inserted in the Act of Parliament for the protection of the owners of certain piers and ferries, including Erskine Ferry. As to these it is provided that the said several quays shall, at the expense of the trustees, but with the approbation and consent of the proprietors, be repaired, lengthened, altered, or reconstructed according to the advice and report of civil engineers of eminence where such repair, lengthening, alteration or reconstruction shall be rendered necessary by the works carried on by the said trustees for deepening the river.

The defenders found on this, the 50th section, as being, in their view, a direction to them to execute once for all certain works in the nature of alterations or improvements of the ferry piers for the benefit of Lord Blantyre. Having rebuilt the piers, they say that the obligation to Lord Blantyre is fulfilled, and that their powers and duties under the 50th section are at an end.

We, however, are satisfied that the obligations of the Clyde Trustees in this matter are not constituted by the 11th section only, or by the 50th section only, but by the two sections taken together.

The main work in this part of the Clyde is the embanking and deepening of the river channel, and this work could not be executed in its entirety without interference with the ferries. It was therefore a necessary part of the scheme of the trustees that the north and south piers of Erskine Ferry should be reconstructed, and the plan and sections shew that this was to be done. But the trustees were not limited to a definite period of time for the execution of their works, and as it might happen that the ferries should be injuriously affected by operations completed before the reconstruction of the piers, and as in any case it was not intended that the trustees should have the power to indefinitely postpone the ferry improvement, the 50th section was passed giving the ferry owner a qualified right to compel the execution of the necessary improvements. Reading the 50th section as supplementary and auxiliary to the 11th section, which we conceive to be the true principle of interpretation, the reconstruction of the piers of Erskine Ferry is a part of the undertaking of the Clyde Trust, and according to the tenor of the 11th section they are to be made and maintained by the Clyde Trustees. It is not to be supposed that the trustees are bound to maintain in perpetuity every piece of work which they may construct in accordance with their powers. Where no private interest is concerned the work may be allowed to go to ruin, or may be taken down and replaced by work of a better design. But where the work executed is in the nature of a substituted pier intended to give the owner of a ferry the same kind of accommodation which he had before, but in a form more convenient for the navigation of the river, the trustees cannot, in our opinion, separate the obligation to maintain from the obligation to execute. The construction and maintenance of the piers constitute together an accommodation work intended to compensate the owner for the interference with his property; and this is no more than the owner is reasonably entitled to; because (first) the liability to injury through collisions is very different in the case of a great navigable channel open to vessels of the largest tonnage from what it was before the deepening of the channel was begun, and (secondly) the cost of repairing the present piers is very much greater than any sum which could have been expended on the piers of the ancient ferry.

In the view which we take it is not necessary to trace the successive alterations which have been made on the Erskine Ferry piers from time to time. All the alterations were made by the trustees in the exercise of their statutory powers,

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and the work is neither more nor less the undertaking of the trustees because it has undergone more than one transformation. In the absence of any suggestion that Lord Blantyre is in any way responsible for the damage to the pier, we think that so far as he is concerned the damage must be treated as a partial destruction of the subject which the Clyde Trustees have to make good. If any claim exists against the ship which came into collision with the pier, that will be a claim on the part of the Clyde Trustees for damage to work which is under their care, and which they are bound to maintain.

For these reasons, which are substantially those assigned in the Lord Ordinary's judgment, we are of opinion that we ought to adhere to the interlocutor reclaimed against.

THE COURT adhered.

DUNDAS & WILSON, C.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 44.

Dec. 9, 1890.
Merryton Coal Co. v. Anderson.

MERRYTON COAL COMPANY, Complainers (Respondents).—*C. S. Dickson.*
JOHN ANDERSON, Respondent (Reclaimer).—*Rhind—A. S. D. Thomson.*

Mines and minerals—Coal Mines Regulation Act, 1887 (50 *and* 51 *Vict. cap. 58), sec. 13—Check-weigher—Interdict.*—By the Coal Mines Regulation Act, 1887, the miners employed in a pit may at their own cost appoint "a check-weigher" to take a correct account on their behalf of the weight of mineral raised, and to determine the deductions to be made therefrom. The check-weigher may on certain grounds be removed by a Court of summary jurisdiction in a proceeding at the mine-owner's instance.

In a proceeding by the owner of a mine for removal of J. A., a check-weigher, the Court of summary jurisdiction refused to remove him. The owner then dismissed the men employed, but re-engaged them on condition that J. A. should not be re-appointed. The miners did not re-appoint J. A. The owner then brought a process of interdict to have J. A. interdicted from entering his premises. *Held* that J. A.'s appointment having fallen, interdict must be granted.

2D DIVISION.
Ld. Trayner.
M.

THE MERRYTON COAL COMPANY, of which Andrew Douglas Brand and Wallace Thorneycroft were the sole partners, carried on a colliery at Larkhall. The miners were employed under an agreement by which their contract of service was terminable without notice by either party. In October 1889 the miners at No. 1 Merryton Pit appointed John Anderson as their check-weigher.*

On 5th August 1890 the Merryton Coal Company presented an application in the Sheriff Court at Hamilton to have Anderson removed from

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* The Coal Mines Regulation Act, 1887 (50 and 51 Vict. c. 58), enacts (sec. 13, subsec. 1),—"The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may at their own cost station a person (in this Act referred to as 'a check-weigher') at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions, in order that he may, on behalf of the persons by whom he is so stationed, take a correct account of the weight of the mineral or determine correctly the deductions, as the case may be."

By subsec. (2) a check-weigher is to have every facility afforded to him for enabling him to fulfil his duties. By subsec. (3) a check-weigher shall not be authorised in any way to impede or interrupt the working of the mine. By subsecs. (4) and (5) a mine-owner or agent or manager who desires the removal of a check-weigher, on the ground that he has interrupted the working of the mine, or for any similar reason, may apply to a Court of summary jurisdiction, who,

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his position as checkweigher. After hearing evidence the Sheriff refused the application.

Thereafter, upon 18th August 1890, the Merryton Coal Company posted up at the pit-head the following notice:—"Merryton Colliery, 18th August 1890.—Every collier working here is hereby formally dismissed from our employment. All may consider themselves re-engaged on the conditions that they do not appoint John Anderson as their checkweigher. All other conditions of employment to remain the same. Those men who go down to-morrow, or on any future day, do so on the distinct understanding that they agree to the above conditions of employment. John Anderson will not be allowed on the ground again. The graith of those who decline to work under these conditions will be sent to the surface."

A number of the miners resumed work after the posting of these notices, and Anderson was not allowed to return to the premises, though he presented himself for the purpose upon 19th August and on 2d October.

On 22d August in consequence of Anderson insisting upon his claim to act as "check-weigher," the Merryton Coal Company, and individual partners, presented a note of suspension and interdict, craving the Court to interdict Anderson from entering or trespassing upon any part of the lands and premises occupied by them.

No check-weigher was again appointed by the miners till after the presentation of the note, but after its presentation they on 27th October appointed another man to be check-weigher.

The note was passed and a record made up.

The respondent stated with regard to the notice;—"The complainers had no power to summarily dismiss the said miners for electing the respondent to be their check-weigher. The respondent has never entered upon the premises of the complainers except when he had a legal right to be there."

On 18th November 1890, the Lord Ordinary (Trayner) granted interdict as prayed for.*

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if satisfied that there is sufficient *prima facie* cause for removal of the checkweigher, may call upon him to shew cause against his removal, and thereafter at the hearing of the cause, if sufficient ground be shewn, shall make a summary order for his removal.

* "OPINION.—The respondent was check-weigher at one of the complainers' pits; and was appointed to that office by the miners there employed, under the powers conferred on them by the Coal Mines Regulation Act, 1887, section 13.

"The complainers were dissatisfied with the respondent's conduct, and applied to the Sheriff to have him removed, but the Sheriff dismissed their application. The complainers thereafter dismissed their miners, who had appointed the respondent, and only re-engaged them on the stipulation that they would not appoint the respondent as their check-weigher. The miners, on their re-employment, did not re-appoint the respondent, and have (since the present proceedings were instituted) appointed another check-weigher. In these circumstances it is plain enough that the respondent has now no right to enter upon the complainers' premises as check-weigher, and he pretends to no other title authorising his presence there. I have been asked, however, by both parties to decide this case, taking the circumstances as they stood at the date of presenting the note of suspension,—that is, disregarding the subsequent appointment of a new check-weigher. Taking the case in that view I am of opinion that the complainers are entitled to the interdict which they seek.

"The respondent was appointed by the miners who were at the time employed at the mine; it is only the persons 'who are employed in the mine' who have

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The respondent reclaimed, and argued;—The respondent was entitled to be at the colliery. At the time the note for interdict was presented he was the only check-weigher whom the men had appointed. The basis of the interdict was a pretended dismissal and re-engagement of the men on a condition applying to him. But that was just a trick to deprive him of his position, after the Sheriff had refused to remove him in the statutory manner. If the plan succeeded it would give a coalmaster a veto upon the election by the men. The case of *Whitehead* v. *Holdsworth*[1] was not in point, because it was decided under an Act under which the check-weigher must himself be one of the men in the employment of the coal-master. But under the Act of 1887 this was not so. The men appointed and paid a check-weigher, with whom the owner had no relation.

The complainers were not called on.

THE COURT (LORD JUSTICE-CLERK absent), without delivering opinions, adhered to the interlocutor of the Lord Ordinary.

W. & J. BURNESS, W.S.—W. OFFICER, S.S.C.—Agents.

No. 45.

Dec. 9, 1890.
Morgan, Gellibrand, & Co. v. Dundee Gem Line Steam Shipping Co., Limited.

MORGAN, GELLIBRAND, & COMPANY, Pursuers (Reclaimers).—*D.-F. Balfour*—*C. J. Guthrie.*

DUNDEE GEM LINE STEAM SHIPPING COMPANY, LIMITED, Defenders (Respondents).—*Murray*—*C. S. Dickson.*

Process—Amendment of record—Expenses.—Amendment of record, involving considerable alteration of the pleadings or a change of the ground of action, will be allowed in the Inner-House, either in reclaiming notes or in appeals, only on payment of the expenses in the cause from the date of closing the record, and the account of expenses must be paid before further hearing by the Court.

1st DIVISION. Lord Kincairney. C.

MESSRS MORGAN, GELLIBRAND, & COMPANY, merchants in London, indorsees of bills of lading of a cargo of flax shipped at Riga for Dundee, brought an action of damages against Messrs Martin & Company and the Dundee Gem Line Steam Shipping Company for loss incurred through delay, &c., in the delivery of the cargo. It was averred against Messrs Martin & Company that they were creditors of the Riga merchants who had shipped the cargo, and that they had devised a scheme by which, upon the misrepresentations, they had induced these merchants to send the cargo to Dundee, with the view of securing and realising it, and thereby obtaining payment of their debt, and further, that they had, by arresting the cargo on its arrival to found jurisdiction, and afterwards, on the dependence of an action against the merchants, succeeded in obstructing the delivery to the pursuers.

It was not alleged that the Dundee Gem Line Steam Shipping Company were in any way connected with the fraud.

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statute the power of appointing a check-weigher. It appears to me that such appointment must fall when the persons who make it cease to be employed at that mine; because (1) if on their ceasing to be employed no other miners are employed in their place, the work at the mine ceases, and there is no need of a check-weigher; and (2) if other miners are engaged in place of those who had ceased to be employed, then they, in turn, have right to appoint their own check-weigher. The case of *Whitehead* (Nov. 8, 1878, L. R., 4 Ex. Div. 13) is not distinguishable from the present case, and I concur in the judgment there pronounced. The statute under consideration in that case was not the statute now in force. But so far as regards the present question the Act of 1887 is only a re-enactment of the provisions of the Act of 1872."

[1] Whitehead v. Holdsworth, Nov. 8, 1878, L. R., 4 Ex. Div. 13.

No. 45.

Dec. 9, 1890. Morgan, Gellibrand, & Co. v. Dundee Gem Line Steam Shipping Co., Limited.

The Lord Ordinary (Kincairney), on 15th July 1890, allowed the pursuers a proof of their averments as against Messrs Martin & Company, but assoilzied the Gem Line Steam Shipping Company.

The pursuers reclaimed.

At the hearing, they asked to be allowed to amend their record by adding to their averments against the Gem Line Steam Shipping Company, which the Lord Ordinary had not thought sufficiently specific. In their amended case, the pursuers alleged that the Gem Company were parties to the fraud as well as the other defenders.

LORD PRESIDENT.—I do not think there can be any doubt that the condition of allowing this amendment must be that the reclaimers shall pay the expenses since the date of closing the record. This is one of a considerable class of cases in which we are called upon to allow such amendments, in the case of records which have been closed without proper consideration. It appears to me that sufficient attention is not paid to the state of the record even in this Court. We have had occasion very lately to see what scant attention is paid in the inferior Courts at that stage of the process, and I think that if we are to apply the rule to which we have given effect in the cases to which I have alluded (*Campbell* v. *Prestongrange Coal Co.*, Dec. 2, 1890, and *Macdonald* v. *Clyde Shipping Co.*, Dec. 6, 1890, both in the First Division) from the inferior Courts, *multo magis* are we bound to apply it to records made up in this Court.

There is another consideration in the present case which leads to the same result. The action has now been converted into an action based upon the ground of fraud, which it was not before the amendment was made. This amounts of course to a very serious charge, and I do not think that amendments of so serious a character ought to be allowed, except upon the condition of payment of expenses from the date of the closing of the record.

LORD ADAM concurred.

LORD M'LAREN.—I am glad that your Lordship has called attention to the necessity for greater care on the part of counsel and agents at that stage of a process which consists in the closing of the record. I am aware that very little time is allowed by the statute for consideration of the pleadings prior to the record being closed, but an application may always be made to the Lord Ordinary, and a reasonable postponement will always be granted. I rather think there may be too great a desire to minimise expense in the earlier stages of a process, and that this may perhaps account for what takes place.

LORD KINNEAR concurred.

THE COURT, on condition of the pursuers paying the defenders' expenses from the date of closing the record, allowed the amendments to be made, and appointed the amended record to be printed and boxed; further, allowed an account of the expenses as taxed to be given in, and remitted to the Auditor to tax and report.

HENDERSON & CLARK, W.S.—J. SMITH CLARK, S.S.C.—Agents.

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Dec. 9, 1890. M'Gill v. Bowman & Co.

JANE BUCHANAN OR M'GILL AND OTHERS, Pursuers (Respondents).—*Asher—Shaw.*

BOWMAN & COMPANY, Defenders (Appellants).—*Murray—Salvesen.*

Reparation—Mine—Workman in employment of separate contractor—Materials supplied by employer to contractor.—A miner in the employment of

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a person who had contracted with a coalmaster for the sinking of a pit was killed by the fall of a "kettle" used in raising material. The kettle and all the appliances connected with it were supplied by the coalmaster under a written contract, which provided, "the contractor to pay his own pitheadmen, and take upon himself the responsibility of their conduct when at work, and any accident that may befall them in the execution of his orders. He must therefore satisfy himself as to the condition and strength of all materials and tackling provided for him, it being understood that he may stop work till the necessary alterations or repairs are made."

In an action at the instance of the representatives of the miner against the coalmaster it was proved that the plant supplied by the defender were reasonably safe and sufficient, though somewhat old-fashioned, and not provided with recent improvements, which would have rendered the accident impossible; further, that the accident occurred through the neglect of the contractor's pitheadman.

Held that the defender was not responsible.

Opinions (*per* Lord Young and Lord Trayner) that a person who supplies plant to a contractor with which the contractor is satisfied, and which he accepts, is not responsible to one of the contractor's servants for defects in that plant.

Statutory precautions for safety of mines—Coal Mines Regulation Act, 1887 (*50 and* 51 *Vict. cap.* 58), *secs.* 49, 51.—The rules appended to the Coal Mines Regulation Act, 1887 (50 and 51 Vict. c. 58), sec. 49, provide that (Rule 19) "the top . . . of every . . . shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purposes of repair or other operations if proper precautions are taken"; and the special rules of a pit, framed under sec. 51 of the same Act, provided that the "pitheadman shall see that no rails are laid up to the mouth of the shaft without some provision being made to prevent waggons being pushed into the shaft." At the mouth of a pit which was being sunk to a greater depth there was no fencing, except that there was a moveable wooden block upon the rails leading to the pit mouth, which it was the duty of the pitheadman not to remove unless he was satisfied that the covering table was on the pit mouth. *Held* that this arrangement was not in breach of the statutory rules.

2D DIVISION.
Sheriff of Fifeshire.
M.

JANE BUCHANAN OR M'GILL AND OTHERS, the widow and children of James M'Gill, a miner, raised an action in the Sheriff Court of Fifeshire against Bowman & Company, coalmasters, Buckhaven, to recover damages for his death, which occurred through an accident at the defenders' pit on 8th April 1889. The pursuers alleged that the accident occurred through the defenders' fault.

The accident occurred in the following circumstances, as disclosed by a proof. In and prior to April 1889 the defenders' No. 1 pit at Muiredge Colliery was being sunk to a greater depth. They entered into a written contract in June 1888 with George Swan, whereby he undertook to deepen the existing No. 1 pit in accordance with a certain specification, and to the satisfaction of their manager. This contract provided, *inter alia*, that the defenders should furnish the necessary materials (with certain exceptions). It also provided as to the men who were to execute the work, as follows:—"Men.—The contractor to pay his own pitheadmen, and take upon himself the responsibility of their conduct when at work, and any accident that may befall them in the execution of his orders. He must therefore satisfy himself as to the condition and strength of all materials and tackling provided for him, it being understood that he may stop work till the necessary alterations or repairs are made."

The defenders provided the materials, and Swan proceeded with the work. One of the men whom he employed was the deceased man M'Gill. The nature of the mechanism which the defenders supplied for bringing up the substance taken out in the course of the work was as follows, as

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described by the Sheriff-substitute:—"A 'kettle' was suspended by a rope over a pulley above the shaft; a line of rails was laid up to the shaft mouth, on which a bogie travelled; about a yard and a-half from the edge of the shaft there was a moveable wooden block which, when laid across the rails, prevented the bogie travelling to the shaft mouth; the shaft mouth was furnished with a covering table on wheels, which could be run off and on, and which moved in a different direction from the rails on which the bogie travelled. In working with these appliances, when it was desired to lower the kettle, it was the pitheadman's duty, after seeing that the covering-table was on the mouth of the shaft, to open the block, run the bogie, with the empty kettle on it, on to the covering-table, attach it to the clevis and rope, signal to the engineman to raise the kettle off the bogie; that being done, to run off the bogie, close the block, remove the covering-table from the shaft mouth, and the kettle was then lowered into the shaft and filled."

Early on the morning of 8th April a man named Gray, who was in Swan's employment, was pitheadman at No. 1 pit. While the bogie carrying the kettle was on the rails near the pithead, and the rope was being brought up the shaft Gray was standing at the covering-table ready to push it over the shaft mouth. The wind blew his lamp out, and he went away to light it. When he returned he forgot that the covering-table was not on the shaft mouth, and opened the block, and moved forward the bogie and kettle on to the mouth of the shaft. There being no covering-table to receive them, they fell into the pit, and killed M'Gill, who was working below.

The pursuers averred that this accident occurred "through the pithead appliances being insufficient. They were of primitive character, and, had they been such as are in ordinary use, the accident could not have happened." They further stated that the defenders had failed to provide the fencing at the top of the shaft which was provided for in rule 19 of the general rules contained in the Coal Mines Regulation Act 1887,* and that, if the shaft had been fenced, no accident could have taken place.

The defenders denied these averments, and pleaded that the deceased not having been in their employment at the time of the accident, they should be assoilzied.

It appeared from the evidence that the apparatus above described had been in use for many years in the district, and it was regarded by the defenders' witnesses as reasonably safe and sufficient; but, on the other hand, it appeared from the evidence of other witnesses that there were newer and safer methods of working, though these were, in the opinion of a mining engineer of great experience (Dr Landale), who was examined for the defenders, objectionable in certain respects.

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* The Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), provided (sec. 49),—"The following general rules shall be observed, so far as is reasonably practicable, in every mine:— . . . Rule 19. The top and all entrances between the top and bottom, including the sump, if any, of every working, ventilating, or pumping shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purposes of repair or other operations if proper precautions are taken."

Section 115 of the Special Rules for the Mines established under section 51 of the Act, under the heading "Supplemental Special Rules for pits or mines in course of sinking or resinking," provided that the "pitheadman shall see that no rails are laid up to the mouth of the shaft without some provision being made to prevent the waggons being pushed into the shaft."

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It appeared that Swan, the contractor, the employer of the deceased, had accepted without any objection the appliances in question as in fulfilment of the defenders' obligation to him under the contract.

The Sheriff-substitute (Gillespie), after findings in fact to the effect above given, found "that the pithead appliances provided by the defenders were objectionable in respect that the rails were laid up to the mouth of the shaft, while the covering table moved in a different direction from the rails, and there was no sufficient protection to prevent the bogie being pushed into the shaft when the covering table was off it; that this construction of pithead appliances has been generally superseded by other constructions which prevent the bogie being pushed down the shaft by the carelessness of the pitheadman, and are recognised by practical men as safer, as for instance, making the covering table travel in the same directions as the rails, so that the bogie cannot be pushed on to the shaft mouth except when the covering table is there, or the same result is attained by laying the rails on to the covering table at its position when it is not on the shaft; or the covering table can be put on hinges, so that when raised off the shaft mouth it fences the hutchway; or if the covering table does move in a different direction from the rails, it can carry a fence so placed as to fence the hutchway when the covering table is not on the shaft, and leave the hutchway open when the covering table is on the shaft; that no sufficient reason has been shewn for the adoption by the defenders of a method deficient in safety: Finds in law that a duty being incumbent on the defenders to provide pithead appliances, and they having provided appliances of an unnecessarily dangerous construction, which allowed the accident to happen, they are liable to the pursuers in damages and solatium for M'Gill's death: Assesses the same at £130, for which decerns against the defenders: Finds the defenders liable in expenses."

On appeal, the Sheriff (Mackay) adhered.

The defenders appealed to the Court of Session, and argued;—The system and the materials supplied to Swan were reasonably safe and sufficient. This particular accident might not have occurred with the newest appliances, but those appliances had their own dangers and inconveniences. A person who used materials, which were thought sufficient and proper when they were erected, was not bound, even in a question with his own servants, to change his system and appliances whenever any improvement was introduced.[1] But the deceased was not the defenders' servant but Swan's, and Swan had accepted without demur the defenders' appliances, and must be taken to have been quite satisfied. There was no evidence of any breach of the contract between the defenders and Swan, and that alone would lead to absolvitor.[2] The cause of accident was the blunder of Gray, the pitheadman, and in no view was there liability for him. On a sound construction of the general and special rules under the Act of 1887, these rules had been observed.

The pursuer argued;—The evidence shewed that the system provided by the defenders was not reasonably safe. Swan was only bound to be satisfied with the "condition and strength" of the materials furnished to him. But that did not relieve the defenders from responsibility for providing what was proved by the evidence to be an old-fashioned system of working. If such a system as the Sheriff-substitute had found to be usual and reasonable had been adopted, no accident could

[1] Wiseley v. Aberdeen Harbour Commissioners, Feb. 2, 1887, 14 R. 445.
[2] Robertson v. Russell, Feb. 6, 1885, 12 R. 634.

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have occurred from Gray's mistake. The rules had been violated. There was to be a protection for the shaft mouth, and the pitheadman was to see that no rails were to be led up to the mouth of the shaft "without some provision being made to prevent the waggons being pushed into the shaft." In the defenders' system there was nothing but the moveable block, which had at the time been removed, to serve as a protection. But in every good system there was a more efficient protection.

LORD JUSTICE-CLERK.—This accident happened in a simple way. An existing pit-shaft was being sunk to a greater depth in the defenders' colliery at Muiredge. When such work is being done the men are not lowered by means of a cage in the way usual during the working of a pit. They are lowered by what is called a "kettle." The kettle was at this pit laid upon a bogie, and the bogie was kept back from running on the rails to the mouth of the pit by a block or stops by which it could be stopped before reaching the "table" at the pit-mouth. This "table" was placed over the pit-mouth to receive the bogie with the kettle which it carried. The "kettle" was then raised off the bogie by means of a pulley, the "table" was removed, and the kettle let down into the pit.

Now, it was the duty of the pitheadman to attend and to see that if the table was not across the pit-mouth the block should not be removed. That was quite a simple duty. It required no skill, nothing but the attention of a careful workman. But on the occasion of this accident the pitheadman was standing at the pit-mouth with the covering table off it, when his lamp was blown out, and he was absent for a little time to get it lighted. When he came back he took off the block without recollecting that he had left the "table" off the pit-mouth, and then he ran the bogie and the kettle on to the unprotected space, and in consequence they fell down and killed M'Gill.

This being the nature of the accident, let me inquire as to the position of the defenders. They had contracted with Swan that he was to sink the shaft to a lower level. Swan was bound to "satisfy himself as to the condition and strength of all materials and tackling provided for him, it being understood that he may stop work till the necessary alterations or repairs are made." Now, the defenders handed over certain appliances for the work to their contractor, Swan. No objection was made to these, and to a certain extent that is real evidence that the appliances were according to the usual and known practice. But, in my view, it is unnecessary to discuss that subject, because on the evidence as to whether the apparatus was reasonably safe and sufficient for the work I think it to be proved that it was. The import of the evidence, in my view, is that something better can be used, and in some places is used. But it is not necessary even for an employer, in order to defend himself against such an action as the present, to shew that he has adopted every new invention and appliance, if that which he has used was adopted on the advice of persons of skill and experience who recommended it as safe and sufficient. Now here, giving my best consideration to the conflicting evidence, I consider that the appliances used were such as were quite usual, adopted and recommended by persons of skill. If the defenders, having erected these appliances for use, had asked a skilled engineer his opinion of them, I think that they would have been told that their appliances were usual and sufficient, and I see no reason to attribute to them fault. I cannot hold that they used appliances which no careful person would have employed.

I therefore conclude that no case of fault is proved against the defenders.

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LORD YOUNG.—I also think that the judgment must be altered, and that the defenders should be assoilzied. I think the result of the evidence is that the system was reasonably safe.

The question whether the owner of appliances for the doing of a particular piece of work is culpable for the use of appliances of an old-fashioned description is always one of degree. I do not say that people are entitled to persevere with an old system which has by most others been abandoned as dangerous. But that being a question of degree, I think that these defenders were not called upon to change this system of appliances, inasmuch as it was reasonably safe, and inasmuch as persons who own such machinery are not absolutely bound to adopt the newest and most improved appliances.

That, as your Lordship has said, suffices for the disposal of the action. The immediate cause of the accident was the error of the pitheadman, and the defenders' appliances were reasonably safe, and they were not in breach of the rules of the Mines Regulation Act, or of any rule of the common law.

But I may also, I think, usefully express my views upon the other question, which was raised and argued to us. It is this. Swan was the person who contracted to sink this shaft to an additional depth. It was contained in his contract with the defenders that they should supply the apparatus for the work to his satisfaction. He was entitled to demand that they should do that. In the words of the contract, the contractor "must satisfy himself as to the condition and strength of all materials and tackling provided for him, it being understood that he may stop work till the necessary repairs or alterations are made." This apparatus was devised by Mr Landale. It was supplied to Swan. It seems to have been an apparatus to Swan's satisfaction. If he was of Landale's opinion, it was all that he was entitled to demand. Now, in these circumstances are the defenders subject to an action by Swan, or by anyone whose only right is derived through him? I think not. If I have painters to work in my house, and undertake to supply the ladders to the master's satisfaction, and do so, am I subject to an action by one of the painters if the ladders prove too weak? Surely not. I think that would be an entirely erroneous proposition. Yet it is involved in this action, and I think that we should negative it.

I think the action unwarrantable.

LORD RUTHERFURD CLARK.—I think that the defenders should be assoilzied. But I proceed entirely upon the facts. I think that the appliances were reasonably safe and sufficient, and that none of the rules of the Mines Regulation Act were infringed.

LORD TRAYNER.—This action is based upon fault; there was no contract of any kind between the defenders and the deceased. The fault alleged against the defenders is that, whereas they were bound by their contract with Mr Swan (in whose employment the deceased was) to supply him with all the necessary and proper appliances for performing the contract work, they supplied improper appliances, which were not only old-fashioned but dangerous, with the consequence that the use thereof led to the deceased's death. I am satisfied on the evidence that the unfortunate death of the workman, whose representatives the pursuers are, did not arise from the fault of the defenders. The appliances, in themselves, were according to the evidence reasonably safe; they were not objected to by Swan or anyone else, and the defenders cannot therefore be held to have committed any breach of their contract with Swan. It is on an

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alleged breach of that contract, however, with its consequences, that the defenders' alleged fault depends. But I go further. It is, I think, clear that the death of the workman in question was not occasioned by any defect in the appliances furnished by the defenders. That occurrence was occasioned by the neglect and fault of the pitheadman. Had he exercised that care in the performance of his duty which he was bound to exercise, and which he might reasonably be expected to exercise, the occurrence would not have taken place. With due care the appliances in question would have been quite safe. I agree with Lord Young on both points.

THE COURT found in fact "that the death of Joseph M'Gill senior, husband of the pursuer Jane Buchanan or M'Gill, was not caused by fault or negligence on the part of the defenders: Therefore sustain the appeal; recall the judgments of the Sheriff and Sheriff-substitute appealed against; assoilzie the defenders."

A. STEWART GRAY, W.S.—REID & GUILD, W.S.—Agents.

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Dec. 9, 1890. Alison v. Robertson's Trustees.

GEORGE JAMIESON ALISON, Petitioner (Respondent).—*Ure.*
MRS HARRIOT MARGARET HOLMES OR ROBERTSON AND OTHERS, (Robertson's Trustees), Objectors (Appellants).—*Mac Watt.*

Bankruptcy—Sequestration—Discharge—Appeal—Competency—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 170.—In a petition in the Sheriff Court by a bankrupt for discharge, the Sheriff-substitute, by interlocutor of 1st October 1890, found the bankrupt entitled to his discharge and appointed him to make a declaration in terms of the statute. Thereafter the Sheriff-substitute, by interlocutor of 10th October, found the declaration made by the bankrupt satisfactory, and discharged him. On 15th October an objecting creditor appealed under the 170th * section of the Bankruptcy (Scotland) Act, 1856.

Held that although the appeal was competent as an appeal against the interlocutor of 10th October, it did not also submit to review the prior interlocutor of 1st October, which was a substantive judgment, and had become final as not having been appealed against within the period prescribed by the Act.

Bankruptcy—Sequestration—Discharge—Bankruptcy and Cessio (Scotland) Act, 1881 (44 *and* 45 *Vict. c.* 22), *sec.* 6.—In a petition by a bankrupt for discharge, the Sheriff, after consideration of a report by the trustee that the bankruptcy had arisen from innocent misfortune, pronounced an interlocutor finding the bankrupt entitled to his discharge, and appointed him to make a declaration in terms of the statute. Thereafter the Sheriff pronounced an interlocutor in which he found the declaration satisfactory, and discharged the bankrupt. An objecting creditor appealed, under sec. 170 of the Bankruptcy Act, 1856, against this interlocutor, and stated that it contained no finding by the Sheriff that he had in terms of section 6 of the Bankruptcy and Cessio Act, 1881,† satisfied

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* Section 170 of the Bankruptcy (Scotland) Act, 1856, provides,—"It shall be competent to bring under the review of the Inner-House of the Court of Session, or before the Lord Ordinary, in time of vacation, any deliverance of the Sheriff after the sequestration has been awarded (except where the same is declared not to be subject to review), provided a note of appeal be lodged with and marked by the Sheriff-clerk within eight days from the date of such deliverance, failing which, the same shall be final."

† By the 6th section of the Bankruptcy and Cessio (Scotland) Act, 1881, it is provided, *inter alia*, as follows,—"Notwithstanding anything contained in the Bankruptcy Acts, the following provisions shall have effect with respect to bankrupts undischarged at the commencement of this Act, and to bankrupts

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himself that the bankrupt's failure to pay a dividend of 5s. in the pound had arisen from circumstances for which he could not justly be held responsible.

The Court *refused* the appeal, holding (1) that it was entirely within the Sheriff's discretion whether he should require the additional evidence on the question prescribed by subsection 2 of the 6th section of the Act; (2) that he might require such evidence at any time before actually discharging the bankrupt; and (3) that he must be assumed to have satisfied himself as to the facts referred to in the section before he granted the discharge.

Dec. 9, 1890. Alison v. Robertson's Trustees.

1st Division. Sheriff of Argyllshire. C.

On 16th July 1890 George Jamieson Alison, a partner of the firm of J. & A. Gardner & Company, quarrymasters near Ballachulish, whose estates, with those of the individual partners, had been sequestrated in May 1889, presented a petition craving his discharge. The petitioner stated that he had obtained the concurrence of a majority in number and two-thirds in value of the creditors, conform to minute of concurrence by the creditors and certificate by the trustee produced, that no dividend or composition had been paid in the sequestration, but that the failure to pay such dividend had arisen from circumstances for which he could not justly be held responsible, and that the trustee had, in terms of the Bankruptcy (Scotland) Act, 1856, prepared a report, which was produced.

Objections to the discharge were lodged by the trustees of the deceased R. J. Robertson, W.S., who were bondholders on the estate of Lagnaha, in which the quarries let to the bankrupt firm of J. & A. Gardner & Company were situated, and creditors of that firm, and the individual partners thereof, in virtue of decrees obtained in an action of maills and duties raised by them on 21st April 1888.

The objectors averred, *inter alia*, that at and prior to the raising of the action of maills and duties the petitioner was insolvent, and during his insolvency had, with consent of his copartners, entered into certain collusive agreements in April 1888, by which he assigned the assets of the firm, including the lease of the quarries, which was a valuable asset, to Duncan Macgregor Gardner for the purpose of carrying through a composition arrangement under which a dividend of 7s. 6d. in the pound was to be paid to the creditors, and of conferring upon the partners material benefits. The objectors received no notice of this arrangement till 24th April 1888, and they had received no composition on their claim against the petitioner, though the other creditors had received a composition from Duncan Macgregor Gardner. They had, however, obtained payment from the latter of the rents and lordships due to them under decree in the action of maills and duties, amounting to £268, 5s. They were still creditors of the petitioner and his firm for the amount of the expenses of

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whose estates may be thereafter sequestrated—that is to say (1) A bankrupt shall not at any time be entitled to be discharged of his debts, unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled—(*a*) That a dividend or composition of not less than 5s. in the pound has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors; or (*b*) that the failure to pay 5s. in the pound as aforesaid has, in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible. (2) In order to determine whether either of the foresaid conditions has been fulfilled, the Lord Ordinary or the Sheriff, as the case may be, shall have power to require the bankrupt to submit such evidence as he may think necessary in addition to the declarations or oaths, as the case may be, made by the bankrupt under sections 140 and 147 of the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), and the report made by the trustee under section 146 of the said Act, and to allow any objecting creditor or creditors such proof as he may think right."

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that action, being £33, 8s. 1d. The petitioner had not specified any innocent misfortune to account for his estate having paid no dividend.

The petitioner in answer admitted the execution of the agreements by which the assets of the firm were transferred to Duncan Macgregor Gardner, and explained that the objectors had not been informed of the agreements because at their dates the objectors had not entered into possession of the estate of Lagnaha, and so had not put themselves in the position of landlords and creditors of the petitioner's firm. It was not until 20th April 1889, ten days after the date of the second agreement, that the summons of maills and duties was signeted, and the petitioner had no knowledge that the objectors intended to raise such an action.

On 1st October 1890 the Sheriff-substitute (Maclachlan) after consideration of a report by the trustee in the sequestration to the effect that the bankrupt had complied with the provisions of the Act, and that his bankruptcy had arisen from innocent misfortunes, repelled the objections; found the bankrupt entitled to his discharge, but before granting the same, appointed him to appear and make a declaration in terms of the statute.

On 10th October the Sheriff-substitute having advised the declaration made by the petitioner found the same satisfactory, and discharged the petitioner.

The objectors on 15th October appealed under the 170th section of the Bankruptcy (Scotland) Act, 1856.

The petitioner objected to the competency of bringing up under this appeal the interlocutor of 1st October.

Argued for the petitioner;—The interlocutor of 1st October had not been appealed against within the period prescribed by the 170th section of the Act of 1856. No doubt it had been held in *Pilling* v. *Drake*[1] that an appeal against an interlocutor submitted also to review a prior interlocutor not appealed against. But the prior interlocutor there was a mere interlocutory order forming a step in the process. The judgment of 1st October was in an entirely different position. It was a substantive judgment upon which the whole case turned, and there was authority for holding that it could not be submitted to review.[2] It had required an express enactment in the Court of Session Act, 1868,* to give an appeal the effect of submitting to review prior interlocutors pronounced in a cause which had not been appealed against. That enactment, however, only applied to appeals which came in place of advocations, and it had no application to appeals in bankruptcy.

There was no force in the objection stated upon the merits to the later interlocutor, that it did not shew that the Sheriff had considered the provisions of the 6th section of the Act of 1881. It was quite clear that the Sheriff could not find the bankrupt entitled to his discharge under the prior interlocutor without first considering the provisions of the Act, and there was nothing to shew that he had not done so.[3]

Argued for the objectors;—(1) Although the appeal here had been taken *per incuriam* against the later interlocutor, it was competent as against both interlocutors. They were only two steps of one proceeding, and the appeal within the statutory period against the last interlocutor necessarily kept open the matters dealt with by the previous interlocutor. Though

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[1] Pilling v. Drake, June 30, 1857, 19 D. 938, 29 Scot. Jur. 434.

[2] Scottish Provincial Assurance Co. v. Christie, Jan. 27, 1859, 21 D. 333, 31 Scot. Jur. 183.

* 31 and 32 Vict. c. 100, secs. 64 and 69.

[3] Boyle, June 20, 1885, 12 R. 1147; Clarke v. Crockatt & Co., Dec. 8, 1883, 11 R. 246.

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the Court of Session Act did not specially apply to bankruptcy appeals, it was according to the spirit of the enactment that it should be extended to them.

(2) *On the Merits.*—It did not appear from the Sheriff's interlocutor of 10th October that he had satisfied himself that the failure of the bankrupt to pay a dividend in the sequestration had arisen from circumstances for which he could not be held justly responsible. The Sheriff could at any time, before actually discharging the bankrupt, require additional evidence in order to satisfy himself on the point, and he was bound to be satisfied before he discharged the bankrupt. The averment of the objectors was that the bankrupt had collusively conveyed away the assets of the firm to a third party before the sequestration, and that he was not entitled to his discharge.

LORD PRESIDENT.—As regards the competency of this appeal, I am of opinion that it brings up quite regularly and properly for review by this Court the interlocutor of the 10th of October, for the appeal was lodged within the time prescribed by the statute. But I am just as clear that the appeal does not bring up for review the interlocutor of 1st October. The attempt to bring the appeal within section 69 of the Court of Session Act of 1868 is hopeless, because that provision is confined to appeals from the Sheriff Court which come in place of advocations, and has no application whatever to appeals in bankruptcy. The appeal here is made under the 170th section of the Act of 1856, and upon that section it must stand or fall.

Then we are told with reference to the interlocutor of 10th October, that the Sheriff-substitute has pronounced it without having considered the application to the case of the provisions contained in the 6th section of the Act of 1881. I can see no evidence of this, and there is no reason to suppose that he did not have in view the provisions applicable to the case before him. It seems to me there is just as much reason to say that he disregarded the provisions of the Act of 1856 as those of the Act of 1881. We are bound to assume that he took the provisions of both statutes into consideration in deciding on the course which he adopted on the 10th October.

Now, what the Act of 1881 provides by the 6th section is this:—"Notwithstanding anything contained in the Bankruptcy Act, the following provisions shall have effect with respect to bankrupts undischarged at the commencement of this Act and to bankrupts whose estates may be thereafter sequestrated,—that is to say, (1) a bankrupt shall not at any time be entitled to be discharged of his debts unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled:—(*a*) That a dividend or composition of not less than 5s. in the pound has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors; or (*b*) that the failure to pay 5s. in the pound as aforesaid has, in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible."

The questions therefore which the Sheriff had to consider under that section were, first, the mere question of fact whether a dividend of 5s. in the pound had been paid by the bankrupt, and, second, whether his omission to pay it could be satisfactorily accounted for; and for the purpose of enabling the Sheriff to determine the questions, the 2d subsection of the 6th section goes on to give him certain powers,—"In order to determine whether either of the foresaid

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conditions has been fulfilled, the Lord Ordinary or the Sheriff, as the case may be, shall have power to require the bankrupt to submit such evidence as he may think necessary, in addition to the declarations or oaths, as the case may be, made by the bankrupt under" various sections "of the Bankruptcy (Scotland) Act, 1856, and the report made by the trustee under section 146 of the said Act, and to allow any objecting creditor or creditors such proof as he may think right."

Now, the whole matter of this inquiry under the 2d subsection is in the discretion of the Sheriff. If he has before him, without further inquiry, enough to satisfy his mind that the non-payment of a dividend of 5s. in the pound has not arisen from circumstances for which the bankrupt is to be held justly responsible, he is entitled to proceed to give the bankrupt his discharge. He is not bound upon the application of the objecting creditors to allow a proof at large, first to the creditors and then to the bankrupt. The matter is entirely in his own discretion.

In the present case I am not going to give an opinion as to whether the Sheriff-substitute's interlocutor is right or wrong upon the merits. All I say is, that the matter is left to his discretion by the statute, and it appears to me that probably he had very good grounds for being satisfied that the failure to pay 5s. in the pound in the sequestration did not arise from circumstances for which the bankrupt could justly be held responsible. It is quite admitted, indeed, that when the bankrupt found he was insolvent he executed a private trust-deed for behoof of his creditors, under which he arranged to pay all his creditors 7s. 6d. in the pound. The objectors, the appellants, were not at that time in the position of creditors of the bankrupt. They held a security over the entire estate, of which the quarries formed part, but they had not at that time raised the action of maills and duties necessary to make them creditors, and therefore 7s. 6d. in the pound was not set apart for them. Under the action of maills and duties, however, they afterwards recovered payment of their debt in full, though not of the costs of the action. They were therefore in at least as favourable a position as any other creditor of the bankrupt, and it would seem rather hard upon the bankrupt to say that such circumstances as I have detailed make him responsible for a dividend of 5s. in the pound not having been paid in the sequestration, and that, though a dividend of 7s. 6d. in the pound was secured to the creditors under the private trust-deed, the provisions of section 6 of the Act of 1881 were not complied with because a dividend of 5s. was not paid under the sequestration.

The Sheriff-substitute held apparently that he had quite sufficient information before him to enable him to dispose of the question without further inquiry, and in my opinion he was quite entitled to act upon it.

I do not think it is necessary to go into the argument submitted to us as to the time at which the Sheriff is bound to consider the matters referred to him under the Act of 1881. But I may say that I entirely concur in the view expressed by Lord Kinnear in the course of the discussion, that at any time before the discharge is actually granted the Sheriff is entitled to say,—"Here is something which is unexplained, and there must be an inquiry upon the subject," and if the Sheriff is not satisfied upon full inquiry that the failure to pay 5s. has not been due to circumstances for which the bankrupt can be held justly responsible, he is entitled at any time before the discharge is actually granted, to institute an inquiry in order to satisfy his mind as to how the matter stands.

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I am therefore in favour of holding that the appeal is incompetent as regards the interlocutor of 1st October, and that as regards the interlocutor of the 10th October the appeal must be refused, because it deals with a matter which is left to the discretion of the Sheriff.

LORD ADAM.—I agree in thinking that this appeal is competent so far as regards the interlocutor of 10th October, but that the effect of the appeal is not to submit to review by this Court the interlocutor of 1st October.

I think the interlocutor of 1st October is a substantive judgment which, in terms of the 170th section of the Bankruptcy Act, 1856, requires to be appealed against within eight days. If that is not done, the interlocutor becomes final, and it is incompetent for us to inquire into the reasons in respect of which the Sheriff has found the bankrupt is entitled to his discharge.

That being so, I think, nevertheless, that it is competent for us to inquire whether or not the judgment of 10th October is well founded.

All that is said against this interlocutor on the merits is that the Sheriff had not in view the provisions of section 6 of the Act of 1881, which requires that, *before* he gets his discharge, a bankrupt must pay a dividend of 5s. in the pound, unless his failure to pay such dividend has arisen from circumstances for which he cannot justly be held responsible.

Now, the only ground upon which it is suggested that the Sheriff has not taken that provision into consideration is that there is no finding to that effect in his interlocutor of 10th October. But I can see no proof at all that the Sheriff has not taken the provision into consideration, and that he has not done what he ought to have done. It was perfectly competent for the Sheriff, notwithstanding the interlocutor of 1st October, before granting the bankrupt his actual discharge, to consider any matters which might have occurred subsequently or otherwise, and therefore he was quite entitled, notwithstanding that interlocutor, before he pronounces the interlocutor of 10th October, if he thought it necessary in the circumstances, to have called upon the bankrupt to produce evidence in addition to his declaration on oath, that his failure to pay the dividend was not a matter for which he could be held justly to be responsible. There was no difficulty in the Sheriff requiring such additional evidence, and it is pretty evident that he did not do so because he had dealt with that question raised by section 6 of the Act of 1881 before pronouncing the interlocutor of 1st October. It was quite within the Sheriff's discretion to require additional evidence or not from the bankrupt, and we cannot interfere with his decision on that matter.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Refuse the appeal as incompetent, so far as it seeks to submit to review the interlocutor of 1st October 1890: Further refuse the appeal as an appeal against the interlocutor of the 10th October, and decern."

DAVID TURNBULL, W.S.—MACRAE, FLETT, & RENNIE, W.S.—Agents.

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MARGARET GARDNER WYLLIE AND ANOTHER, Pursuers (Respondents).—*Johnston—G. W. Burnet.*

WILLIAM WILSON M'BRIDE AND ANOTHER, Defenders (Reclaimers).—*Murray—Salvesen.*

BURGH OF IRVINE, Defenders.—*Strachan—Macfarlane.*

JAMES WYLLIE, Defender.

Succession—Deathbed—Reduction—Title to sue.—A woman, by antenuptial contract conveyed her whole heritable and moveable estate to trustees, to hold it for her liferent use, or in the event of her husband's survivance, for his liferent use, and lastly, for the use and behoof of the child or children who might be procreated of her body, declaring that after the death of the survivor of the spouses the "trustees shall pay over or assign the trust-funds and estate to the lawful child or children of the said" wife, the wife having a power of appointment, or failing her the surviving husband. It was also to be "lawful and competent" to the wife, whom failing, to the husband, "to restrict, if she or he shall see cause, the right of any of the said children to the liferent merely of their provisions, and to secure the principal to their lawful issue, or failing such issue, to the other children" of the wife, "declaring that the share of each child shall vest and become payable on the death of" the survivor of the spouses, "and on each of the said children attaining the age of twenty-one years complete or being married."

The wife died in 1868, predeceasing her husband. There was one child of the marriage, a daughter. The wife had on deathbed executed along with her husband a mutual disposition and settlement, whereby they respectively conveyed their whole estates to the survivor.

In 1889 the daughter raised against her father and various disponees from him an action for reduction *ex capite lecti* of the mutual disposition and settlement, and of the deeds following thereon. *Held (rev.* judgment of Lord Trayner) that the pursuer's interest as heir was excluded by the marriage-contract, under which her right might at her father's pleasure be reduced to a liferent, and therefore that she had no title to sue.

2D DIVISION. Lord Trayner. M.

MARGARET GARDNER WYLLIE, only child of the marriage between James Wyllie and Margaret Gardner or Wyllie, and Joseph Campbell Penney, C.A., judicial factor on the trust-estate created by an antenuptial contract of Mr and Mrs Wyllie, raised an action of reduction *ex capite lecti* of a mutual disposition and settlement made by Mr and Mrs Wyllie on 21st April 1868, and of another mutual disposition and settlement by them on 4th May 1868, against James Wyllie, and certain persons to whom he had granted dispositions of and bonds over subjects embraced in the marriage-contract.

Mrs Wyllie died on 10th May 1868. The pursuer's ground of reduction was that these deeds were executed when she was on her deathbed, to the prejudice of the pursuer Margaret Gardner Wyllie, who would otherwise have been entitled to succeed under the marriage-contract. A number of other deeds proceeding upon the mutual disposition second mentioned were also brought under reduction, but it is unnecessary in view of the judgment now reported to refer to these in detail.

Mr and Mrs Wyllie were married on 30th December 1865. Mrs Wyllie was possessed of heritable property in Irvine. Prior to their marriage they executed a marriage-contract. By this contract, *inter alia*, Mrs Wyllie conveyed to trustees her whole estate, heritable and moveable, for the following purposes, viz., (1) her own liferent; (2) in the event, which happened, of her husband's survivance, for his alimentary liferent, under burden of educating and maintaining any children of the marriage, "Lastly, For the use and behoof of the child or children who may be procreated of the body of the said Miss Margaret Gardner, declaring that

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after the death of the survivor of the said James Wyllie and Margaret Gardner, the said trustees shall pay over or assign the trust funds and estate to the lawful child or children of the said Margaret Gardner in such proportions, at such time, and under such conditions as she shall by any deed under her hand direct, and failing such deed, and in the event of the said James Wyllie surviving the said Margaret Gardner, as he shall by any deed under his hand direct, and failing such direction by either, then the said trustees shall divide and apportion the trust funds and estate among the children of the said Margaret Gardner equally, share and share alike, and it shall be lawful and competent to the said Margaret Gardner, whom failing, to the said James Wyllie, to restrict, if she or he shall see cause, the right of any of the said children to the liferent merely of their provisions and to secure the principal to their lawful issue, or, failing such issue, to the other children of the said Margaret Gardner; declaring that the share of each child shall vest and become payable on the death of the survivor of the said James Wyllie and Margaret Gardner, and on each of the said children attaining the age of twenty-one years complete or being married."

The marriage-contract was never recorded in the Register of Sasines, and was never intimated to the trustees named in it.

The pursuer, the only child of the marriage, was born on 23d September 1866.

On 21st April 1868, when Mrs Wyllie was ill of the disease of which she died, the mutual settlement first brought under reduction was executed by her and her husband. It was prepared by Mr M'Jannet, solicitor, who was unacquainted with the terms of the marriage-contract. It was inconsistent with the marriage-contract, and on Mr M'Jannet becoming acquainted with the nature of the marriage-contract he advised Wyllie that it was an irrevocable deed, and that the mutual settlement was ineffectual in competition with it. Wyllie then induced another solicitor, who had prepared the marriage-contract, to prepare the mutual disposition and settlement of 4th May 1868, which was the second deed brought under reduction. It was executed within six days of Mrs Wyllie's death. By it each of the spouses, for love, favour, and affection toward the other, conveyed to the survivor of them absolutely, and to the heirs and assignees whomsoever of the survivor, and failing them both by death, to the child of the marriage the whole estate, heritable and moveable, of the first deceaser.

After the death of Mrs Wyllie, on 10th May 1868, Wyllie made up his title by notarial instrument, proceeding upon the mutual disposition and settlement of 4th May, to his wife's heritable property. He proceeded to burden and sell parts of the subjects.

In July 1889 the action of reduction was brought, the defenders called being James Wyllie, the pursuer's father (who did not appear), and Jane Boyd, William Wilson M'Bride, and the Corporation of Irvine, who all derived right through deeds granted by him, and who appeared to oppose decree of reduction.

The pursuers pleaded;—1. The said mutual trust-dispositions and settlements, being the deeds first and second libelled in the summons prefixed hereto, ought to be reduced on the ground (1) that it was *ultra vires* of the parties thereto to grant or execute the same in the circumstances set forth in the foregoing condescendence, and (2) that they were granted *in lecto*. 2. The remaining deeds libelled, proceeding as they do upon a deed which is void or voidable, are themselves reducible, and ought to be reduced as craved, with expenses as concluded for.

The defenders pleaded, *inter alia*, that the action was irrelevant.

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A proof was taken before answer.

On 6th June 1890, at the close of the proof, the defender M'Bride obtained leave to add a plea of "No title to sue."

On 18th June 1890 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Finds that the mutual settlements, dated respectively 21st April 1868 and 4th May 1868, being the writs first and second described and called for in the conclusions of the summons, were executed by the late Mrs Margaret Gardner or Wyllie on deathbed, and that the said Mrs Margaret Gardner or Wyllie was labouring, at the dates of said deeds respectively, under the disease of which she died: Therefore finds, reduces, decerns, and declares in terms of the conclusions of the summons." *

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* "OPINION.—On 16th December 1865 the defender James Wyllie and the late Mrs Margaret Gardner or Wyllie entered into and executed an antenuptial contract of marriage, by which, *inter alia*, Mrs Wyllie conveyed to certain trustees named all sums of money and property of every description, heritable and moveable, then belonging to her, or which she might acquire in any manner of way whatever. The trustees were directed to hold the estate so conveyed to them for the following purposes:—(1) For the liferent use of Mrs Wyllie; (2) for the liferent use of her husband should he survive her; and (3) for the use and behoof of the child or children who might be procreated of the body of Mrs Wyllie; 'declaring that, after the death of the survivor of the said James Wyllie and Margaret Gardner, the said trustees shall pay over or assign the trust funds and estate to the lawful child or children of the said Margaret Gardner.' There was a power reserved to the spouses to apportion the estate among the children, but, as there was only one child born of the marriage, there was no room for the exercise of that power. There was also a power reserved to Mrs Wyllie, whom failing, to her husband, to restrict, if she or he should see cause, the right of any of the said children to the liferent merely of their provisions, and to secure the principal to their lawful issue, or, failing such issue, to the other children of Mrs Wyllie. This power was not exercised by Mrs Wyllie, and has not been exercised hitherto by Mr Wyllie.

"This contract of marriage remained after its execution, until shortly before Mrs Wyllie's death (which occurred on 10th May 1868), in the hands of the agent who had prepared it, and who acted as law-agent and factor for Mrs Wyllie from the period of her marriage until her death. Its existence was never intimated to the trustees therein named. The same law-agent prepared a mutual deed of settlement by Mr and Mrs Wyllie, which was executed by them on 4th May 1868, whereby they, and each of them, conveyed to the survivor 'absolutely, and the heirs and assignees whomsoever of the survivor,' the whole estate, heritable and moveable, now owing and belonging, or that shall be owing and belonging, to the first deceaser. At the date of the execution of that mutual settlement Mrs Wyllie was on her deathbed, as was well enough known both to Mr Wyllie and the law-agent. It was a mutual settlement only in form, for at its date Mr Wyllie had no estate to convey, and the sole purpose for which that deed was executed was to confer on Mr Wyllie a right to the estate, which under the marriage-contract had been conveyed to trustees for behoof of his child. Following upon the foresaid mutual settlement, Mr Wyllie made up a title to the heritable estate of his wife, and has disponed or burdened it by the several writs mentioned in the summons.

"The pursuer Margaret Gardner Wyllie, the only child born of the said marriage, now seeks to set aside the foresaid mutual settlement, *ex capite lecti*, as being to her prejudice, as heir of her mother and heir of provision under the marriage-contract. There is no doubt about the fact that the deed in question was executed on deathbed, and that it is to the pursuer's prejudice. But there are two defences stated in bar of the pursuer's obtaining decree of reduction which have been urged upon me, and of which I have now to dispose.

"The first of these is that the pursuer has no title to sue—a defence only

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M'Bride reclaimed, and argued;—He was a stranger who acquired the subjects from Wyllie for onerous causes, and on the faith of the records. It was proposed in this action to reduce his title in consequence of an objection founded on the law of deathbed, a ground of reduction now abolished by an Act of 1871.* Such an objection—though the law of deathbed existed when Mrs Wyllie died—was to be narrowly scanned. No one but the heir had a right to reduce on the ground of deathbed. But the pursuer Miss Wyllie was not heir. Her character as such was excluded by the marriage-contract. Under that deed her parents or the surviving father were entitled to restrict her right to a liferent, and she had no vested right of fee till the surviving parent died without having executed any such deed of restriction. If there had been several children, the pursuer could have been, in the exercise of her parents' right of appointment under the contract, cut out of all right under the contract.† The heir must be the heir *alioquin successurus*, and must have both a title and interest to reduce *ex capite lecti*.[1] Mr Bell said,[2]—"The general rule is that the plea of deathbed is competent to the heir who, *alioquin successurus*, is entitled to be served but for the deathbed deed."

Argued for the pursuer;—The pursuer was heir of her mother, and was not displaced from that position by the contract of marriage. Mrs Wyllie

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stated by the defender M'Bride after the proof in the case had been concluded. The main argument submitted in support of this defence was, that the pursuer is not heir of provision under the marriage-contract, but only a beneficiary having a claim against the trustees, who are the disponees therein, and that the reduction of the mutual settlement would set up the conveyance in the marriage-contract in favour of the trustees to the exclusion of the pursuer. Of course, if the reduction of the mutual settlement had the effect of setting up a title in somebody else which was adverse to and exclusive of the heir's right, the heir would have no title to reduce. But the reduction of the settlement, and consequent restoration of the conveyance under the marriage-contract, so far from being adverse to or exclusive of the pursuer, is, on the contrary, the restoration of her right. The trustees only hold for her, and are bound to convey to her at a certain time. Holding only for behoof of the pursuer, the trustees, in my opinion, are not the singular successors of the late Mrs Wyllie; at all events, as it is a question with the pursuer. They are the medium through which Mrs Wyllie hands over her property to the pursuer; they have no right of property directly at all which they could exercise to the pursuer's prejudice. To set up their title, therefore, as trustees is not setting up any title or right adverse to or exclusive of the pursuer's. Nor is the pursuer a mere beneficiary under the marriage-contract in the sense in which a legatee is a beneficiary under a will. Her right is conferred by an onerous deed which destines the heritage thereby conveyed to her. The interposition of a trust does not make her any the less the heir of provision.

"It was pointed out that Mr Wyllie had the power to restrict the pursuer's right to a liferent, and to confer the fee on her children. I do not regard this as of importance. Mr Wyllie, in point of fact, has not exercised this power, and may never do so. Whether he would now be allowed to do so, after his attempt to defraud the heir under the marriage-contract, may be a question. But as matters at present stand, no restriction has been placed on the right of fee conferred on the pursuer by the marriage-contract.

"I am therefore of opinion that the plea of no title should be repelled. . . ."

* Act to Abolish Reductions *ex capite lecti* (34 and 35 Vict. c. 81).

† Powers of Appointment Act, 1874 (37 and 38 Vict. c. 37), sec. 1.

[1] Erak. iii. 8, 98, 99, 100; Campbells v. Campbells, 1738, M. 3195; Shaw v. Campbell's Executors, March 2, 1848, 9 D. 782, 19 Scot. Jur. 386; Ker v. Ker's Trustees, March 10, 1830, 8 S. 694, 2 Scot. Jur. 337 Bell's Prin., sec. 1815.

[2] Bell's Com. p. 92 (7th ed.), 97 (5th ed.)

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had divested herself by the marriage-contract, and the trustees under the marriage-contract held for the daughter, and no deed had been executed to limit her right. Even though the heir's right were contingent, she had still a right to reduce, for this privilege of reduction was for the protection of all kinds of heirs, so that successions previously settled might not be disturbed on deathbed.[1] The case of *Shaw* v. *Campbell*, quoted on the other side, was really decided on another point. The pursuer Miss Wyllie was entitled to use her character as heir to support her right under the deed. Her right to the heritage might be defeasible to a certain extent, but that would not exclude her title.

At advising,—

LORD JUSTICE-CLERK.—James Wyllie and the now deceased Margaret Gardner or Wyllie, his wife, executed an antenuptial contract in 1865. By that contract the wife conveyed to trustees her whole estate then belonging to her, or which she might acquire. The purposes of this conveyance by her were her own life rent, excluding the husband's legal rights, the husband's liferent in the event of his survivance of her, and lastly, "for the use and behoof of the child or children who may be procreated of the body of the said Miss Margaret Gardner." A power of appointment was reserved to Mrs Wyllie, and failing such deed by Mr Wyllie, and it was declared that it should be lawful to her, whom failing to him, to restrict the share of any child to a liferent, and it was also declared that the share of each child should vest and become payable on the death of the last survivor of the spouses.

The marriage was dissolved by the death of Mrs Wyllie in 1868. The only child of the marriage was the pursuer, who was born in 1866. Mrs Wyllie did not attempt to exercise any of the reserved powers, but it appears that a few days before she died, and when she was fatally ill, she was induced by her husband, in defraud of the marriage-contract, to execute along with him "mutual disposition and settlement," by which each conveyed, "in favour of the survivor of us absolutely, and to the heirs and assignees of the survivor, and failing us both by death, to the child or children of our marriage," the whole estate of the first deceaser.

It is a remarkable fact that this mutual settlement was prepared by the same agent who prepared the antenuptial marriage-contract, and it is a fact not very creditable to that agent. Proceeding in virtue of that mutual disposition, Mr Wyllie, after her death, made up a title to the heritable estate which had belonged to his wife, and subsequently he proceeded to dispose of that property. It has now been in possession of others who purchased it for a considerable time. One of the questions which at the outset appeared to be raised by the defences was whether this reduction was not excluded by prescriptive possession on the part of the defenders, but I think that in the course of the argument it came to be agreed that that defence was untenable. The question whether the pursuer can prevail in this reduction depends, in the first place, upon her legal position under the antenuptial contract of marriage. The doctrine of the law of deathbed was that the heir of the person who granted a deathbed deed had a right to set aside on the ground that it was to his prejudice in his character as heir. But it has never been held that a person had the power to reduce *ex capite lecti* who had only a possible fee in the event of the proprietor dying without executing

[1] Hepburn v. Hepburn, 1663, M. 3177; Porterfield v. Caul, 1672, M. 317.
[2] Morison v. Morison, 1808, Hume's Decisions, 147.

a deed by which it was in his power to deprive him of that fee. Now, what is the pursuer's right from which she derives her alleged title to reduce *ex capite lecti*? It depends upon the marriage-contract. But under that contract her right in the trust funds might be reduced to a liferent by her father and her mother together, or by either of them who may survive the other. The right is one which is contingent. In these circumstances, I think therefore she had no title to reduce *ex capite lecti* the deeds which she seeks to reduce, and therefore that it is not competent to her to insist in this action. I move your Lordships therefore to recall the interlocutor of the Lord Ordinary and assoilzie the defenders.

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LORD YOUNG concurred.

LORD RUTHERFURD CLARK.—I suppose this is the last judgment that will be pronounced upon the law of deathbed. I agree in the result at which your Lordship has arrived. The pursuer is heir. But I think that her interest as such is excluded by the marriage-contract.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

JAMES DRUMMOND, W.S.—STURROCK & GRAHAM, W.S.—JAMES RUSSELL, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

WILLIAM WHITE, Pursuer (Appellant).—*D.-F. Balfour—C. S. Dickson.*
WILLIAM BRIGGS, Defender (Respondent).—*Guthrie Smith—W. Campbell.*

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White v. Briggs.

Copyright—Advertising pamphlet—Drawings.—The manufacturer of a certain kind of cement for increasing the strength of walls and rendering them damp-proof, issued a pamphlet of twelve pages by way of advertisement, in which were set forth the virtues of his cement, the different kinds of construction to which it was applicable, and the method of applying it. This pamphlet, which was registered under the Copyright Act (5 and 6 Vict. c. 45), contained a drawing of a double brick wall, consisting of two single brick walls with a small space between them, with an iron tray inclined on the top of one of the walls to guide the cement into the cavity between the two.

Another manufacturer issued a single leaflet setting forth the virtues of his cement for increasing the strength of walls and rendering them damp-proof. He mentioned several kinds of construction to which it was applicable, which had been mentioned by the other manufacturer, and to illustrate the method of application he gave a drawing of a brick wall at the same angle of perspective, with the same number of courses of bricks, and with a tray inclined on its top at the same angle and with the same supports as in the other person's drawing.

The former manufacturer having brought an action of interdict on the ground of infringement of his copyright in the pamphlet, *held* that the nature and extent of the similarity between the text and the illustration of the two advertisements were not such as to constitute any infringement of copyright.

2D DIVISION. Sheriff of Forfarshire. J.

WILLIAM WHITE, Great Western Works, Abergavenny, who held a patent for "An improved method or manner of building walls so as to render them damp-proof and to increase their strength," issued as an advertisement a pamphlet consisting of twelve pages of descriptive matter and laudation of the method said to have been invented by him, and twenty-eight pages of testimonials. This pamphlet was registered under the Copyright Act (5 and 6 Vict. c. 45). He titled his pamphlet "White's Hygeian Rock Building Composition, rendering walls damp-proof, increasing the strength of walls, reducing the cost of walls." He

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stated that his composition "fulfils three of the greatest desiderata in building walls, viz., damp-proofness, strength, and economy. . . . For the walls of large reservoirs, swimming-baths, gas-holder tanks, sea-walls, basement and cellar walls, damp courses, and similar constructions, . . . a wall constructed with this composition is unrivalled. . . . A wall built two half bricks on the flat is much stronger then an eighteen inch wall built in the ordinary way. . . . By its use great economy can be effected. . . . A cwt. will fill in about 2½ yards superficial, half inch thick."

White gave several sketches in his pamphlet, among them one of a "cavity wall," *i.e.*, a double wall with a narrow cavity between the two brick sides, into which the cement was to be poured. The drawing shewed one side with four courses of bricks, the other side a course higher, the cavity between the two sides and a tray inclined or tilted towards the cavity to guide the liquid cement into it. This description was appended to the drawing, viz., "in pouring the composition into the cavity it is of great advantage to use a small chair, constructed of sheet iron, to lead the composition into the cavity."

William Briggs, Arbroath, a rival manufacturer of cement, issued an advertisement on a single sheet, with the heading,—"Healthy Houses—Damp-proof Building Rock Composition." The leaflet set forth as regarded the composition,—"One cwt. fills in about 2½ superficial yards at half-inch thick. It renders brick walls, &c. perfectly damp-proof, and greatly increases their strength. So much is this the case that a wall built two half-bricks on the flat, with Tenax" (the composition) "run in is much stronger than an 18-inch wall built in the usual way, making its use very economical . . . It is specially suited for cellar and basement walls, damp courses, reservoirs, tanks, swimming-baths, &c." At the top of the leaflet was a drawing of a brick wall at the same angle of perspective as the drawing in White's pamphlet, shewing, like it, a double wall with four courses of bricks on one side, and five on the other, with a slit between for the insertion of cement, and a tray tilted towards the slit at the same angle as in White's drawing, and supported as in it by two wedges. Appended to this drawing was "The above illustration requires no explanation except that the arrangement to lead the composition into the cavity of the wall is a simple construction of light sheet iron."

White raised an action against Briggs to interdict him from reprinting and publishing and circulating his pamphlet or portions thereof, or colourable imitations thereof. He pleaded his copyright.

The defender denied that he had copied the pursuer's pamphlet, and pleaded;—(2) The pursuer having no valid copyright in the series of pamphlets founded on, the action falls to be dismissed. (3) Assuming the pursuer to have a copyright in the pamphlets referred to, the defender not having infringed same is entitled to be assoilzied.

In the course of a proof which was led the defender deponed,—"I am not prepared to say that the design on my leaflet was not made by taking the design of the 'chair' at the bottom of one page of the pursuer's pamphlet and putting it on another design in the middle of the same page. There is a phrase on page 7 of the pursuer's pamphlet ("a wall built two half bricks," &c.), identical with the phrase occurring in the first red paragraph in my leaflet. It is the same, with the exception that my trade-mark (Tenax) is introduced. I am not prepared to say that the phrase in my leaflet was not taken from the pursuer's pamphlet. My son wrote the words in my leaflet. I use the same enumeration of objects for which my patent is applied as the pursuer does. It is impossible to do otherwise."

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The Sheriff-substitute (Robertson), on 22d July 1890, found in fact "That the pursuer has patented an invention which claims to be original, and by which brick walls are consolidated and rendered damp-proof: That, with a view to introduce and advertise his invention, the pursuer has printed and circulated the pamphlet, piracy of which is complained of: That this pamphlet is of no literary value or merit apart from the invention which it advertises: That the defender also claims to have invented a similar process, and has circulated the notices complained of with a view to introduce and advertise his process: Finds, in fact and law, that in so doing the defender has not infringed any copyright in the pursuer's pamphlet: Therefore refuses the prayer of the petition, under reservation of the pursuer's right to proceed against the defender for an infringement of patent, by injunction, interdict, or otherwise, as he may be advised."*

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* "NOTE.— . . . I have no doubt a pamphlet may be the subject of copyright. The term 'book,' used in the Act, includes 'catalogues, tracts, abridgments, digests, expensive designs, and the like, so long as these claim to be original, and to be the product of mental effort apart from mere advertisement.'

"In the case of *Hotten* v. *Arthur*, 1863, 1 H. and M. 603, a bookseller's catalogue was protected by the Court because short anecdotes or descriptions of the books were appended to the catalogues. As V.-C. Page Wood remarked, these were the product of mental exertion, and the publisher had a right of property in them apart from the books which they described. In the case of *Macfarlane*, 10 R. 801, a trade book of designs was made the subject of protection, and the Court allowed a proof of the piracy, the designs being very costly and having been all made from original castings or patterns in the possession of the publisher. In the same way a cemetery stone mason who published a book of monumental designs taken from tombstones was held to be entitled to protection. But an ordinary advertisement which has no value or use except to make known the kind of business of the advertiser is not within the scope of the copyright law—Copinger, page 97. Perhaps the case of *Cobbett* v. *Woodward*, 1872, L. R., 14 Eq. 407, best illustrates the principles of copyright law. Lord Romilly says, 'Wherever letterpress bears the trace of original composition it is entitled to protection, but not where it simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar things.'

"In short, unless the pursuer's pamphlet has some value apart from its use as a mere advertising medium, I do not think it can fairly come within the scope of copyright protection. I have carefully read the pursuer's pamphlet. It may be described as a trade circular or intimation, partaking largely of the nature of an advertisement, and it explains a patent invention by which brick walls are consolidated and rendered damp-proof. This is done by pouring a cement between two brick walls built parallel to and within an inch of each other, and several drawings of walls illustrate the *modus operandi* of the invention. There is no literary merit or value in the pamphlet apart from the invention. And the drawings are only original in so far as they illustrate the patent, being merely figures of brick walls drawn in perspective. In the absence of all literary effort, whether poetic, dramatic, historical, or inventive, there is really nothing to steal or pirate except the idea of the patent itself. There are no smart pictures or *jeux d'esprit*; nothing which corresponds to the jocular and artistic originalities connected with Pears' Soap, for example, or to the playful allusion to Darkest Africa, which promotes the sale of Nubian Blacking. These are clever designs, combined with witty ideas, which have cost some thought and trouble apart from soap and blacking. The young gentleman who 'won't be happy till he gets it,' and the young lady who was 'washed ashore' by soap, are amusing trade designs, which I can quite suppose no one can appropriate or make use of in selling

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The pursuer appealed to the Court of Session, and argued;—This was not a case of innocent coincidence, but of wilful imitation, and as such should be interdicted.[1] The three topics for consideration by the Court were (1) the quantity taken,[2] (2) the collocation of the words taken, and (3) the purpose for which they were taken. Thus one publishing a cookery book would not infringe the copyright of one who had written a book of travels in China by quoting a description of some Chinese dish he had seen prepared by the natives.[3] The three elements were all present here to prove an intention of piracy. The criterion taken by the Sheriff, viz., "literary merit," was no criterion at all. A bad book was protected as well as a good book. A mere advertisement, no literary

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another soap. But in the present case there is nothing of that sort, and I have great doubts whether the Copyright Act applies. But even if it does, and even if the pamphlet is entitled to protection, has the defender pirated it? Assuming that he has discovered a cement also, perhaps a cheaper and better one, how is he to describe it and the method of using it except by using English words and terms which are necessarily similar to those used by the pursuer? I quote, for example, the following line of the pursuer's pamphlet: 'A cwt. will fill in about 2½ yards superficial, half-inch thick.' The pursuer complains that the defender says exactly the same of his cement. Now, unless the pursuer is to be the only person in the world who is to be allowed to deal with a hydraulic mixture of this particular consistency and specific gravity, I fail to see any harm in the defender saying that his cement will cover a certain superficial area also; and if the pursuer is to be the only person in the world entitled to use this cement, then he must proceed against the defender for infringing his patent, not for pirating his pamphlet. The pursuer also complains that the defender uses his cement on the same subjects as are detailed in the pamphlet, such as 'reservoirs,' 'baths,' 'tanks,' 'basement walls,' and 'damp courses.' Surely the pursuer has no copyright in printing these words. In the same way I regard the illustrations. These are merely figures of brick walls. The pursuer complains that the defender's figure of a brick wall has the same number of bricks in it, and is drawn at the same angle of perspective as his own. But these figures are nothing in themselves, except as illustrating the invention. I fancy anyone may draw a figure of a brick wall, even at the same angle as the pursuer has done, and with the same number of bricks in it. But in doing so, if he illustrates as his own a patented idea of another man's, then an action for infringement of patent will lie against him; but not surely one for infringement of copyright in a brick wall at a certain angle, and with so many bricks in it. So that, in regard to the line above quoted and the figure of the brick wall, in my opinion the pursuer might just as well claim copyright in the multiplication table or in the figure of a square.

"I think the pursuer has mistaken his remedy. He ought to proceed against the defender for infringement of the patent, as threatened by his solicitor in May 1889. Whether he will succeed or not I cannot say; but according to Stubbs' Directory for the United Kingdom I see there are upwards of fifty makers of cements in London, and sixty more in the provinces, so that the pursuer may have some trouble.

"I cannot better sum up this case than in the words of Lord Selborne, in *Singer Manufacturing Company* v. *Loog*, 1882, L. R., 8 App. Cases, 15. He says, 'If the defender has a right to make and sell articles similar to the pursuer's he has a right to say so, and to employ the terminology common in his trade, if he does this in a fair, distinct, and unequivocal way.'"

[1] Macfarlane & Co. v. Oak Foundry Co., March 16, 1883, 10 R. 801 (Book of Designs for Iron Castings).

[2] Copinger, p. 187, and cases cited; Bradbury v. Hotten, 1872, L. R., 8 Ex. 1 (Pictures from *Punch*).

[3] Per C. B. Kelly in Bradbury v. Hotten.

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work at all, was protected;[1] so was a directory,[2] or a publication of the bill of entry of the custom-house.[3]

Argued for the defender;—In deciding questions of this sort the Court must "look to the nature and objects of the selection made, the quantity and value of the material used, and the degree to which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work."[4] One author was entitled to use the work of another, unless he thereby did injury to the original author in respect of his work.[5] Tried by that standard the pursuer here could shew no injury done to him. But beyond that there had been no piracy. Persons having a common idea to express must express it in words very much alike.

LORD JUSTICE-CLERK.—As this matter is presented to us, no case is made on behalf of the complainer that the respondent in the work he is doing, or in the way in which he is doing it, is infringing any right of his. The complainer and the respondent both have a mode of building walls by which, as they say, they produce better walls.

The only question we have to consider is whether in the advertisement or leaflet issued by the respondent he has infringed any right of copyright in the complainer's pamphlet.

The case for the complainer is that there has been an improper appropriation of sentences used by White in his pamphlet. I have looked with care at these sentences, and I am satisfied that there is nothing in the advertisement which is objectionable on that ground. The purpose they both have in view makes it necessary that the same language—common language with no peculiarities about it—should be used. There is nothing of the nature of an infringement of copyright in anything that is said. The use by the respondent of such ordinary terms as "damp-proof" to express the quality of his productions, or of "swimming baths," "reservoirs," or "tanks," to describe the kind of things that will be improved by the adoption of his method of construction, cannot give rise to an interdict on the footing of an infringement of copyright having been committed.

But then there is a drawing in Briggs' leaflet. There are two things he wishes to represent in that drawing,—the first is that in building a wall under his process you are to have two walls of the thickness of a single brick with a slit between them for the insertion of cement; the second is a tray which is to guide the cement into the slit. Both White and Briggs give directions how the cement is to be used. It cannot be said that Briggs is not entitled to use that mode. If he is to shew at all how it is to be used, I cannot see how it can be shewn otherwise than he has shewn it. The complainer's drawings represents nothing that is at all difficult to copy. In such cases, as was admitted from the bar, the whole question is one of degree, and when it became necessary to appeal to the case of *Kelly* as the nearest illustration his counsel could get of the law having interfered to prevent the adoption by one person of ordinary material, which anyone with time and trouble could collect or make as well as any other,

[1] Maple & Co. v. Junior Army and Navy Stores, 1882, L. R., 21 Ch. Div. 369 (Furniture Catalogue).

[2] Kelly v. Morris, 1866, L. R., 1 Eq. 697; Morris v. Ashbee, 1868, L. R., 7 Eq. 34.

[3] Maclean v. Moody, June 23, 1858, 20 D. 1154, 30 Scot. Jur. 693.

[4] Per Mr Justice Story quoted in Scott v. Stanford, 1867, L. R., 3 Eq. 718.

[5] Bradbury v. Hotten, *ut cit.*; Alexander v. Mackenzie, Feb. 27, 1847, 9 D. 748, 19 Scot. Jur. 341 (Analysis of Acts of Parliament).

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it was so evident that the copying here, if any took place at all, was the merest trifle, that it was plain that the complainer's case was hopeless.

LORD YOUNG.—I am of the same opinion. There is here no question of patent, neither is there any case of a colourable imitation of the complainer's commodity, or of anything done to palm off the respondent's article as the complainer's article.

Therefore, adopting the language of Lord Selborne cited by the Sheriff-substitute, I observe that the respondent had a right to make and sell this article.

There is only one way of using this article—this cement. But it is said that, in informing his customers how it is to be used, the defender has employed the same language as the complainer has used to instruct his customers. In the use of that language I am clearly of opinion that there was no infringement of copyright.

But it is also said that the defender has copied a drawing of a brick wall which the pursuer had used to illustrate his meaning. There is no copyright in the drawing of a brick wall. There is nothing original in the drawing of a brick wall used to illustrate the application of this cement, any more than there would be in the drawing of a hat, or a snuff-box, or a tobacco-pipe, or an umbrella, used for the purpose of pointing out how a band is to be put on the hat, or something done to the box, the pipe, or the umbrella. There is no copyright in that. There is no copyright in a bit of brick wall. Copyright is foreign to the case.

LORD RUTHERFURD CLARK.—I am content to dispose of this case on the facts, and to hold that in fact there has been no invasion of the pursuer's rights.

LORD TRAYNER.—I am of the same opinion as your Lordships. The defender was entitled to describe in the language he thought best suited for his purpose this cement and the mode of applying it, and it is out of the question to hold that, because he has used the same language as another maker of cement, who is using it for the same purposes, he has thereby infringed that latter's copyright.

As regards the illustration, I think that there is no such adoption, in quantity or in quality, of the complainer's work as to justify an interdict. The question appears to me to be *de minimis*.

THE COURT found "in fact in terms of the Sheriff-substitute's interlocutor," and refused the appeal.

WEBSTER, WILL, & RITCHIE, S.S.C.—DUNCAN SMITH & MACLAREN, S.S.C.—Agents.

No. 50.
Dec. 11, 1890.
Willison.

MRS ALICE MITCHELL GRIEVE OR WILLISON AND OTHERS, Petitioners. —*Kemp.*

Judicial factor—Factor loco tutoris—Appointment of Mother—Guardianship of Infants Act, 1886 (*Act* 49 *and* 50 *Vict. cap.* 27), *secs.* 2 *and* 8.—The 2d section of the Guardianship of Infants Act, 1886, enacts that "on the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father." Section 8 provides that "in the application of this Act to Scotland the word guardian shall mean tutor, and the word infant shall mean pupil."

Held where a father had died without nominating tutors for his pupil chil-

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dren, that it was not competent to appoint the mother as factor loco tutoris to them, as she was already by operation of the above enactment their tutor.

DUNCAN CAMPBELL WILLISON died on 10th December 1887, intestate, and without having nominated tutors and curators to his children. He was survived by his wife and by five children, three of whom were in minority and two in pupillarity.

A petition was presented by Mrs Willison, with concurrence of her three minor children, to have herself appointed curator bonis to the three minor petitioners, and factor loco tutoris to the two pupil children.

The petitioners averred that the five children were entitled to succeed to certain shares of their father's estate, which consisted partly of heritage and partly of moveables. As their interests were alike it was expedient that the curator bonis appointed to the minors should also undertake the office of factor loco tutoris to the pupils.

After the petition was presented, Mrs Willison lodged a minute in which she stated that she did not desire the office of guardian to her children conferred upon her by the Act.

On 22d November 1890 the Lord Ordinary reported the motion for the appointment under the petition to the First Division.*

LORD PRESIDENT.—I think the difficulty suggested to the Lord Ordinary has arisen under section 2 of the Guardianship of Infants Act, 1886, which provides

* "NOTE.—The petitioner, Mrs Willison, and her three minor daughters, concur in asking that Mrs Willison (who is a widow) should be appointed curator bonis to the three minor petitioners, and factor loco tutoris to her two younger daughters, who are in pupillarity.

"The petition does not refer to the Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 27), but I called the attention of the petitioners to sections 2 and 8 of that statute, which seem to me to raise a serious obstacle to the appointment of Mrs Willison as factor loco tutoris to her pupil daughters. The statute, in very absolute terms, makes her their tutor, and I did not see how I could appoint her to be factor loco tutoris, which presupposes that there is no tutor. The petitioner, Mrs Willison, then lodged a minute, stating that she did not desire the office of guardian to her pupil children conferred upon her by the Act. It seems to me that this does not remove the difficulty, seeing that she is willing to act in the substantially identical capacity of factor loco tutoris. Had she absolutely declined to act as guardian in any form, it would, I think, have been competent, under section 13 of the Statute (taken in connection with section 12 of the same Act, and section 31 of the Pupils Protection Act), to appoint some other person as factor loco tutoris, and I have recently made such an appointment in another case, where the interest of the pupils seemed to require it. But I greatly doubt the competency of appointing a factor loco tutoris where there is, in form, no resignation of the office of tutor, and in reality no unwillingness to act.

"It was pressed upon me by counsel for the petitioner that there was great convenience in the course proposed, inasmuch as, if appointed factor loco tutoris, Mrs Willison would, under section 11 of the Judicial Factors (Scotland) Act, 1889 (52 and 53 Vict. c. 39), become, *ipso facto*, curator bonis to the children when they attained minority, instead of having to present two applications to the Court for appointment in that capacity. I do not doubt that there would thereby be some saving of expense, but considerations of that kind will not justify the appointment if my view of the statute be correct. If, therefore, I had acted on my own judgment, I would have appointed Mrs Willison curator bonis to the minor children, and *quoad ultra* refused the prayer of the petition. But as the point is a new one, I have thought it best to report it. The peremptory character of a mother's appointment under the statute is dwelt on in the case of *Maquay* v. *Campbell*, June 27, 1888, 15 R. 784."

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that "on the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone, where no guardian has been appointed by the father, or jointly with any guardian appointed by the father; where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother."

As regards the last part of the section, we have nothing to do with it here, because there is no application for the appointment of a guardian or guardians to act jointly with the mother. But the mother being in law guardian of these children, or tutor, as the Act is explained by the 8th section, she becomes such tutor or guardian by operation of the statute. She requires no service or appointment, but only the application of the Act itself. It may be that she is entitled to renounce her office. She may be placed in such circumstances as make it undesirable for the interest of her children that she should act as their guardian, but, until she renounces the office, no one can be appointed as factor loco tutoris. She is by statute law the guardian of her children.

There is a minute in process by which Mrs Willison states that she did not desire the office of guardian to her pupil children conferred upon her by the Act. Now, if by that she means to resign the office, and decline to act, it may be open to the Court to appoint a factor loco tutoris—that is to say, a factor in her place—but as to appointing the person who by law is entitled to be guardian to the office of factor loco tutoris—that is to say, to the office of factor coming in place of guardian—the law cannot do it. The office of guardian or tutor is hers absolutely. If she desires to act, let her act; if she desires to renounce the office, let her apply to someone else to act as factor loco tutoris. There is no other alternative open.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Having considered the petition on the report of Lord Stormonth Darling, and heard counsel for the petitioner, remit to his Lordship to refuse the petition in so far as it prays for the appointment of Mrs Willison as factor loco tutoris to her pupil children: *Quoad ultra* remit to his Lordship to proceed."

MACPHERSON & MACKAY, W.S., Agents.

No. 51.
Dec. 12, 1890.
Forbes v. M'Condach's Trustees.

JOHN FORBES AND OTHERS, Pursuers (Appellants).—*Salvesen.*
DAVID MITCHELL AND ANOTHER (M'Condach's Trustees), Defenders (Respondents).—*M'Lennan.*

Succession—Vesting—Trust—Direction to convey to beneficiary on occurrence of a certain event.—A testator directed his trustees to invest in their names one-third of the residue of his estate and to pay the interest to his daughter, A B, during her life for her aliment and support. The deed then proceeded, "Upon the death of the said A B, I appoint the said third part of said residue" to be divided among A B's children, declaring that it should be payable to each as they respectively attained majority. In the event of a child dying before receiving payment of his or her share leaving lawful children, such children were to succeed to the share, and if a child should die before receiving his or

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her share but leaving no lawful children, such child's share was to be equally divided among the surviving children and the lawful children of other predeceasing children.

After all the children of the daughter had attained majority, their mother desired to renounce her liferent, and they with her consent sought declarator that the right to the one-third of residue had vested in them.

Held that no right was conferred upon the children until the death of their mother.

2D DIVISION. I.

HARRY M'CONDACH senior died in 1859, leaving a trust-disposition and settlement by which he conveyed his whole estate, heritable and moveable, to trustees for certain purposes. After providing for certain legacies, the testator directed the trustees to divide the residue into three equal parts. With regard to one of these parts he appointed the trustees to invest it in their names, "and the interest that may arise upon the said third part of said residue I hereby appoint from time to time, as the same shall fall due, to be paid by my said trustees to my daughter, Mrs Isobel M'Condach or Forbes, during her life, for her aliment and support, but that only in such portions at one time as my said trustees shall see proper; declaring further, that if my said trustees shall think that my said daughter's circumstances so require, but only if they shall see proper, it shall be in the power of my said trustees to make advances to my said daughter out of the principal itself of said third part of said residue for her further aliment and support, to an extent not exceeding £5 in any one year, nor £50 in whole." The settlement then provided,—"Upon the death of the said Mrs Isobel M'Condach or Forbes, I appoint the said *third* part of said residue so to be invested in the names of my said trustees, *or* the balance thereof, to be uplifted and equally divided, at the time *after* specified, among the children of her, the said Mrs Isobel M'Condach or Forbes, born or to be born of her present or any future marriage, equally between them, share and share alike; declaring that the said share falling to each of my said daughter's children shall so be payable by my said trustees or their aforesaids, to each of the said children as they respectively attain majority; . . . declaring that if all my said daughter's said children shall have attained majority before my said daughter's death, then that the said principal of said third part, or the balance thereof, shall be uplifted and divided among the said children as aforesaid as soon after my said daughter's death as my trustees or their aforesaids can conveniently uplift and divide the same; . . . declaring further that if any of my daughter's said children shall die before receiving payment of his or her share respectively, leaving lawful children, then that such children, equally between them, shall be entitled to their deceased parent's share; but declaring that if any of my said daughter's children shall die before receiving his or her share, leaving no lawful children, then that the share of such child or children so dying shall be equally divisible among such child or children's surviving brothers and sisters, and the lawful children as aforesaid of any of them that may have predeceased leaving lawful children, but in room only *per stirpem* of their deceased parents."

The children of Mrs Forbes had all reached majority before June 1890.

In June 1890, John Forbes and others, the whole children of Mrs Forbes, with consent and concurrence of Mrs Forbes, raised against M'Condach's trustees, in the Sheriff Court at Aberdeen, an action for declarator that they had full and absolute right and title to the sum of £148, 6s. 8d., being the balance of one-third of the residue, and for decree for payment thereof.

The pursuers stated that they had acquired a vested right to the fee, that their mother, the liferentrix, was aged and in ill-health, that the

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income of the fund was insufficient for her maintenance, that they had been contributing to her maintenance, and that she was anxious to accelerate the period of division, and for that purpose had discharged her liferent.

The pursuers pleaded;—(1) The fee of the sum sued for having vested in the pursuers, and their mother having renounced and discharged her right of liferent in the same, the defenders are bound to denude themselves of the trust, and to make payment as prayed for, with costs.

The trustees defended the action, and pleaded, *inter alia*;—(1) The right to the said share of said residue liferented by the said Mrs Forbes as aforesaid does not vest under the said settlement till the date of her death.

They also contended that the liferent was alimentary, and could not be renounced.

The Sheriff-substitute (Grierson), on 24th July 1890, sustained the defenders' first plea in law, and assoilzied them.

The pursuers appealed to the Court of Session.

Argued for the pursuers;—The pursuers had a vested right in the trust-funds, the payment only being postponed. The only object of the postponement was the liferent. All the declarations of the deed simply followed out the legal rules of succession. At all events, the fund had vested in the pursuers as a class.[1]

Argued for the defenders;—There was no vesting till the death of Mrs Forbes, because the only right of the pursuers was to an equal division of the trust funds upon the death of their mother. No right was bestowed on them unless they survived that period, and there was a conditional institution of the children and survivors. It followed that the right was not vested while she lived.[2]

At advising,—

Lord Trayner.—The pursuers have brought this action to secure payment from the defenders of the sum remaining in their hands as the balance of the one-third of the residue of his estate which the late Mr M'Condach by his trust-settlement destined to his daughter Mrs Forbes, the pursuers' mother. By that settlement Mr M'Condach directed his trustees to invest in their own names one-third of the residue of his estate, and to pay the interest or produce thereof to Mrs Forbes "during her life, for her aliment and support," and "upon the death" of Mrs Forbes he directed the residue so invested to be uplifted and equally divided among her children, the children's shares being payable to them "as they respectively attain majority." There is also a provision to the effect that the issue of any child predeceasing "before receiving payment of his or her share" shall succeed to the parent's share, and that the share of a child predeceasing without issue shall be divided among that child's surviving brothers and sisters. The pursuers have all attained majority, and they contend that they are entitled to payment of the sum now in the defenders' hands, as their mother, whose liferent interest alone prevents the division of the fund, is willing to renounce her liferent; and Mrs Forbes is a party to this action and concurs in the pursuers' demand.

The trustees object to pay over the trust funds in their hands to the pursuers

[1] *Authorities.*—M'Alpines, March 20, 1883, 10 R. 837; Marshall v. King, Oct. 30, 1888, 16 R. 40; Macdougall v. M'Farlane's Trustees, May 16, 1890, 17 R. 761; Hay's Trustees v. Hay, June 19, 1890, 17 R. 961.

[2] Bryson's Trustees v. Clark, Nov. 26, 1880, 8 R. 142; Muirhead v. Muirhead, May 12, 1890, 17 R. (H. L.) 45.

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on two grounds,—(first) that they are not entitled to part with them, because the liferent is alimentary and cannot be renounced; and (secondly) because no right to the liferented fund has vested in the pursuers. I had much sympathy with the pursuers' case on reading the record and the settlement. But I have come to the conclusion that the pursuers are not entitled to the decree which they seek. I do not propose to deal with the first contention of the trustees—that the liferent is alimentary and cannot be renounced. But I think that on a sound construction of the testator's settlement no right vests in the pursuers till the death of Mrs Forbes. That appears to me to follow conclusively from the application of the decision pronounced in the case of *Bryson's Trustees* v. *Clark*, 8 R. 142. No right is by Mr M'Condach's settlement conferred upon the pursuers until the happening of a certain event, viz., the death of Mrs Forbes, their mother. Now, from the opinion of the Lord President in that case, it is clear that when no gift is conferred in favour of a person except upon the occurrence of a certain event, and not sooner, then no right vests in that person until that event happens. Till it does happen, the condition on which alone he is to take a right is not fulfilled. If no right has vested in the pursuers, the trustees cannot safely part with the trust funds to them, because having no vested right they cannot give the defenders a valid or effectual discharge.

On this ground, I am, although with some regret, of opinion that the interlocutor of the Sheriff-substitute ought to be affirmed.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THE COURT dismissed the appeal.

JOHN RHIND, S.S.C.—AULD & MACDONALD, W.S.—Agents.

No. 52.

Dec. 12, 1890.*
Wilson v. Scott.

MRS LILIAS WILSON, Complainer.—*M'Lennan.*
WILLIAM SCOTT, Respondent (Reclaimer).—*Watt.*

Jurisdiction—Suspension—Exclusion of review in small-debt action—Small-Debt Act, 1837 (1 *Vict. cap.* 41), *sec.* 30.—A summons in the Small-Debt Court set forth that the defender was owing to the pursuer £12, as per note of claim. The note of claim bore,—"To half year's rent due by the defender, payable in advance . . . £12." The Sheriff gave decree for £12. The pursuer's agent subsequently, in a letter to the defender's agent, admitted that the £12 was the year's rent, but he refused to depart from the decree, as the whole year's rent was due, and executed a poinding upon the decree.

In a suspension, *held* that it was incompetent to review the Sheriff's judgment on the merits, and that nothing had occurred since the decree to warrant the Court to suspend diligence.

Bill-Chamber.
1ST DIVISION.
Lord Lee.
C.

WILLIAM SCOTT, commission-agent, Lauder, raised an action in the Small-Debt Court of Berwickshire against Mrs Lilias Wilson, residing in Lauder, setting forth that the defender was owing to the pursuer £12 as per note of claim.

The note of claim bore,—"June 4, 1890.—To half year's rent due by the defender, payable in advance, for current half year of house and small garden plot in Lauder belonging to the pursuer, and let under a verbal lease for one year from Whitsunday 1890 . . . £12."

On 26th June 1890 the Sheriff granted decree for £12, and 15s. 7d. of expenses.

* Decided Nov. 21, 1890.

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On 28th June 1890 Messrs Romanes & Rankin, the defender's agents, wrote to Mr John Mackenzie, the pursuer's agent,—"Pray say if, on payment of the sum demanded, Mrs Wilson's right to resume possession of the premises will be conceded without any question, and if the year's rent will be discharged. £12 was the rent for the year, and not the half year, as set forth in the summons."

On 30th June Mr Mackenzie wrote in reply,—"Dear Sirs,—I am in receipt of your letter of 28th inst., and regret that I cannot enter into any stipulations under which your client, Mrs Wilson, should pay the sum found due, and constituted by a decree of Court. Any question relative to possession is an entirely different matter, and cannot be mixed up in any way with the payment of the sum due under the decree. I admit that the rent of £12 is for one year, and not for half a year, and had I noticed it in time, would have amended the summons. It may, however, be done yet. I shall delay extracting the decree until Wednesday, in order to give you time to remit."

After further correspondence an arrestment and a poinding were executed upon the decree.

Mrs Wilson thereupon brought the present note of suspension and interdict praying for suspension of the decree, recall of arrestments, and for interdict against the sale of the poinded goods.

The complainer founded on the letter of 30th June above quoted, and pleaded;—(1) The decree being for £12, while the half year's rent has, since the decree has been pronounced, been admitted by the respondent to be £6 only, ought to be suspended with expenses, and the arrestment thereunder ought to be recalled, and the sale of the complainer's effects interdicted.

The respondent objected to the competency of the suspension on the ground that it was excluded by sec. 30 of the Small-Debt Act, 1 Vict. cap. 41.

It was not disputed that the year's rent of £12 was due, being payable in advance.

The Lord Ordinary on the Bills (Lee), on 4th September 1890, passed the note.

The respondent reclaimed.[1]

At advising,—

LORD PRESIDENT.—This is a process of suspension and interdict, in which the complainer asks the Court to suspend a decree pronounced by the Sheriff of Roxburgh, Berwick, and Selkirk, and the whole grounds and warrant thereof, to recall certain arrestments, and to interdict a sale of the complainer's effects, which have been poinded in execution of that decree.

Now, the answer made to this note is, that the process is incompetent, because the decree which is sought to be suspended is a decree pronounced in the Small-Debt Court in terms of the Small-Debt Act (1 Vict. c. 41), and that the jurisdiction of this Court is excluded. An attempt was made to distinguish between the suspension of the decree itself and the diligence following upon it, but it will be seen at once by reference to the Small-Debt Act that there is no room

[1] *Authorities cited by the Respondent.*—Graham v. Mackay, Feb. 25, 1845, 7 D. 515, 17 Scot. Jur. 240; Turnbull v. Russell, Nov. 15, 1851, 14 D. 45, 24 Scot. Jur. 9; Samuel v. Mackenzie & Bell, Nov. 29, 1876, 4 R. 187; Lennon v. Tully, July 12, 1879, 6 R. 1253; Robertson v. Pringle, Feb. 5, 1887, 14 R. 474.

Authority cited by the Complainer.—Wilson v. Stronach, Jan. 9, 1862, 24 D. 271, 34 Scot. Jur. 128.

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for such a distinction, because the 30th section provides that "no decree given by any Sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review, or stay of execution, other than that provided by this Act"—that is to say, by the immediately following section (sec. 31), which provides for an appeal to the Court of Justiciary on certain specified grounds.

The construction of these sections of the statute has been made the subject of several judgments of this Court, the first of which is the case of *Graham* v. *Mackay*, 7 D. 515. That was a very strong case for sustaining the jurisdiction of this Court, for there the complaint was that the Sheriff had no jurisdiction over the defender, and could not pronounce a decree against him. If any ground could have been found as an exception to the general rule laid down by the statute, that would most readily have suggested itself, because if there is no jurisdiction to pronounce a decree, then there is no decree. The Court, however, disregarded that consideration, and held that everything which calls itself and bears to be a small-debt decree must receive effect unless set aside in the manner prescribed by the 31st section of the Act.

The respondent here got a decree for £12, but it is said that by mistake the £12 was described as rent for half a year, whereas it was a full year's rent. I am quite willing, if necessary, to assume that the complainer—the defender in the Small-Debt Court—did not owe the respondent any money at all, but even then I think we cannot get the better of the 30th section of the Act, because this is in form a small-debt decree, and therefore we must give effect to the plain language of the 30th section.

It is quite true that subsequent to the case of *Graham* v. *Mackay* certain learned Judges in the Outer-House have departed from the rule so plainly laid down there, misled, I think, by a phantom light which calls itself "substantial justice." But these departures have been corrected by appeal to the Inner-House. "Substantial justice" in the abstract may be the *maximum bonum*, and in the smooth current of the administration of justice, where nothing intervenes to prevent it, there is no reason why "substantial justice" should not always be done. But there are many inconveniences and considerations of public policy that sometimes intervene, and are recognised by the Legislature as good grounds for refusing effect to the plea of "substantial justice" in any particular class of cases and a Court of law is bound to subordinate the wisdom of the philosopher and the scientific jurist to the wisdom of the Legislature. We have occasion sometimes to lament that the wisdom of the Legislature is expressed in terms somewhat approaching to the ambiguity of the Delphic Oracle, but if the Legislature speaks distinctly and without ambiguity, then it is the sole guide for a Court of law. So, in the present case, I apprehend that "substantial justice" coming into conflict with a precise and unambiguous enactment is naught, and must go to the wall. The wisdom of the Legislature must prevail over everything.

This doctrine, and the particular rule established in the case of *Graham* v. *Mackay*, have been repeated in several later cases, which it is unnecessary for me to go over, but they repeat in almost so many words the rule laid down in the case of *Graham* v. *Mackay*.

It is necessary, perhaps, to add, in conclusion, that there may be facts emerging subsequent to the date of the decree which will prevent the holder of the decree putting it in force. If the defender can shew that his debt has since been paid

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Dec. 13, 1890. Hutchison v. Hutchison.

craved the Court to give her the custody, or failing that to make provi her having full access to the child. The Court ordered her to disclose dence. Thereafter, the father, by aid of the warrant, obtained restoratio child.

The Court, in respect that the custody of the child had been reco the petitioner, found it unnecessary to pronounce any further order, *missed* the petition.

The petitioner was found entitled to expenses.

1st Division. C.

In a petition presented by John Paterson Hutchison, photogra Penicuik, the petitioner stated that on 18th January 1888 his w Agnes Forrest Stevenson or Hutchison, left his house, leaving beh the two children of the marriage, Margaret Forrest, who was si old, and a boy aged three years; that his wife had continued t apart from him ever since that date. That on 12th November 1 daughter, while on her way to school, was abducted by a man a women, believed by the petitioner to have been acting on the instr of his wife, and was thereafter taken to Glasgow; and that the pe believed that his wife intended to take the child outwith the juri of the Court.

The prayer of the petition was for intimation and service on t her sister, and two of her brothers, to ordain them to lodge answe upon resuming consideration hereof, with or without answers, to fi the petitioner is entitled to the custody of the child," and to gra rant, &c., the terms of which appear in the interlocutor of 15th No *infra*.

The petitioner cited the cases of *Earl of Buchan* v. *Lady Cardr* 27, 1842, 4 D. 1268, 14 Scot. Jur. 415, and *Leys* v. *Leys*, July 2 13 R. 1223, in support of the form of the prayer for warrant to ta custody the person of the child.

On 15th November 1890, the Court ordered intimation and serv answers in eight days, and granted "warrant to messengers-at-ar other officers of the law to take into their custody the person of t Margaret Forrest Hutchison, daughter of the said John Paterson H son and of the said Agnes Forrest Stevenson or Hutchison, where may be found, and deliver her into the custody of the said John P Hutchison: And authorise and require all Judges Ordinary in S and their procurators-fiscal to grant their aid in the execution warrant, and recommend to all magistrates elsewhere to give t and concurrence in carrying the same into effect: Further, prohi interdict the said Agnes Forrest Stevenson or Hutchison, or anyone on her behalf, and all others, from withdrawing, or attempting t draw, the said Margaret Forrest Hutchison from Scotland."

Mrs Hutchison lodged answers, in which she stated that she h her husband on account of his unkindness and cruelty towards he had repeatedly endeavoured to obtain access to her children. occasions on which access was granted to her, it was only on suc ditions as made it impossible for her to enjoy her children's society petitioner and his sister were endeavouring to alienate the affecti the children from their mother. She admitted having taken aw child Margaret on 12th November from her husband's house. She asked the Court to give her the custody of the children, or failing make provision for her having full and complete access to them denied that she had ever intended to remove the child outwith the diction of the Court, but she did not disclose the place of its reside

On the answers being lodged and the case appearing in Single the petitioner (who denied the allegations of cruelty, &c.) mov

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Hutchison v. Hutchison.

for a peremptory order on the respondent to hand over the child to This motion was refused, and the case was sent to the Summar ut the Court intimated to the respondent's counsel that the respon- ould have to disclose the place of residence of the child. eafter, the petitioner having failed to discover the residence of the nd the respondent having refused to inform him, he presented a the Court seeking to have the respondent ordained to inform him hild's residence, and the Court on 3d December, having considered e and heard counsel for the respondent, ordained the respondent such information within twenty-four hours, with certification. der was followed by the restoration of the child.

he question of access it was argued for the respondent;—Under section of the Guardianship of Infants Act, 1886, it was open to a r a mother living apart from one another at any time to come to rt and ask for an order for the custody of or access to their children. spondent was entitled to have such an order pronounced under the petition.[1]

ed for the petitioner;—This was not an ordinary petition for . The object of the petition really was the undoing of an illegal the respondent, and that object had now been accomplished, as the ad obtained restoration of his child. The petition then fell to be ed, and it was incompetent to consider the question of access, was not raised in the petition. The petitioner had had no oppor- f considering the averments of the respondent, assuming them to ant.

PRESIDENT.—The sole object of this petition was to obtain delivery to er of a child which had been illegally carried away by its mother. l has been attained, and the object of the petition having thus been ished, I think the proceeding is at an end. We cannot do anything terms of the prayer of the petition except find that it is unnecessary to rther order, because the petitioner has obtained delivery of his child. he question of expenses has been disposed of there is nothing more s.

ometimes convenient, especially with a view to save expenses, to regu- matter of possession, custody, or access in a process where the question necessarily arise, but that is a different kind of case from the present, the whole object is to undo an illegal act, and when the illegal act is I do not think we can raise up another question.

uld not save expense if we were to consider the right of the mother to because we must have more information before we can dispose of the . The petitioner has had no opportunity of meeting the averments con- the answers, and must have such an opportunity before we can dispose uestion.

efore think we ought simply to find it unnecessary to pronounce any order, and dismiss the petition.

ADAM.—If this were a proper petition for custody of a child, in the determining which of the spouses had right to the child, it might make nce in the result to be arrived at. That, however, is not the nature of tion. It is true the petition contains a prayer to find the petitioner

[1] Beedie v. Beedie, March 20, 1889, 16 R. 648.

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Hutchison v. Hutchison.

entitled to custody, but that only leads up to the true object of the petitio the prayer is not meant to be a substantive prayer, for the fact is that th was forcibly carried away from the petitioner on 12th November last, an to remedy this wrong that the petition is brought, and for no other p The leading prayer therefore is that the mother, or anyone else who sho found to be withholding the child from the custody of its father, sho ordained to deliver up the child to the petitioner. That is the true na the petition, and I agree with your Lordship that, that object havin attained, we ought simply to dismiss the petition, and find the petitioner e to expenses.

Lord M'Laren.—It is true that under the Guardianship of Infants A provided that, upon the application of the mother, the Court is to mak order as may be fitting regarding the custody of the child and right of ac it. I agree with your Lordship in the view that this does not necessaril our jurisdiction to cases where the petition is in the name of the mothe the contrary, wherever there is a process depending which truly raises th tion of the regulation of the rights of the spouses with reference to the cu custody of the children, an order such as the statute contemplates may be and that may be, as in the case of *Beedie*, in a petition at the instance father for access, or it may be in disposing of an application for separatio aliment. But the present case does not raise any question of the regula the rights of the spouses; it is an application for the purpose of restori right of the husband against an attempt on the part of the wife to depri of it by taking the law into her own hands, and I think if we were to allo process to be converted into an application for access, we should be intro a new form of jurisdiction founded on arrestment.

Lord Kinnear concurred.

Counsel for the petitioner moved that the respondent be found in expenses. Counsel for the respondent stated that the responde no separate estate in the ordinary sense of the word. She was w to support herself, and it was not usual to give the husband ex against his wife in such circumstances. Counsel for the petitioner that his information was that she was earning a livelihood as a grapher.

The Court pronounced this interlocutor:—"Having resume sideration of the petition, with the answers thereto for the r dent, and heard counsel for the parties, in respect that the cu of the child, Margaret Forrest Hutchison, has been recove the petitioner, find it unnecessary to pronounce any further Dismiss the petition, and decern: Find the petitioner entit expenses."

Shiell & Smith, S.S.C.—J. & J. Galletly, S.S.C.—Agents.

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Court for a peremptory order on the respondent to hand over the child to him. This motion was refused, and the case was sent to the Summar Roll, but the Court intimated to the respondent's counsel that the respondent would have to disclose the place of residence of the child.

Thereafter, the petitioner having failed to discover the residence of the child, and the respondent having refused to inform him, he presented a note to the Court seeking to have the respondent ordained to inform him of the child's residence, and the Court on 3d December, having considered the note and heard counsel for the respondent, ordained the respondent to give such information within twenty-four hours, with certification. This order was followed by the restoration of the child.

On the question of access it was argued for the respondent;—Under the 5th section of the Guardianship of Infants Act, 1886, it was open to a father or a mother living apart from one another at any time to come to the Court and ask for an order for the custody of or access to their children. The respondent was entitled to have such an order pronounced under the present petition.[1]

Argued for the petitioner;—This was not an ordinary petition for custody. The object of the petition really was the undoing of an illegal act by the respondent, and that object had now been accomplished, as the father had obtained restoration of his child. The petition then fell to be dismissed, and it was incompetent to consider the question of access, which was not raised in the petition. The petitioner had had no opportunity of considering the averments of the respondent, assuming them to be relevant.

Lord President.—The sole object of this petition was to obtain delivery to the father of a child which had been illegally carried away by its mother. That end has been attained, and the object of the petition having thus been accomplished, I think the proceeding is at an end. We cannot do anything more in terms of the prayer of the petition except find that it is unnecessary to grant further order, because the petitioner has obtained delivery of his child. After the question of expenses has been disposed of there is nothing more before us.

It is sometimes convenient, especially with a view to save expenses, to regulate the matter of possession, custody, or access in a process where the question does not necessarily arise, but that is a different kind of case from the present, because the whole object is to undo an illegal act, and when the illegal act is undone I do not think we can raise up another question.

It would not save expense if we were to consider the right of the mother to access, because we must have more information before we can dispose of the question. The petitioner has had no opportunity of meeting the averments contained in the answers, and must have such an opportunity before we can dispose of the question.

I therefore think we ought simply to find it unnecessary to pronounce any further order, and dismiss the petition.

Lord Adam.—If this were a proper petition for custody of a child, in the case of determining which of the spouses had right to the child, it might make a difference in the result to be arrived at. That, however, is not the nature of the petition. It is true the petition contains a prayer to find the petitioner

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Dec. 13, 1890.
Smith v. Smith's Trustees.

benefit to be placed under the guardianship of his grandmother. further believe and aver that the estate is not sufficient to bear the exp of his board and education at Crieff. The available income, it is beli amounts to about £40. They are satisfied that if he were living wit grandmother, and educated in Glasgow, the expense of his upbringin education could be provided out of the income of the estate, and that an arrangement would be in every way conducive to his interests welfare.

"They have frequently represented their wishes to this effect t trustees. Mr Hamilton is at present in Scotland on sick leave, and believed, intends shortly to return to India. He refuses to accede t petitioners' wishes as to the custody of the child, and the other tr Mr Sutherland, refuses to say what is to be done.

"In these circumstances, the petitioners are under the necessi applying to the Court for authority to remove the pupil from the cu of the said James Wilson, and to find the petitioner Mrs Cath M'Master or Smith entitled to his custody."

The trustees lodged answers. They stated that shortly before his Mr Smith had removed the boy from his grandmother's house, and placed him under the care of Mr Wilson, with whom Mr and Mrs were on intimate terms, and with whose care of the boy he (Mr S had frequently expressed himself highly satisfied. The boy was rec a good education at the Crieff Academy. The cost of his board and ing was about £53 a-year, and his income was about £60 a-year. they had come to no final resolution as to the best mode of expendi boy's means on his behalf, they had deemed it best not, at all eve the meantime, to discontinue the arrangement which his father had and preferred to his son's boarding with his grandmother. The re dents further explained that Alexander Smith, who was the boy's nex agnate and his heir-at-law, was in very infirm health, and was una maintain himself or to be a proper guardian for the boy. The respo further submitted that Mrs Smith was not in law entitled to the cu of the boy, and that no benefit would arise to the latter from being re from his present residence to her care.

The respondents produced letters from Mr Smith, dated 25th 8th June, and 27th July, from which it appeared that he was satisfied with the arrangement and with Mrs Wilson's care of the that the boy's mother had been desirous that the arrangement sho made.

No personal objection to the grandmother or any of the petition point of character was stated in the answers, and it was stated fro bar that none was entertained by the respondents. It appeared tha of the objects which the petitioners desired was that the grandm means might be increased by the board payable for the boy.

Argued for the petitioners;—Considering that the testator had gi express directions as to the boy's custody, and that all his nearest tions concurred in asking the Court's sanction to the proposed ar ment, the prayer of the petition ought to be granted. It was q legitimate consideration that whatever small benefit could be gai the management of his board and education should go to his grandm rather than to a stranger. In any view, the petition should be sist a factor loco tutoris to the boy was appointed.

Argued for the respondents;—The grandmother had no legal whatever to make these demands. It was a matter entirely for the d tion of the Court. The father had approved of the present arrange and, in any view, it was too soon after his death to disturb it.

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ugh a factor loco tutoris were appointed, he would have no title to rfere with the custody of the boy.

ORD PRESIDENT.—The pupil, John M'Gregor Smith, is nine years old. His er died in October of last year, and his mother shortly before that date. At ime of the death of both his parents the boy was boarded with Mr James on at Crieff, and received his education there, and we have evidence before the effect that this arrangement was highly satisfactory to his parents.

he boy had no legal guardian of any kind. No tutor had been nominated m by his father, and from some statements in the papers before us it appears his nearest male agnate will probably never be competent to undertake office. We must therefore deal with the boy as entirely without a legal dian.

ow, the object of this petition is to transfer the custody and upbringing of oy from the hands of Mr Wilson to his grandmother. I do not see that r the grandmother, or, indeed, all the relations of the boy put together, have itle to demand that this should be done, and therefore it is entirely a ques- for the discretion of the Court whether the existing arrangement should be nded, and another arrangement made for the custody and for the education e child.

ow, looking to what were the feelings and opinion of the father and mother ous to their deaths, I am certainly not of opinion that any cause has been n for making the change proposed. On the contrary, I think it would be and inadvisable in the highest degree to interfere with the existing arrange-

being therefore, in my opinion, neither the right of the petitioners nor of ther person to demand the change, I think it inexpedient, in any point ew, that the arrangement should be altered, and therefore this petition must, nk, be refused.

m also very decidedly of opinion that not one penny of the expense of these edings can be allowed to become a burden on the boy's estate, and there- he petition must be refused with expenses.

RD ADAM.—I think this petition should not have been presented. The are that, on the death of his father, the pupil, who is nine years old, was r the care of Mr Wilson, to whom he had been entrusted for his education e father and mother, and it is obvious that the latter were satisfied with Wilson's efforts for the boy's good. It is not even said in the petition that hild was not well or happy. All that is said is that, while the child might ossibly be worse off under his grandmother's charge, it was reasonable that randmother should to some extent benefit by boarding him. In this state atters I see no reason to change the arrangement hitherto existing.

ORD M'LAREN concurred.

ORD KINNEAR.—I concur with your Lordship in the chair.

THE COURT refused the petition, with expenses.

PHILIP, LAING, & Co., S.S.C.—FINLAY & WILSON, S.S.C.—Agents.

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Smith v. Smith's Trustees.

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being therefore, in my opinion, neither the right of the petitioners nor of ther person to demand the change, I think it inexpedient, in any point w, that the arrangement should be altered, and therefore this petition must, k, be refused.

m also very decidedly of opinion that not one penny of the expense of these edings can be allowed to become a burden on the boy's estate, and there- he petition must be refused with expenses.

RD ADAM.—I think this petition should not have been presented. The are that, on the death of his father, the pupil, who is nine years old, was r the care of Mr Wilson, to whom he had been entrusted for his education e father and mother, and it is obvious that the latter were satisfied with Wilson's efforts for the boy's good. It is not even said in the petition that hild was not well or happy. All that is said is that, while the child might ossibly be worse off under his grandmother's charge, it was reasonable that randmother should to some extent benefit by boarding him. In this state atters I see no reason to change the arrangement hitherto existing.

RD M'LAREN concurred.

RD KINNEAR.—I concur with your Lordship in the chair.

THE COURT refused the petition, with expenses.

PHILIP, LAING, & Co., S.S.C.—FINLAY & WILSON, S.S.C.—Agents.

No. 55.

Dec. 16, 1890.
Hastings v. Chalmers.

WILLIAM HASTINGS AND OTHERS, Pursuers.—*W. C. Smith.*
ROBERT CHALMERS, Defender.—*C. S. Dickson.*
THE LORD ADVOCATE, Compearer.—*Wallace, A.-D.*

Proof—Public officer—Confidential report by police inspector to procurator-fiscal.—In an action of damages for wrongous apprehension against an inspector of police, *held* that the pursuers were not entitled to recover confidential reports made by the inspector to the procurator-fiscal.

1ST DIVISION. C.

(SEE *ante*, July 15, 1890, 17 R. 1130.)

In an action of damages raised by William Hastings and others, formerly seamen on board the s.s. "Tay," against, *inter alios*, Robert Chalmers, inspector of police of Linlithgowshire, for illegal apprehension on 4th June 1889, the pursuer moved for a diligence to recover the reports made by Chalmers to the Procurator-fiscal of the county of Linlithgow, relating to the circumstances of the arrest, in order that they should be used in evidence before the jury which had been summoned to try the action.

The pursuer founded upon the undernoted authorities.[1]

The motion was not opposed by the defender.

On behalf of the Lord Advocate, it was stated that while he was unable to declare that any prejudice would arise to the public service from the disclosure of the information, he was of opinion that it was highly inexpedient that such confidential reports should be produced.

THE COURT (LORD PRESIDENT, LORD ADAM, LORD M'LAREN, and LORD KINNEAR) refused the motion, on the ground that the reports sought to be recovered were confidential communications by an officer in the public service to his superior officer in the same department.

WM. B. RAINNIE, S.S.C.—CROWN AGENT—Agents.

No. 56.

Dec. 16, 1890.
Hay v. Coutts' Trustees.

MRS JANE AMELIA COUTTS OR HAY, Pursuer (Reclaimer).—*W. G. Mill*
JOHN STEWART AND OTHERS (Coutts' Trustees), Defenders (Respondents).—*Johnston.*

Succession—Deathbed—Cash payment—34 and 35 Vict. c. 81.—The Act 34 and 35 Vict. c. 81, upon the preamble that "it is expedient to abolish all challenges and reductions in Scotland *ex capite lecti*," provides "that no deed, instrument, or writing made by any person who shall die after the passing of this Act, shall be liable to challenge or reduction *ex capite lecti*."

A father executed a deed of provision "to come into operation during my lifetime," whereby he conveyed to trustees for behoof of three of his children *nominatim*, "the sum of £6000 (£3200 of which I have handed to them in cash.) . . ." The deed was delivered immediately after its execution, and the £3200 was at the same time handed by the granter to the trustees by cheque payable to one of them. A child of the granter of the deed, who had not been mentioned in it, sought to have it declared that she was entitled to legitim out of the £3200 handed over in cash, averring that the sum had been handed to the trustees by her father on deathbed. *Held* that the pursuer's averment was irrelevant, in respect the payment of the money was to be regarded as made in implement of the deed of provision, and not as an independent transaction.

Question, whether the Act 34 and 35 Vict. c. 81, abolished the law of deathbed

[1] Henderson v. Robertson, Jan. 20, 1853, 15 D. 292, 25 Scot. Jur. 188; Dickson on Evidence (Grierson's edn.) vol. 2, p. 907, sec. 1655; Boag v. Gillies and Others, June 28, 1832, 5 Deas & Anderson, 434.

with respect to written instruments only, and not with respect to gifts made without writing.

No. 56.

Dec. 16, 1890.

Hay v. Coutts' Trustees.

1ST DIVISION.

Ld. Kyllachy. C.

On 28th April 1884 James Coutts, residing at Corstorphine House, Corstorphine, executed a trust-deed of provision "to come into operation during my lifetime," whereby he conveyed to trustees for behoof of three of his youngest children, viz., Mary, Malcolm, and Alice Coutts, "the sum of £6000 sterling (£3200 sterling of which I have handed to them in cash, and the remainder being contained in five several bonds and dispositions in security, which I have assigned to them by separate assignations of the said bonds and dispositions in security executed by me of even date herewith)."

The deed was delivered immediately after its execution, and the funds thereby settled were paid over to the trustees at the time, £2800 in heritable bonds and £3200 being handed over to the trustees by Mr Coutts, by cheque upon the Royal Bank of Scotland payable to one of the trustees.

Mr Coutts died on 2d June 1884. His wife survived him, and died on 10th December 1888. He left a trust-disposition and settlement in favour of the same trustees, dated 29th April 1884, in which he disposed of the *universitas* of his estate as at his death amongst his ten children. His moveable estate at the date of his death amounted, exclusive of the sum of £3200, to £10,000 or thereby.

Mrs Jane Amelia Coutts or Hay, his eldest child, brought an action against the trustees under the two deeds, seeking to have it declared "that the pursuer is entitled to one-tenth of one-half of the moveable estate left by the said deceased James Coutts, her father, in name of legitim: And further, that the sum of £3200 mentioned in the said trust-deed of provision was paid and transferred to the defenders, as trustees therein mentioned, by the deceased James Coutts, without any just, necessary, or onerous cause, on or about the 28th day of April 1884, while he was on deathbed, within sixty days of his death, and while labouring under the disease of which he died, to the prejudice of the pursuer as a child of the deceased James Coutts, as aforesaid: And further, that the pursuer is entitled to one-tenth of one-half of said sum of £3200 as part of her legitim payable therefrom."

The summons contained further conclusions for count, reckoning, and payment.

The pursuer pleaded, *inter alia*;—(2) The said James Coutts having paid the said sum of £3200 to the defenders while he was on deathbed, and within sixty days of his death, and while labouring under the disease of which he died, the pursuer is entitled to decree of declarator, count, reckoning, and payment, as craved.

The defenders pleaded;—(5) Said deed is not subject to challenge on the head of deathbed, in respect that the exception of deathbed was abolished by the Statute 34 and 35 Victoria, cap. 81.

On 6th November 1890 the Lord Ordinary (Kyllachy) found that the pursuer had made no relevant averment in support of her second plea in law, and therefore repelled the said plea.

The pursuer reclaimed, and argued;—The Act 34 and 35 Vict. c. 81, only abolished the law of deathbed as to "deeds, instruments, or writings."[1] The only case contemplated by it was that of dispositions of heritage executed on deathbed. The old law otherwise remained in force which

[1] See Stair, iii. 4, 22; Ersk. Inst. iii. 9, 16; Fraser on Husband and Wife, vol. 2, p. 1006; Milroy v. Milroy, May 31, 1808, Hume, 285; Brown v. Thomson, M. 3200; *cf.* also Greig v. Greig, Oct. 19, 1872, 11 Macph. 20, 45 Scot. Jur. 12.

No. 56. prevented a father affecting the legitim of his children by delivery of cash on his deathbed.

Dec. 16, 1890. Hay v. Coutts' Trustees.

Argued for the defenders;—(1) The deed in question was not open to challenge as defeating the children's legitim, for it was an irrevocable *inter vivos* deed completely divesting him of the sums thereby conveyed. (2) The delivery of the cash and the execution of the deed fall to be regarded as one transaction, and as the deed could not be challenged *ex capite lecti* under the Act, neither could the transference of the money, which was made in pursuance of the deed. Further, it was a reasonable view that when the Act abolished challenges of "deeds" *ex capite lecti*, the Legislature also intended to extend its operation to delivery of cash on deathbed.

LORD PRESIDENT.—The trust-deed of provision executed by James Coutts is dated 28th April 1884 and he died on 2d June thereafter. It is impossible to view the deed as a disposition *mortis causa*, because it is not a deed under which any right could revive to the maker in the event of his recovering from the disease under which he was suffering. It was an out and out settlement in favour of three of his children, "to come into operation during my lifetime," and it conveyed to the trustees acting under it the sum of £6000 in all, to be managed and disposed of by them for the benefit of the three children. The £6000 consisted partly of heritable bonds, and the pursuer does not seek to challenge the deed so far as these bonds are concerned, because her only title to challenge the deed arises from her right to legitim, which is pleaded on record, and heritable bonds are not subject to claims for legitim. It is therefore the sum of £3200, which the truster says in the deed "I have handed to them" (the trustees) "in cash," which forms the subject of contention between the parties. The plea which the Lord Ordinary repelled is,—"The said James Coutts having paid the said sum of £3200 to the defenders while he was on his deathbed, and within sixty days of his death, and while labouring under the disease of which he died, the pursuer is entitled to decree of declarator, reckoning, and payment as craved." The Lord Ordinary held that the pursuer had made no relevant averment to support the plea, and I agree with him. I think the question comes to be whether the deed is open to challenge as a whole. If £3200 had been handed over in bank-notes by the testator on deathbed without anything more being done, it would be a different case, and would have looked like a fraud on the legitim. That, however, is not the case. The sum is handed over by cheque in pursuance of a general settlement in favour of three particular children referred to in the deed, and the transaction must stand or fall as a whole.

I cannot say I can find any law for holding that after the passing of the Act 34 and 35 Vict. c. 81, a deed of this kind is reducible on the ground of deathbed. On the contrary, it appears to me that the effect of the statute is to protect from challenge on such a ground every deed or writing by a testator. I am therefore of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD ADAM.—I am of exactly the same opinion. The object of the pursuer in seeking to separate the transaction into two parts is obvious, because if she could plead the actual payment over in cash of the sum of £3200 as a distinct and separate transaction by itself, she might have a good deal to say for the plea that the transaction did not fall within the statute which abolished the exception of deathbed. It might be argued that the enacting clause of the statute applies to instruments and writings only, and that the actual handing

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over of cash cannot be brought under the clause. The question would have thus been left open as to whether the Act was meant to apply to a case like this.

But I agree with your Lordship that we must look at the trust-disposition and the payment of the money to the trustees as one transaction. If that is truly the nature of the transaction, then, beyond all question, we have what constitutes a title to the beneficiaries, and, being a deed, writing, and instrument, it falls within the enacting clause of the Act.

LORD M'LAREN.—The legal question which was argued by Mr Miller is no doubt an interesting point, if the circumstances of the case admitted of such a question being raised, because, whether by design or by inadvertence, it is certain that the Statute of 34 and 35 Vict. does not in its enacting words contemplate the case of a gift made without writing, and reducible on the head of deathbed. Should such a case arise for consideration, we shall have to consider whether the enacting words can receive aid from the preamble, or whether they must be taken as they stand. No such case is raised here, because under the deed of settlement, produced and printed, the trustees of Mr Coutts have received by deed of gift, assignation, and disposition the sum of £6000 sterling, whereof, it is stated, the testator handed to them £3200 in cash. That deed of gift is a good title to the money, and may be pleaded in answer to a demand upon the trustees to account. Under the old law the effect of the deed might be taken away by reduction *ex capite lecti*. But here the statute comes in to fortify the title by taking away the right of challenge *ex capite lecti*, and therefore the case of the pursuer under the second plea in law entirely fails.

LORD KINNEAR concurred.

THE COURT adhered.

J. R. DOUGLAS & MITCHELL, W.S.—ANDREW WALLACE, Solicitor—Agents.

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Dec. 17, 1890.
Florence v. Mann.

CHARLES ALEXANDER BEATON FLORENCE, Pursuer (Appellant).—*Comrie Thomson—Watt.*
CHARLES MANN, Defender (Respondent).—*D.-F. Balfour—Sym.*

Process—Jury trial—Verdict—Contributory negligence—Reparation.—In an action of damages for personal injury, the jury returned the following verdict,—"Find for the pursuer, but in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300." *Held* that the verdict being either self-contradictory or ambiguous, could not be applied as a verdict for either party, and that it must therefore be set aside and a new trial granted.

1ST DIVISION.
Ld. Kyllachy.
C.

CHARLES A. B. FLORENCE raised an action against Charles Mann, proprietor of the Palace Hotel, Aberdeen, for £2000, as damages, in respect of personal injuries sustained by him in a fall from the second floor of the defender's hotel into the space in which the lift worked.

The case was tried before Lord Kyllachy on 16th and 17th October, on the ordinary issue of fault, and the jury returned the following verdict:—"Find for the pursuer, but in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300."

The defender moved the presiding Judge to hold the verdict as one for him. The pursuer requested his Lordship to charge the jury anew. Lord Kyllachy directed the verdict to be entered as delivered.

Both parties moved in the Inner-House to have the verdict set aside and a new trial granted, in the event of this verdict not being entered in their favour by the Lord Ordinary.

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Thereafter, both parties having claimed the verdict, the Lord Ord on 13th November, pronounced this interlocutor:—"The Lord Ord having considered the motion of the pursuer to apply the verdic decern for the damages found due, and the counter motion of the def to enter the verdict as a verdict for the defender, and to apply the by granting decree of absolvitor, in respect it is stated that both p have applied to the First Division of the Court to set aside the v and grant a new trial, reports the said motions to the First Divis the Court." *

Argued for the pursuer;—The fair reading of the verdict was t was an unequivocal finding for the pursuer. The qualification intro by the word "but," was inserted by the jury merely in order to in their reason for mitigating the damages, and it was a part of the f quite separable from the earlier portion. The verdict was entirely dif from the verdict given in the case of *M'Naughton* v. *Caledonian Ra Co.*[1] founded upon by the defender. There the jury found an accid be due partly to the fault of the deceased and partly to the fault

* "NOTE.—The Lord Ordinary has difficulty in dealing with these m to apply the verdict while an application to set aside the verdict is pend the Division. There might not perhaps be the same difficulty in his construing the verdict, and entering it up for one party or the other, but circumstances he has thought it better to report the matter, with his opin

"After hearing counsel and giving full weight to the argument addu the pursuer, he is unable to read the verdict otherwise than as a verdict f defender. Taking it by itself, and without reference to what the Lord Or knows of the evidence, it cannot, it is thought, be doubted that the imp of contributory negligence to the pursuer is *prima facie* fatal to the pu case, and although it may be the Court's duty, in construing such a verd reconcile, if possible, its different parts, the Lord Ordinary does not k know of any proper or received sense in which contributory negligence co such a case be imputed to a pursuer consistently on the one hand with a for such pursuer, and on the other hand, with a reduction of damages in of such contributory negligence.

"Nor would the result be different if the Lord Ordinary were to apply construction of the verdict his knowledge of the evidence. No view facts occurs to him upon which the jury could legitimately have found the pursuer on the question of contributory negligence, and at the same given him a verdict. It is not, the Lord Ordinary thinks, possible to rej the finding as amounting merely to this, that the pursuer might by extraor caution have avoided the accident. Negligence implies want of ordinary ca and this the jury quite understood. Neither was the case one in which was any suggestion that the accident, being due to the sole fault of the def the injury was aggravated by some fault of the pursuer. In that ca verdict might not have been appropriate, but it might have been unde Nor again is it possible to represent the case as one of the class of cases of *Davies* v. *Mann*, 10 M. and W. 546, and *Radley* v. *London and North-W Railway Company*, L. R., 1 Appeal Cases, 754, are the best known exa cases, viz., where the operative and proximate cause of injury being the f the defender, there is at the same time some antecedent or initial fault on th of the pursuer. There was nothing of the sort suggested. Altogether, th was, in the Lord Ordinary's opinion, rather one where the affirmation of con tory negligence on the part of the pursuer really negatived any fault, tha say, any operative fault on the part of the defender.

"For these reasons the Lord Ordinary, if he had fallen to pronounce ment, would have entered up the verdict for the defender, and in respect t would have pronounced decree of absolvitor."

[1] M'Naughton v. Caledonian Railway Co., Dec. 17, 1858, 21 D. 160, 31 Jur. 94.

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defenders. "Contributory negligence" in the sense of the present verdict was negligence which the jury thought not to be proximate to the result, but remote, and which was to be considered by them as affecting the damages. There might be negligence on the pursuer's part, and yet it might not be sufficiently proximate to the accident to disentitle him to a verdict.[1]

Argued for the defender;—The verdict was equivalent to a finding that the accident was produced by two causes—fault on the part of the defender and fault on the part of the pursuer. The pursuer could not recover on such a verdict, for according to it the accident would not have happened but for his own fault.[2] The jury had in fact negatived the issue sent for trial,—whether the accident was due to the defender's fault,—by finding that it was in part due to the pursuer's own fault. Had there been, as in the older practice, a separate issue of contributory negligence, it was clear that the jury would have affirmed it. It was impossible to separate the verdict into (1) a verdict for the pursuer, and (2) a qualification as a reason for mitigating damages. It was not legitimate to use contributory negligence merely to reduce the damages, and in any view, that was not the fair reading of the verdict. It was exactly to the same effect as the verdict in *M'Naughton's* case, which was entered up for the defenders. The English cases[3] referred to, as to "proximate" fault or "decisive" cause, were not unfavourable to the defender. They really only came to this, that the person who last had the opportunity of avoiding the accident, notwithstanding the other's negligence, was responsible. If that applied here, it was fatal to the pursuer, for according to his own case he had opened the door communicating with the lift and entered a dark place, and the jury had found that to be a negligent act.

LORD PRESIDENT.—This verdict is expressed thus:—"Find for the pursuer, but in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300."

Now, of course, a great deal depends in construing this verdict upon what the jury meant by the words "contributory negligence," but I think we must take it for granted that the jury were well instructed as to the meaning of these words. There is no complaint as to the way in which the case was left in the hands of the jury by the presiding Judge. There being evidence apparently to go to the jury on the question of contributory negligence, it must be assumed that his Lordship explained what the words meant in law.

Now, I think the matter is very well settled in our law, and I do not know any better exposition of the doctrine of contributory negligence than that given by Lord Wood in the case of *M'Naughton* v. *Caledonian Railway Co.*[2] "The fault must be such as to have directly conduced to the injury suffered, and not merely remotely connected with it, for in that case it is not to be considered as con-

[1] Moffat & Co. v. Park, Oct. 16, 1877, 5 R. 13; Woods v. Caledonian Railway Co., July 9, 1886, 13 R. 1118; M'Naughton v. Caledonian Railway Co., per Lord Wood, 21 D. p. 166; Davies v. Mann, 1842, 10 Meeson and Welsby's Rep. 546; Radley v. London and North-Western Railway Co., 1876, L. R., 1 App. Cases, 754; Walton v. London, Brighton, and South Coast Railway Co., 1866, 1 Harrison and Rutherfurd, Common Pleas Reports, 424; Smith v. Dobson, 1841, 3 Manning and Granger, 59.

[2] M'Naughton v. Caledonian Railway Co., 21 D. per Lord Justice-Clerk (Inglis), p. 163; King v. North British Railway Co., Oct. 29, 1874, 12 S. L. R. 53.

[3] Pollock on Torts, p. 400.

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tributory to the injury, within the principle that fault or negligence on the part of the individual injured shall afford a good answer to a claim by him for damages against a defender who has also been guilty of fault or negligence. The fault of the injured party, when only remotely connected with the accident, is to be, as it were, discounted from the case. In a legal view, it, in the question of the abstract right to damages, forms no part of the case—the negligence of the defender alone being held to have caused the injury—whatever weight it may be entitled to in assessing the amount of the damages. But on the other hand, if while there was fault on the part of the defender, directly conducing to or causing the injury, there was, at the same time, fault on the part of the individual injured, by rashness or want of the care which he was bound to exercise, or in any other way which also directly contributed to the injury, then damages cannot be recovered by him."

Now, taking the words contributory negligence in the sense there expressed, what is it that this verdict means? I think this, that the jury found for the pursuer, but in respect of there being contributory negligence on his part, they reduced the damages to £300. If that is the meaning of the verdict it is plainly bad in law, because they were not entitled after finding contributory negligence to bring in a verdict for the pursuer, and just as little were they entitled, having found fault on both sides, to reduce the damages merely in respect of contributory negligence. In short, the verdict is quite unsound in point of law. If the meaning is anything else, I am quite unable to say what it does mean. And the conclusion I therefore arrive at is, either that the verdict means something quite inconsistent with the law applicable to the case, or it has no intelligible meaning at all, or, in other words, is tainted by a fatal ambiguity, and the result must be that it must be entered for neither party.

No doubt a slight variance in the form of the verdict might have made a great difference, and might have entitled the defender to claim the verdict as one for him. Suppose the jury had said they found that the pursuer was injured by the fault of the defender, and that the injury was caused also by the contributory negligence of the pursuer, and assessed the damages at £300. That would have been quite an intelligible verdict. It would have been a verdict which is commonly called a special verdict. It would have found two matters of fact, and would have assessed the damages contingent on the verdict being entered up for the pursuer, but would have left it to the Court to decide whether it should be entered up as one for the pursuer or as one for the defender. We should have had a substantive finding (first) that the defender was in fault; (second) that the pursuer was in fault; and that both faults contributed to produce the injury. The law applicable to this is not doubtful. The pursuer could not recover damages on such a verdict. But see how different this is from the present verdict. The jury do not assess the damages contingent upon the verdict being entered up for the pursuer, but they assess them at what they conceive a low rate, because the pursuer's fault contributed to the injury. Now, the legal consequence of the pursuer contributing to the injury is to find no damages due to him. I am therefore for setting aside the verdict altogether, and directing a new trial. I think the jury could not have understood the nature and effect of contributory negligence, though they received perfectly good instruction from the presiding Judge on the point.

LORD ADAM.—I also think this verdict contradictory and ambiguous.

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The first part of it, by which there is a finding for the pursuer, to my mind firms the question put in the issue, that the injuries caused to the pursuer were used by the fault of the defender, and, if there was no more in the verdict, here would be no question before us.

The verdict, however, goes on to state that, "in respect of there being contributory negligence on the part of the pursuer, we assess the damages at £300." Now, Mr Comrie Thomson argued that all the jury meant by this finding was t they thought there had been some negligence on the part of the pursuer, t that it was not such negligence as went to the essence of the case, but was ly considered by the jury in diminishing the damage. The example was taken n the case of *Davies* v. *Mann* of a drunk man being found lying in an avenue, l having been run over in the dark. If the jury found in such a case that the ured man had not contributed to the accident, it might nevertheless be said t the jury might fairly take into consideration the fact of the man's being e in the dark, and might assume that as a reason for diminishing the damages. rtainly should not say that that was an erroneous view to take of such a case. ly difficulty here, however, lies in the existence of the word "contributory." nnot but believe that the jury meant what we understand by the word. No ction was taken to the Judge's charge, and we must assume that he explained hen the meaning of the word, and told them that it was such negligence on part of the pursuer as contributed to or caused the accident; and, if that is I agree with your Lordship in thinking that the result in the finding is not to minish the damages, but to lead to the finding of no damages being due at all.

I therefore think that the verdict is self-contradictory and ambiguous, and it does not appear to me that the jury understood what they were saying when they announced the view which they did in order to diminish the damages. This is not the case of a special finding that there was fault on the part of the defender, and also upon the part of the pursuer, where it is left to the Court to enter up the verdict for one or other party. We have instead a definite finding for the pursuer, and, in the awarding of the damages to him, a finding which is inconsistent with it. I think, then, the verdict must be set aside, and a new trial ordered.

Lord M'Laren.—It seems to me that the argument on the construction of this verdict resolves into a logical dilemma, which is the result of the jury having found the pursuer guilty of "contributory negligence." Either these words were used in their ordinary and legal signification, or they were used in some different sense, which the jury has failed to explain.

In the first alternative, the verdict is void as being contrary to law; in the second alternative, it is void for uncertainty or ambiguity. I need say no more, except to express my concurrence in the reasons given by your Lordship for setting aside this verdict.

Lord Kinnear concurred with the Lord President.

The Court pronounced this interlocutor:—"On the report of Lord Kyllachy, having heard counsel for both parties, set aside the verdict found by the jury upon the issue in this case as self-contradictory or ambiguous: Appoint a new trial to be had in the cause, and remit to the Lord Ordinary to proceed accordingly."

Andrew Urquhart, S.S.C.—Auld & Macdonald, W.S.—Agents.

No. 58.

Dec. 18, 1890. Duke of Sutherland v. Reed.

THE DUKE OF SUTHERLAND, Pursuer (Respondent).—*Murray—C. S. Dickson.*

WILLIAM REED AND OTHERS, Defenders (Reclaimers).—*M'Kechnie—Kennedy.*

Res judicata—Decree dismissing action as incompetent not res judicata.—proprietor of a farm presented a petition in the Sheriff Court for inte against the crofters on adjoining lands pasturing their cattle on pasture upon his farm. The Sheriff found that the crofters had been in possessi the pasturage *qua* crofters at the date of the passing of the Crofters Act, and therefore, the action was incompetent. In a subsequent action raised b pursuer in the Court of Session, concluding for declarator that the crofter no right to pasture their cattle, &c., on his farm and for interdict agains defenders entering upon certain pasture lands which he alleged to be part farm, but which the defenders alleged to be part of their crofts as pasturag Court repelled a plea of *res judicata*.

Question, whether any decree in the Sheriff Court can support a plea o *judicata* in the Supreme Court.

Jurisdiction—Forum conveniens—Action in Supreme Court against cr —Application to Crofters Commission—Crofters Holdings (Scotland) Act, (49 *and* 50 *Vict. c.* 29), *sec.* 6.—*Held* that the jurisdiction of the Court of Se to entertain an action by a proprietor for declarator and interdict against cr whose holdings adjoined his lands, and who asserted that at the date o Act they had rights of pasturage over his property, was not ousted by an cation made by the crofters prior to the raising of the action, and still pen to have fair rents fixed for their holdings under the Crofters Holdings land) Act, 1886.

1ST DIVISION. Ld. Stormonth Darling. C.

THE DUKE OF SUTHERLAND raised an action against William Reed others, crofters, Crakaig, parish of Loth, Sutherlandshire, in whic sought to have it declared that they had "no right or title to enter or pasture their cattle, horses, sheep, or other bestial, upon the farm lands of Crakaig belonging to the pursuer, and let to John Bra Dudgeon, farmer, Crakaig, his tenant, or upon any part thereof." summons further concluded for interdict against the defenders ent upon the lands or disturbing the tenant in his possession of the "and in particular from grazing their sheep or bestial to the west o line marked A B on the plan produced herewith, being the ea boundary of said farm of Crakaig."

The pursuer averred that the eastern boundary, as expressed i leases of Dudgeon and his predecessor, consisted partly of a dyke en ing it from the grazing possessed in common by the defenders and crofters whose holdings were to the east of the farm and of a line in tinuation of this dyke running northward to the top of the hill.

The defence to the action was two-fold. In the first place, the d ders maintained that the eastern boundary of Crakaig farm was no dyke at A B on the plan but was the burn of Crakaig, which was 100 yards to the west of the dyke, and that therefore they were w their right in pasturing as far as the burn of Crakaig. They averred this matter had been determined adversely to the pursuer in their fa in an action raised by him against them in the Sheriff Court of Ross Cromarty on 10th July 1889.

In the action referred to the Duke prayed the Sheriff to interdic defenders from unlawfully entering, trespassing, and pasturing their c horses, sheep, or other bestial, upon the farm and lands of Crakaig, i parish of Loth and county of Sutherland, or upon any part thereof, to remove such cattle, &c., as they had already put on the lands."

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The defenders averred that the crofts of which they were tenants were formerly held by them or their authors as subtenants of the tenant of the farm of Crakaig. (Stat. 2) "About forty years ago it was intimated to the whole crofters in said township that they should hold direct from the landlord. At that time the landlord's factor (Mr Gunn), along with the then tenant of the farm of Crakaig (Mr Innes), settled the exact boundary between the crofters' hill pasture and the farm of Crakaig. That boundary was announced to be the said burn of Crakaig on the west, and an old ditch and turf dyke leading eastwards from the said Crakaig burn to the road leading from the public road to the defenders' holding on the south."

They further averred, that from the time they took their respective holdings they had always put their stock on the hill pasture.

The pursuers answered, that the true boundary of the farm was not the burn of Crakaig but was the dyke marked A B upon the plan produced in the present action.

On 26th August 1889 the Sheriff-substitute (Mackenzie) allowed the defenders a "proof of article 2 of their statement of facts (in so far as the same is denied or not admitted), and the pursuers a conjunct probation." He then granted interim interdict and personally inspected the ground. After a proof in which both parties led evidence of possession, the Sheriff-substitute, on 10th December 1889, pronounced this interlocutor:—"Finds that the crofts of which the defenders are now in possession were formerly held by them or their authors as subtenants on the Crakaig farm, and that, attached to said crofts, there was a large extent of hill pasture common to the whole crofters of the township of Crakaig, and lying between the Alteenie burn on the east and the Crakaig burn on the west: Finds that during the tenancy of Robert Innes, principal tenant of Crakaig farm—and about forty years ago—intimation was made to the whole crofters of the township that in future they should hold direct of the proprietor, the Duke of Sutherland, to whom the rents would be payable, and this arrangement was then carried out and has been acted upon ever since: Finds that in carrying out said arrangement the proprietor's factor, Mr Gunn, along with the said Robert Innes, settled and defined the boundaries between the crofters' hill pasture and the Crakaig farm pasture as follows:—The Crakaig burn on the west, and an old drain and feal dyke leading eastwards from the Crakaig burn to the road giving access from the public road to the defenders' holdings on the south: Finds that the hill pasture between these boundaries has been possessed and used in common by the defenders and the other crofters of the township ever since said delimitation and up to July last, when the present interdict was served upon the defenders, and that until said last-mentioned date no legal intimation was ever made to them that in occupying the common pasture allocated as above mentioned they were thereby acting illegally and committing a trespass upon any part of the principal farm of Crakaig: Finds in law, that as crofters in legal and actual possession of the common pasture extending up to the Crakaig burn on the west at the date of the passing of the Crofters Holdings (Scotland) Act of 1886, the defenders are entitled to security of tenure as regards the holdings then possessed by them: Therefore finds that the present action, in so far as it seeks to interfere with their free use of the said common pasture extending up to the Crakaig burn (and no other trespass on the Crakaig farm is alleged against the defenders), is incompetent: Recalls the interim interdict, and dismisses the action."

The pursuer appealed to the Sheriff (Low) but did not insist in his appeal, which was dismissed on 16th January 1890.

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In the second place the defenders averred that the present actio within the exclusive jurisdiction of the Crofters Commission, with they had on 28th May 1887 lodged an application to have fair rents for their holdings, including the disputed portion of the hill grazing that these applications were still pending. The whole subject-matt the present action fell within the jurisdiction of the Commission, an disputed boundaries or marches would be determined on the heari the applications. By section 21 of the Crofters Holdings (Scotland 1886, the Commission was empowered to determine summarily any tions relative to the boundaries or marches between crofters' hol including grazings and adjoining lands, and its decision in that n was declared by section 25 to be final.

The pursuer pleaded;—(1) The defenders having no right or ti enter upon, or pasture their cattle, horses, sheep, or other bestial upo said farm and lands of Crakaig, decree ought to be granted, in ter the conclusions of the summons.

The defenders pleaded;—(1) *Res judicata.* (2) *Forum non conve* (3) The pursuer having submitted the matter in controversy betwe parties to the judgment of the Sheriff-substitute, and having with his appeal against the said judgment which determined the said c versy on its merits, and having acquiesced in its becoming final, is l from insisting in the present action. (4) The matter in controversy raised by the defenders' prior application to the Crofters Commi which is still pending, and the said Commission being empowe determine such questions finally, the present action should be missed.

On 13th November 1890, the Lord Ordinary (Stormonth Darlin pelled the 1st, 2d, 3d, and 4th pleas in law for the defenders, and al the parties a proof of their averments.*

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* "OPINION.—The pursuer asks for a proof of his averments. This is r by the defenders on two grounds, (1) that the matter in controversy is *re cata* in respect of a judgment of the Sheriff-substitute of Sutherland, a that the subject-matter of the present action falls within the exclusive ju tion of the Crofters Commission.

"I do not think that either of these pleas is a bar to inquiry in the p action.

"(1) What the pursuer here seeks is declarator that the defenders ha right or title to enter upon or pasture their stock on the farm of Crakaig part thereof, and interdict against them from disturbing the tenant of th in his peaceable possession thereof, and in particular from grazing their or bestial to the west of a certain line on a plan produced with the sum The action in the Sheriff Court was at the instance of the same pursuer a the same defenders, and it related to the same stretch of hill pasture. petition prayed for interdict in similar though less precise terms, and concluded that the defenders should be ordained to remove their stock, ing their doing so, that warrant should be granted to the pursuer to h removed. The Sheriff-substitute, after granting interim interdict, allo proof limited to certain averments, and personally inspected the ground. then issued the interlocutor quoted on record, whereby he recalled the i interdict, and dismissed the action. I cannot regard a possessory judgment kind as forming a bar to this action of declarator and interdict. It may b the Sheriff proceeded on a view of the evidence which, if well founded, wo fatal to the pursuer's success in the present proceedings. But, in order to the conclusion that the defenders ought not to be interdicted, and that their ought not to be summarily removed, it was unnecessary for him to do than satisfy himself that the defenders had a *prima facie* case for maint possession. The question of right was not necessarily involved, and the

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The defenders reclaimed, and argued;—The defence of *res judicata* in respect of the Sheriff Court action fell to be sustained. Substantially the same question as arose here, viz., as to the exact boundaries of the farm of Crakaig, had been raised in that action between the present parties, and even although the form of the present action in the Court of Session was different, the plea of *res judicata* was good.[1] Looking to the procedure in the Sheriff Court action, it was vain to say that it was merely one to regulate possession. 2. Prior to the raising of the Sheriff Court action, the defenders had applied to the Crofters Commission to have fair rents fixed. That necessarily brought within the cognisance of the Commission all questions affecting the extent of their holdings. Indeed, by section 21 of the Crofters Holdings Act, 1886, they had power to decide any questions as to boundaries. The jurisdiction then of the Court of Session was ousted, and the matter fell within the exclusive jurisdiction of the Commission.

Argued for the pursuer;—No decree of a Sheriff in any action, whether possessory or otherwise, could ever be *res judicata* in a subsequent action raised in the Supreme Court. The text of Erskine[2] was to this effect, and although Mr Nicolson, in his edition, had cited in a footnote certain cases which he said seemed to point to an opposite conclusion, none of them bore out the statement.[3] There was further a substantial distinction between the two actions. The judgment in the Sheriff Court action was a possessory one upon a limited amount of proof. The question raised in the present action was one as to heritable right. 2. The jurisdiction of the Court of Session was not ousted. It might be that the Commissioners had power under the Act to fix the boundaries between crofters' holdings and adjoining lands, but the question could be equally well decided here. Indeed, this was the most convenient *forum*,[4] and a judgment in the

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may not have been, and probably was not, presented with the fulness appropriate to a declarator in the Supreme Court.

"(2) By section 21 of the Crofters Act it is made competent to the Commissioners to decide summarily any questions relating to the boundaries or marches between crofters' holdings and adjoining lands. This section is introduced, and I think the whole of it is controlled by the words 'when an application for an enlargement of crofters' holdings is made to the Crofters Commission,' but it is admitted by the pursuer that such an application has been made by the defenders, although it has not yet been considered by the Commissioners. The defenders' counsel rather repudiated the notion that it was by this application that the Commissioners' right of adjudication was let in, for he maintained that the application to fix a fair rent necessarily brought within their cognisance all questions affecting the extent of the holding. But whether the jurisdiction of the Commissioners is invoked by the one kind of application or the other, I am of opinion that it is not privative, and that in particular it does not oust the jurisdiction of the Supreme Court in determining whether a particular area of ground falls within one contract of lease or another (see Erskine's Inst. 1, 2, 7, and with reference to a separate part of the jurisdiction of the Crofters Commission *Fraser* v. *Macdonald*, 14 R. 181)."

[1] Marquis of Huntly v. Nicol, Jan. 9, 1858, 20 D. 374; Anderson v. Gill, Dec. 22, 1860, 23 D. 250, 33 Scot. Jur. 111; Glasgow, Airdrie, and Monkland Junction Railway Co. v. Drew, March 25, 1861, 23 D. 835, 33 Scot. Jur. 434; Earl of Leven and Melville v. Cartwright, June 12, 1861, 23 D. 1038, 33 Scot. Jur. 321, per Lord Justice-Clerk, p. 1079 of 23 D.; Robertson v. Melville, Feb. 24, 1860, 22 D. 893, per Lord Deas, p. 896, 32 Scot. Jur. 375.

[2] Ersk. iv. 3, 7.

[3] Marquis of Stafford v. Mackenzie, June 26, 1827, 5 S. 839; Robertson v. Melville, Feb. 24, 1860, 22 D. 893, 32 Scot. Jur. 375; Campbell v. M'Gillivray, Jan. 13, 1864, 2 Macph. 399, 36 Scot. Jur. 194.

[4] Fraser v. Macdonald, Dec. 7, 1886, 14 R. 181, per Lord Young, at p. 187.

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Supreme Court upon the point would shew the Commissioners, when came to consider the questions submitted to them, the exact state of rights of both parties at the date of the application to the Commissio

LORD PRESIDENT.—This is an action of declarator in which it is sought declared that the defenders, who are crofters in the parish of Loth and county of Sutherland, have no right or title to enter upon or pasture their horses, sheep, or other bestial upon the farm and lands of Crakaig, in the of Loth and county of Sutherland, belonging to the pursuer, and let to Bradfute Dudgeon, farmer, Crakaig, his tenant, or upon any part thereo there follows a conclusion for interdict against the defenders entering up disturbing the tenant in his possession of the farm.

Now, the defence upon the merits to that action is that the defenders the right of pasturage over the lands in question, and there is thus raised a tion of fact and law which seems to be quite competent to be raised b summons and defences, and as certainly suited to the jurisdiction of this But the action has been met by four pleas in law of what may be ca technical character, but in practical effect they resolve into two only. Th is *res judicata*, and the other is *forum non conveniens*. The Lord Ordina disposed of these adversely to the defenders.

As regards the plea of *res judicata*, it is founded upon a summons or pe in the Sheriff Court of the county of Sutherland, and a judgment prono by the Sheriff-substitute thereon. The petition prays the Sheriff to int the defenders from unlawfully entering, trespassing, and pasturing their horses, sheep, or other bestial upon the farm and lands of Crakaig, i parish of Loth and county of Sutherland, or upon any part thereof, a forth. Now, this petition was disposed of by the Sheriff-substitute in which appears to me to be rather remarkable. The statements of the ties in that petition were to a large extent statements of possessio the one party and the other, but the way in which the Sheriff-subs dealt with the case was to allow a very limited proof, not a general of possession to both parties, but a proof of article 2 of the defenders' ment of facts (in so far as the same is denied or not admitted), and pursuer a conjunct probation. Now, statement 2 for the defenders in that S Court case was not a statement of possession at all, but it was to this eff "That about forty years ago it was intimated to the whole crofters in said ship that they should hold direct from the landlord. At that time the land factor (Mr Gunn) along with the then tenant of the farm of Crakaig (Mr settled the exact boundary between the crofters' hill pasture and the fa Crakaig. That boundary was announced to be the said burn of Crakaig o west, and an old ditch and turf dyke leading eastwards from the said C burn to the road leading from the public road to the defenders' holdings south." Now, that is an averment of an agreement, but when the parties to lead evidence the Sheriff-substitute seems to have forgotten what was the character of the proof he allowed, and accordingly evidence of possessio adduced upon both sides. The proceedings therefore were so far very irre But what renders the whole case still more remarkable is this, that in th the Sheriff-substitute "finds that the hill pasture between the said sou boundary and the defenders' holdings has been possessed and used in co by the defenders and the other crofters of the township ever since said d

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tation and up to July last, when the present interdict was served upon the defenders." Now, that is a finding in fact on which the Sheriff-substitute had allowed no proof whatever. Then he finds still further, "that until said last mentioned date no legal intimation was ever made to them that in occupying the common pasture allocated as above mentioned they were acting illegally and committing a trespass upon any part of the principal farm of Crakaig." And he "finds in law that as crofters in legal and actual possession of the common pasture up to the Crakaig burn on the west at the date of the passing of the Crofters Holdings (Scotland) Act of 1886, the defenders are entitled to security of tenure as regards the holdings then possessed by them"; and therefore he "finds that the present action, in so far as it seeks to interfere with their free use of the said common pasture up to the Crakaig burn (and no other trespass on the Crakaig farm is alleged against the defenders) is incompetent," and "recalls the interim interdict, and dismisses the action."

Now, I really am unable to understand by what process of reasoning the Sheriff-substitute comes to that conclusion. He begins the conduct of the process by substantially refusing any proof of possession, and then he allows evidence to be led of possession in the course of the proof, and then he finds certain facts in reference to possession, and thereupon he finds the action incompetent, and recalls the interim interdict, and dismisses the action. Now, perhaps it might be thought sufficient for the present purpose, without further criticising the mode of conducting the process by the Sheriff-substitute, to say that his finding that that process was incompetent can never by any possibility be *res judicata* to bar an action which undoubtedly is competent for trying the question. An action dismissed as incompetent cannot prevent the pursuer of that action from raising a competent action to try the same question. It would be just as absurd to say that because an action had been dismissed as irrelevant, therefore the pursuer of that action could never bring a relevant action to try the same cause. That question was raised in the well-known case of *Russell* v. *Gillespie* (July 22, 1859, 21 D. (H. of L.) 13, 31 Scot. Jur. 641, and 3 Macq. Appeals, 757), where the House of Lords held, reversing the judgment of this Court, that the fact of the second action being relevant when the first action was irrelevant was a complete answer to the plea of *res judicata*. It appears to me that this kind of incompetency is a case *a fortiori* altogether. If the former action was incompetent the case could not be tried, and was not tried, under it, and therefore that plea falls to the ground.

Then as regards the second defence, it appears that the party has mistaken his position altogether. The object of this action is to establish—independently of the operation of the Crofters Act altogether, and without prejudice to any application which may be made to the Crofters Commission for giving additional land to the defenders—what were the rights of parties at the time the Crofters Act was passed. That does not interfere with the operation of the Crofters Act. On the contrary, it rather seems to me to clear the way to let in the operation of the Crofters Act, for until it be determined what were the existing rights of parties at the time the Crofters Act was passed, or at the time the application under the Crofters Act was made—until that is determined it is difficult to see what the Crofters Commission could do. Are they to grant additional pasture land to the crofters upon the footing that they already possess this pasture land on the farm of Crakaig, or on the supposition that they do not possess it? I think that would be a great obstacle to the Crofters Commission in determining

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this case. But a judgment in the present case would remove that, and v
shew the Crofters Commission what was the state of the rights of parties a
the possession of parties at the time when the Crofters Act was passed an
Commission brought into operation. Therefore the plea of *forum non conv*
appears to be a dream in this case altogether. It seems to me this is the
venient *forum* of all others for trying this question.

Upon these grounds I entirely agree with the Lord Ordinary in the conc
at which he has arrived in repelling the first four pleas.

LORD ADAM.—The pursuer of this action of declarator is the Duke of S
land, and the defenders are certain crofters who claim to have in conn
with their crofts certain rights of pasture extending over adjoining g
Now, the declarator in its leading conclusion seeks to have it found and de
that the defenders had no right to pasture cattle, and so on, on the far
lands of Crakaig. But that does not disclose the real question at issue betwe
parties, because if you once establish a right to pasture, the question arises
is the extent of the farm of Crakaig? and, as I understand the case, the
ders do not maintain any right to pasture cattle upon that farm. Therefo
real question does not appear on the first conclusion of this action.
appears upon the second conclusion, where interdict is sought against the
ders in particular grazing their sheep or bestial to the west of the line n
A B on the plan produced, being the eastern boundary of the said fa
Crakaig. The answer to that is in point of fact that that particular line
which is, I understand, represented by a wall on the ground, is not the e
boundary of the farm of Crakaig, but that the eastern boundary is the b
Crakaig, and it is said that the only place where the defenders have pa
their cattle is upon the piece of ground in dispute between these two
That is the real question at issue, the question of fact whether or not th
boundary of the farm of Crakaig is this wall or whether it is the burn.

Now, in defence four pleas, as your Lordship has said, are stated
defenders, but in point of fact these really resolve into two. The first is
is *res judicata*, a certain process in the Sheriff Court having already decide
this boundary claimed by the crofters is the true boundary; and in th
place, that whether that was so or not, the Court of Session is not the
conveniens in which to try this case. These are the two pleas, or rather,
the substance of the four pleas which the Lord Ordinary has repelled, an
question is, whether the Lord Ordinary is right or wrong in repelling those

Now your Lordship has stated what the Sheriff Court action was. It
asked interdict against the defenders pasturing their cattle "upon the far
lands of Crakaig." It does not appear anywhere on the face of the petit
the Sheriff Court what the boundaries are of that farm. That question,
is the question raised in the present action, first appeared in the defences
petition in the Sheriff Court, and it is a question that is vital, because
respondents were right in saying that the only place where they pastured
cattle is beyond that boundary, then of course the Sheriff should have r
the interdict, and there would have been an end of the case. The S
substitute, as your Lordship pointed out, took a very peculiar view
was to my mind a possessory action, and neither more nor less, and i
therefore one in which the proof of possession for a period of seven years,
any period short of forty years, would be sufficient, and all that was

sary to entitle the tenants to have the interdict brought against them refused; and that was the real point in the case to which the proof should have been directed. But instead of that, as your Lordship has pointed out, the only thing of which the Sheriff-substitute allowed proof was the averment in article 2 of the defenders' statement of facts, in which it was averred that, some forty years before, those representing the Duke of Sutherland at the time had laid out on the ground the true boundary of the farm of Crakaig, and that it was then announced to be this particular burn. That was the only thing of which a proof was allowed, but proof was notwithstanding led not only of that but of possession, for which there was no warrant; and thereafter, on considering this proof, the Sheriff-substitute came to the conclusion that the action was incompetent, and he accordingly dismissed it. Now, how an action brought by a party against cattle being allowed to trespass on what he alleged was his ground is an incompetent action I cannot understand. He might have had no ground on the merits for saying that cattle were trespassing on his ground, but how an action which he brought against an alleged trespasser is incompetent I entirely fail to see. That, however, was the result of that action, and I agree with your Lordship that no finding in fact in an action which the Sheriff has found incompetent can avail in barring a subsequent action which is competent.

But besides that, I think that that action being merely a possessory action, any finding come to in it cannot be *res judicata*. Mr Murray raised a very large plea on this question. He said it was well-known law that no decree of the Sheriff Court, or judgment in the Sheriff Court, can in any case be *res judicata*. I do not consider it necessary to go into that question in this case, because, as I have said, the case which was in the Sheriff Court was a mere possessory action. The Sheriff, no doubt, is allowed in some cases to determine questions of heritable right, but he has not a universal jurisdiction in questions of that kind. By the 8th section of the Sheriff Court (Scotland) Act of 1877 (40 and 41 Vict. c. 50), the Sheriff has jurisdiction in a limited class of cases to determine questions of that kind, but that is his only jurisdiction. Now this case in the Sheriff Court was not brought under these clauses at all, but just as an ordinary possessory action brought before the Sheriff in the exercise of his ordinary jurisdiction. He had no jurisdiction to determine such a question of heritable right, and if that be so, any findings of his which are said to determine the question of heritable right which is in litigation in the present action cannot exclude the present action. On these grounds I quite agree with your Lordship and the Lord Ordinary that this plea must be repelled.

I have nothing to add to what your Lordship has said about *forum non conveniens*. I think this is not only the *forum* convenient, but the only *forum* to determine this question.

LORD M'LAREN.—I agree with your Lordship that nothing that we decide in this case can interfere in any way with the operation of that most useful and convenient Act of the Legislature, the Crofters Act. That sufficiently appears when we consider what is the principle of the Crofters Act. Whether one agrees with the principle or not it is this, I think, that where a proprietor has allowed a village community to be formed on his estate in those remote districts of the Highlands where there is no employment and no means of subsistence except upon the land, he has given his village tenants an expectation that they

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will be enabled to support themselves out of the land, and he is unde obligation to furnish them with sufficient arable and pasture land fo purpose of subsistence. That, I take it, is the principle embodied in the and it is worked out by means of a Commission, who are empowered t with questions of rent and also with questions of occupation, and if necess add to the holdings.

Now, one sees that in the end that may be a better thing for the prop than to have to support his tenants under the Poor-law. But it neve intended that these tenants should choose for themselves any part of the most convenient for themselves and belonging to their landlord. If claim a part of the estate as their possession, that is a question of law must be decided by the ordinary Courts, and not by a Commission, whic not deal with questions of right at all, but with questions of expediency the obligation resulting from circumstances of residence, and the obligati the land to maintain the poor who are upon it. It appears to me that the of the farm tenant is a right quite as deserving of consideration by a Co law as the right of the crofter, and where the two interests conflict, the pr tor is the proper person to have the claim settled. That I presume to b reason why the Duke of Sutherland appears here to maintain the right farm tenant. After we have determined whether the subject in dispute b to the crofter community or belongs to the farm tenant, it will then be f Commissioners, if necessary, to assign such holdings as they may think to the crofters.

I agree with your Lordship that there is no good objection to the p action.

Lord Kinnear.—I agree with your Lordship in the chair, and also wi additional observations that were made by Lord Adam.

The Court adhered.

Tods, Murray, & Jamieson, W.S.—Rusk & Miller, W.S.—Agents.

No. 59.

Dec. 18, 1890. Crichton's Trustee v. Howat's Tutor.

Mrs Bessie Hay (Crichton's Trustee), Pursuer (Respondent).—*J. A.* —*A. S. D. Thomson.*

William Howat (Howat's Tutor), Defender (Reclaimer).—*Murra* *J. Wilson.*

Succession—Conditio si sine liberis decesserit—Inter vivos deed—Destin —By *inter vivos* deed two sisters conveyed certain heritable subjects to selves and another sister in liferent, and to their nieces *nominatim*, an survivors or survivor of them, in fee, and infeftment followed for these r tive rights. One of the nieces having thereafter died without having altere destination, her son claimed a third of the fee, pleading the *conditio*. *Hel* he was not entitled to it—*per* Lord Justice-Clerk and Lord Young, in r (1) that the conveyance was of an isolated subject, and was not part of a g settlement; (2) that it was in favour not of a class but of certain indivi named; and (3) that there was a conditional institution of survivors; *per* Rutherfurd Clark, on the ground that the conveyance contained a destinati the subjects, which must receive effect.

Question, whether the doctrine of the *conditio si sine liberis* can be appli the case of an *inter vivos* deed.

2d Division. Lord Trayner. M.

By *inter vivos* deed, dated 3d March 1859, Mrs Dickie and her s Miss Crichton, then *pro indiviso* proprietors of certain heritable sub in Dumfries, conveyed the same to themselves and another sister in

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rent, and to their nieces (the only nieces they had), Julia, Dorothea, and Katherine, *nominatim*, "and the survivors or survivor of them, in fee." On this conveyance infeftment followed in favour of the whole disponees for their respective rights of liferent and fee, the instrument of sasine being recorded on 7th April 1859. Dorothea (afterwards Mrs Howat), one of the fiars, died in April 1879 without leaving any testamentary writing disposing of her estate, and without having altered the destination in the disposition above referred to. She left one son, William Howat. Katherine (Mrs Costine), another fiar, died in September 1879, leaving a trust-settlement disposing of her whole estate, heritable and moveable, among her "brothers and sisters, or the survivor of them, and the heirs of their respective bodies." One of the brothers who took under this settlement, Horatio Augustus Crichton, died after acquiring right under the settlement, appointing his widow (afterwards Mrs Hay) to be his sole trustee.

Mrs Dickie survived till 1886.

Mrs Hay now raised an action of declarator against, *inter alia*, William Howat and his father, as his tutor-at-law, to have it found and declared that Mrs Costine was, at the time of her death, vested in one-half of the subjects in question.

She pleaded;—(1) The share of the property referred to in the summons, which was destined to Mrs Howat, having upon her death passed to the other fiars, decree in terms of the declaratory conclusions of the summons should be pronounced.

Mr Howat, as tutor for his son, defended, and pleaded;—(3) The said William Howat junior, as heir-at-law of his mother, the late Mrs Howat, acquired right to her share of the property in question in virtue of the *conditio si sine liberis* implied in the destination in the disposition of 1859.

Lord Trayner, Ordinary, on 28th June 1890, found "that the deceased Katherine Hay Crichton or Costine was at the time of her death vested in, and heritable proprietrix of, one-half *pro indiviso* of All and Whole the subjects described in the conclusions of the summons." *

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* "OPINION.— . . . The first question, and the only one to be decided at this stage of the case, is whether William Howat is entitled to one-third of the subjects conveyed by the disposition of 1859 as heir of his mother. It is admitted that he cannot successfully claim any share of the subjects under the destination in that conveyance as it stands, for that destination is in favour of three disponees named, 'and the survivors or survivor of them' alone. But he maintains that that destination is to be read as implying a conditional institution in favour of the heirs of each fiar to the share which each fiar took under it.

"I am of opinion that this is not a case for the application of the *conditio si sine liberis*, &c. So far as I know, this is the first case in which it has been sought to add the implied condition to the destination in an *inter vivos* deed on which infeftment had followed. I do not say that this may not be competent, but it appears to me that such a case presents more difficulty in the way of implying the condition than the usual case of a testamentary or *mortis causa* deed. Passing over that difficulty, however, I think there is no room for the implied condition in this case, for several reasons—(1) The conveyance of 1859 is not of the nature of a universal or family settlement, but is a deed of gift of a special subject. (2) It is not a gift in favour of a class, but in favour of persons named and individually chosen by the granters. (3) The gift is destined not only to the persons named, but to the 'survivors or survivor of them,' thus making the survivors or survivor the conditional institutes to a predeceaser, to the exclusion, so far as expressed, of the predeceaser's heirs, and 'it is not likely that when one conditional institute is expressed another should be implied' (per Lord Justice-Clerk Moncreiff in *Blair's Executors*, 3 R. 365). (4) There is no reason to suppose that the granters of the conveyance had any intention of benefiting the issue

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Howat reclaimed, and argued;—It was said that it was entirely novel to apply the *conditio* to a destination contained in an *inter vivos* deed, but there was authority for applying it to all destinations.[1] Again, it was said that the *conditio* would be applied to effect an institution, but not, as it was sought to do here, to make a substitution. But, again, the answer was that authority had determined otherwise.[2] Then, to take up the points specified by the Lord Ordinary, they might be thus answered, viz.:—(1) This was true only of bequests of corporeal moveables;[3] it did not hold in the case of provisions as distinguished from mere legacies.[4] (2) The beneficiaries here were nieces, and the only nieces, of the disponers. That was sufficient to meet the requirements of a case for the application of the *conditio*.[5] (3) But the only case in which the *conditio* fell to be applied—it was a presumption as to an institution which had not been made—was where there was an institution actually made which came into competition with it. (4) The elements here insisted on existed in every case of the application of the *conditio*. (5) The "love, favour, and affection" might well be extended to the son of one of the nieces.

Argued for the pursuer;—It was entirely novel to apply the doctrine of the *conditio* to *inter vivos* deeds. It was well said in Bell's Dictionary, "There is no example of this implied condition in our law, where the donation was *inter vivos* and perfected by delivery." By mere survivance the sisters here took an accrescing fee, just as in the case of a trust title, to the exclusion of the heirs of the predeceaser.[6] There was here no room for the application of the *conditio*, for the immediate beneficiary, Mrs Howat, herself survived and took. The *conditio* should not be extended

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of the disponees, because such issue had no existence at the date of the conveyance, and might never exist; while (5) there is reason to believe, from the 'love favour, and affection' which was the inducing cause of the conveyance, that the granters meant precisely what they said, viz., that on the death of any one of the disponees the surviving disponees should take the benefit by accretion of the predeceaser's share.

"It is unnecessary to examine the cases cited by either party. But it appears to me that the reasoning of the Lord Justice-Clerk in the case of *Blair's Executors*, which I adopt, is for the most part directly applicable to this case, and is adverse to the defender.

"I think this is a hard case for the defender. His mother could have conveyed to him the third share of the subjects which she took under the conveyance of 1859. What she would have done had the necessity for some act on her part, with the view of excluding her sisters and benefiting her own nominees been before her mind, it is not possible to say. She would very probably have preferred her son to her sister or her sister's representatives, but she might also have preferred her husband to her son. But, having done nothing to alter the destination in the deed of 1859, it must now regulate the rights of parties, and in my opinion, it excludes the defender."

[1] Bell's Pr. secs. 1704 and 1776; Magistrates of Montrose v. Robertson, 1738 M. 6398.

[2] Magistrates of Montrose, *ut supra;* Rougheads v. Rannie, 1794, M. 6403 Menzies' Lectures, 482; Bell's Lectures, 2d edn. p. 915, 3d edn. p. 922, referring to Rougheads.

[3] Thus see M'Alpine, &c., March 20, 1883, 10 R. 837.

[4] Grant's Trustees v. Grant, July 2, 1862, 24 D. 1211, Lord President at p. 1226, 34 Scot. Jur. 589; Bogie's Trustees v. Christie, Jan. 26, 1882, 9 R. 453.

[5] Bogie's Trustees, *ut cit.;* M'Call v. Dennistoun, Dec. 22, 1871, 10 Macph. 281, 44 Scot. Jur. 160.

[6] Bell's Lectures, 2d edn. p. 939, 3d edn. p. 946; Bissett v. Walkers, 1799 M. App. *voce* Deathbed, No. 2.

[7] Gillespie v. Mercer, March 8, 1876, 3 R. 561.

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to effect a substitution in place of a conditional institution, its only mate end. The present case was *a fortiori* of *Blair's Executors.*[1] e was here a destination of the estate making it quite unnecessary npute any intention to the disponers. This intention was fully essed. Nor was this a provision in the sense required to invoke the *tio.* The Court had refused to apply it in the case of a legacy of 0.[2]

advising,—

RD JUSTICE-CLERK.—In 1859 these two sisters conveyed a certain heritable rty to themselves and another sister in liferent, and to three nieces specially d and to the survivors or survivor of them in fee. Infeftment followed diately thereafter. One of the fiars died in 1879 without leaving any ment. She was survived by a son, and the question which is now before ourt is, whether that son is entitled to succeed to his mother's share, or ier that share goes to his mother's sisters under the survivorship clause. contended on his behalf that the *conditio si sine liberis* applies, on the d that the testators acted as *parentes* to the nieces in making this settle- that it is a family settlement, and that, accordingly, children of prede- g fiars are entitled to the share left to their parent.

is a peculiarity of this case that it does not relate to a *mortis causa* settle- but to a deed *inter vivos* followed by infeftment. Whether under any nstances the doctrine of the *conditio si sine liberis* could apply to such a may be a question, but it is one which does not require to be decided in ase, in the view I take of it. The deed here does not present the charac- ics of a settlement to which the *conditio* applies. It relates not to the al estate of the donor, but only to a distinct piece of property. It is fore unlike the case of a general family settlement. It does not give to a , but only to certain specified persons selected by the donors. This militates st the idea that the donor is taking the parental position in making the There is also a special conditional institution by which the donors destine hare given to one of the donors to pass to the survivors or survivor of the ns named, when any of them shall die. This fact is unfavourable to the of implied intention conditionally to institute some other class for benefit. these grounds, which are substantially those given by my brother Lord ner, who decided the case in the Outer-House, I am of opinion that the locutor should be affirmed.

RD YOUNG concurred.

RD RUTHERFURD CLARK.—I agree in thinking that the Lord Ordinary's ment must be affirmed. I think the deed contains a destination to which ust give effect. On that ground I proceed.

THE COURT adhered.

MARCUS J. BROWN, S.S.C.—SOMERVILLE & WATSON, S.S.C.—Agents.

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[1] Blair's Executors v. Taylor, Jan. 18, 1876, 3 R. 362.
[2] M'Call v. Dennistoun, *ut cit.*

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Rixon v. Edinburgh Northern Tramways Co.

AUGUSTUS WILLIAM RIXON, Pursuer (Reclaimer).—*H. Johnston*—
EDINBURGH NORTHERN TRAMWAYS COMPANY AND OTHERS, Defend
(Respondents).—*Murray*— *C. K. Mackenzie.*

Company—Title to sue—Reduction—Shareholder—Directors.—An ind shareholder in a public company brought an action for reduction of an agr between the company and certain contractors for the construction of certai of tramway as authorised by Act of Parliament, the allegations being (1) t agreement had been entered into in contravention of the Act of Parliam respect that there had been no competition for the contract, although the been previous agreements between the company and the Corporations of burgh and Leith, which were confirmed by the Act of Parliament, to the effe the works to be executed by the company should "form the subject o petition"; (2) that the directors of the company who had concluded the ment were disqualified by having interests apart from the interest of th pany in the contract to which it related; and (3) that the pecuniary con of the contract were such as shewed that it had been carried through by of a fraudulent scheme whereby the pursuer and the minority of the share were defrauded by the majority. The parties to the agreement were all c defenders.

The Court repelled the reasons of reduction and *assoilzied* the defenders, (1) that the stipulation as to competition being one between the compa the two corporations, the pursuer had no title to enforce it; (2) that in p fact there was no such conflict between the personal interests of the direct their duty to the company as would disqualify them from acting, an even if there had been, such objection had been obviated by the ho tion of the company at a general meeting; and (3) that although a min the shareholders had a title to plead fraud, it had not been proved tha had been any fraud practised by the majority upon them, or that a bad had been made knowingly or in disregard of the interests of the compan the intent to sacrifice the interests of the company and of the minority.

1ST DIVISION. Lord Kincairney. O.

(VIDE *ante*, March 20, 1889, 16 R. 653.)

Augustus William Rixon, London, a shareholder of the Edi Northern Tramways Company, incorporated by the Edinburgh No Tramways Act, 1884, brought an action of reduction against (1 company; (2) the Patent Cable Corporation, Limited, and John liquidator of that company; and (3) Dick, Kerr, & Company, tr contractors in London and Kilmarnock, and Frederick Manuelle an Kerr, the partners of that company.

The deed sought to be reduced was a contract executed by these on 15th June 1888, whereby, *inter alia*, Dick, Kerr, & Company to construct a cable tramway between Stockbridge and Princes St Edinburgh, under the statutory powers of the Edinburgh Northern ways Company, and also to pay the creditors of the Edinburgh Co to the amount of £3000; and whereby, on the other hand, the Edi Company agreed to pay a contract price of £75,000, of which £60,0 to be paid in shares of £10 each, and £15,000 in mortgage debe There were several reasons of reduction, of which these three wer mately pressed,—(1) Because the agreement, having been entere without any opportunity for competition by other contractors, was i travention of a requirement in the Edinburgh Company's Act; (2) b it was illegal, inasmuch as the directors who entered into it wer qualified as being interested in the contract to which it related; a because the contract was carried through by means of a fraudulent s whereby the Edinburgh Company and a minority of the shareh

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including the pursuer, were defrauded by the majority of the shareholders.

At first only the Edinburgh Company were called as defenders, the other two companies being called by a supplementary summons.*

The transactions, negotiations, and events out of which the agreement arose were very complicated, the nature of the fraudulent scheme which the pursuer sought to prove being that Dick, Kerr, & Company had got their contract on far too favourable terms; that the contract price should have been a third of what it was, and that the interests of the Edinburgh Company had been correspondingly sacrificed; that this was brought about through the influence of the Assets Realisation Company, who had control of a large majority of the shares of the Edinburgh Company, and so had full command of the company. The Assets Company were creditors of the Patent Cable Corporation (the connection of which company with the transactions will appear hereafter) to the extent of £43,314, 19s. The Patent Cable Corporation went into liquidation, and the Assets Company were in danger of losing the money they had advanced, and the case of the pursuer was that they induced Dick, Kerr, & Company to pay this sum of £43,314, 19s., and procured for them in return, and as an inducement or bribe, this favourable contract with the Tramway Company, which, as already mentioned, they controlled.

The pursuer pleaded;—(1) The agreement libelled having been entered into in contravention of the Edinburgh Northern Tramways Company's Act of 1884, is illegal and reducible at the pursuer's instance. (2) The said agreement not having been entered into in conformity with the said Act of Parliament was *ultra vires* of the company, and ought to be reduced in terms of the conclusions of the summons. (3) The said agreement having been entered into fraudulently and collusively, as condescended on, and being to the prejudice of the pursuer, decree should be pronounced in his favour as concluded for. (4) The said agreement having been entered into to the prejudice of the Edinburgh Northern Tramways Company by persons disqualified from being directors, and from voting or acting as such, is null and void, and ought to be reduced as concluded for.

The defenders the Edinburgh Northern Tramways Company pleaded;—(1) No title to sue. (2) The statements of the pursuer are irrelevant, and insufficient in law to support the conclusions of the summons. (3) The statements of the pursuer, so far as material, being unfounded in fact, the defenders are entitled to absolvitor.

The pleas for the other defenders were in similar terms.

The following narrative of the transactions out of which the action arose, as disclosed by the proof, is taken from the opinion of the Lord Ordinary (Kincairney):—

"The Edinburgh Northern Tramways Company was incorporated by statute dated 7th August 1884, and was empowered to make certain lines of tramway, and among these were two, the one between Princes Street and Golden Acre, called the Golden Acre section, and another between Princes Street and Stockbridge, called the Stockbridge section. The

* By interlocutor of 10th January 1889 Lord Kinnear sustained the plea of want of title stated by the Edinburgh Company; but on a reclaiming note the Court recalled the Lord Ordinary's interlocutor *hoc statu*, and sisted the process to enable the pursuer to call the other parties to the agreement as defenders; and that having been done, their Lordships, by interlocutor of 20th March 1889, repelled the defenders' plea that all parties had not been called, and also repelled the plea to title as an objection to satisfy the production, reserving its effect on the merits, and remitted the cause to the Lord Ordinary.

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company was empowered to use mechanical power—that is to say were empowered to lay cable tramways. The capital is (sectio declared to be £90,000, in 9000 shares of £10 each, and the first dir Messrs Boulton, Couper, Galloway, Turnbull, and Waddell, are nam the Act in the usual way (section 54).

"There are various agreements scheduled and confirmed by th Schedule C is an agreement with the Magistrates of Edinburg schedule E with the Magistrates of Leith; and by both of these con section 2 and section 7 respectively, it is provided that 'all the executed by the promoters shall form the subject of competitio contract.'

"Mr W. H. Beattie, architect, Edinburgh, and Mr G. V. Mann, were among the promoters of the Act, and I suppose there is no that they were the principal promoters. Mr Beattie was afte engineer and Mr Mann secretary of the company.

"There was a company in London called the Patent Cable Tra Corporation, Limited, which had been recently incorporated, and ha engaged in the construction of the Highgate Cable Tramway in L This company had acquired right to certain patents connected with tramways, and the Edinburgh Company entered into a contract with dated 24th October 1884, for the construction of the Golden Ac Stockbridge sections of the tramways authorised by their statute contract price was stated as £93,000, which, however, covered mor the cost of construction, and, among other things, included the ex of obtaining the Act.

"It was provided that the first £5000 of the contract price wa paid by the issue of 500 shares of the company, and the balance be paid, if the company had not sufficient cash, in debenture or in shares. It was agreed that Mr Beattie and Mr Epples (who had carried out the Highgate line) should be engineers f company.

"By an agreement, dated 25th October 1884, between the Patent Tramways Corporation on the one hand, and Mr Mann and Mr on the other, it was, *inter alia*, agreed that Mr Mann and Mr should indemnify the Patent Cable Corporation against the co obtaining the Act, and the corporation agreed to pay Mr Beattie £ —£5000 in cash, £8500 in debentures of the Cable Corporatio £3500 by transference of 350 shares of the Edinburgh Company.

"The construction of the tramways did not proceed under thes tracts, for reasons which need not be referred to; and on 22d July a second agreement was entered into between the Edinburgh Co and the Patent Cable Corporation, which, following out 'Heads of promise,' dated 31st May 1886, modified the former agreement in v particulars. In particular, the contract price was increased to £9 and it was also provided that the contractors should be at liberty t ceed with one section only, constructing, however, the building driving machinery required for both; and with regard to the s which the contractors might elect not to execute, it was provide the Edinburgh Company, after written notice to the contractors, proceed with the line themselves, subject to arrangements as to ment to the contractors of a proportion of the cost of the buildin driving machinery.

"The contractors elected to construct the Golden Acre section, opened for traffic on 28th January 1888, buildings and machinery able for both lines being also constructed.

"No part of the work was in reality executed by the Patent Cabl

poration. It was all done by Dick, Kerr, & Company, as sole contractors, who were paid by the Cable Corporation—at least to a large extent—not in cash, but by debentures.

"All the benefits of these agreements were transferred (1) by the Cable Corporation to a company called the Debenture Corporation by assignment, dated 7th July 1886; and (2) by the Debenture Corporation to the Assets Realisation Company by translation, dated 4th January 1888, although the former deed bears an earlier date than the second contract between the Cable Corporation and the Edinburgh Company.

"It is important to notice that the latter deed of 4th January 1888 was in implement of a contract between the two companies on or about 4th November 1887, and that date, and not 4th January 1888, must be held to be the date when the interest of the Assets Company in the Cable Corporation commenced.

"These assignations were made in security of an advance by the Debenture Corporation, in respect of which the Debenture Corporation received mortgage debentures of the Cable Corporation for £40,000, which they transferred to the Assets Realisation Company. In this way the Assets Realisation Company came to be secured creditors of the Cable Corporation for £40,000 and interest, for which they held Cable Corporation debentures, and they were the assignees of the benefits of the Cable Corporation contracts with the Edinburgh Company. There is no clear information in the proof about the transaction and understanding between the Debenture Corporation and the Assets Company. They were certainly in close alliance, although that alliance does not seem to affect this question. I suppose that on the side of the Assets Company the transaction was a speculative purchase with the prospect of liquidation.

"As the Edinburgh Company seems to have had very little money in hand, and as the contract price was payable to the Cable Corporation to a large extent in shares, it resulted that all the shares, with a trifling exception, came to be held either by the Cable Corporation on the one hand, or by Mr Beattie and Mr Mann on the other.

"The qualification of each director was ten shares, and each of the original directors received ten shares, *i.e.*, fifty shares altogether, representing a nominal value of £500, but they did not pay any part of that price. The arrangement was that £2 per share was to be held as representing directors' fees, and the remaining £8 per share was supplied through an arrangement with Beattie and Mann, into the details of which it is unnecessary to enter.

"The outcome, however, was that the Cable Corporation came to be possessed of a large majority of the shares of the Edinburgh Company, while Beattie and Mann held a number of these shares, but were in a hopeless minority. There was not much said at the proof about Mr Rixon, the pursuer, and he was not a witness. He holds five shares in his own name, and is alleged by the defenders to hold them as Beattie and Mann's nominee. But that seems only imperfectly proved. At all events it was not disputed that he has the full right and title of a shareholder.

"Although the Cable Corporation held the Tramway Company shares, it is plain enough that the Cable Corporation was entirely in the hands of its mortgagees, who were, firstly, the Debenture Corporation, who were replaced by the Assets Company; and, secondly, Dick, Kerr, & Company, who were postponed mortgagees. The mortgages clearly more than exhaust the Cable Corporation's assets, and thus it was the mortgagees rather than the Cable Corporation who had the substantial interest in the Edinburgh Tramway Cable Company.

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"Mr Harold Brown* is agent of the Assets Company, and it ap to me that in transactions which he originated and carried throu acted primarily in the interests of the Assets Company, first in m what seemed an advantageous although a speculative purchase of the Corporation Debentures, and afterwards in protecting their int which seemed imperilled by the financial condition of their debto Cable Corporation.

"Mr Brown was also agent for the Debenture Corporation, and h for some time agent of the Cable Corporation, but he resigned that a when he foresaw a probable conflict of interests between the Cabl poration and the Debenture Corporation.

"Having acquired the Cable Corporation debentures, and thus th mary interest in their assets, Mr Brown directed his attention to these assets, and among them the Edinburgh Tramway, available did not regard with favour the Edinburgh management, and he th that the only or the best means of making the Edinburgh Tram success was to get the Stockbridge section constructed, because that fully utilise the cost of the buildings and machinery, which, as a mentioned, had been made to work both sections.

"With the view of securing complete control over the Tramway pany, he divided the Cable Corporation shares among various no shareholders, so as to increase their voting power, under the 44th s of Table A of the Companies Clauses Act, and so as to make sure c voting the Edinburgh holders, who, as I gathered, resorted to the plan.† The effect was to give a voting power on behalf of the Company of 673 against 291.

"The transfers by which the holdings of these nominee shareh were created are mostly dated on 29th November 1887, but it seer to have been until 28th February 1888 that Mr Brown put his into operation by insisting on the resignation of the Edinburgh dir replacing them by four gentlemen, Messrs Balfour, J. M. Broad, C Brown, and Salmon, and removing the business to London. N these new directors had any beneficial qualification, but were all nor of the Cable Corporation or the Assets Company.

"Mr Brown took the further step of obtaining the appointmen judicial factor on 20th March 1888.

"In the meantime proceedings were taken for the liquidation Cable Corporation, and on 14th January an order to wind up wa nounced, and on 13th February Mr Annan, who had for four years secretary of the Assets Company, was appointed liquidator. It do signify in whose name the petition for liquidation was brought. The I think, be little doubt that practically this appointment was ow the action of the Assets Company, or perhaps, to speak more exac Mr Harold Brown.

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* The Lord Ordinary referring to his evidence said,—"The individu contrived and carried out the whole scheme was unquestionably Mr Brown, partner of the firm of Linklater & Company, solicitors, Londo any fraud was committed he had the principal share in it; and indeed I that almost the whole case will be found in his distinct, and, as I thought I heard it, candid evidence, although of course the pursuer will not conced Mr Brown's candour was equal to his exceptional ability."

† The Lord Ordinary observed in regard to this,—"The power of a holder to increase his voting powers by the creation of fictitious holders to savour of a device to evade the Act of Parliament. But the legality was not challenged, and does not seem doubtful.—(See Buckley (5th ed.) Lindley on Company Law, 309, and cases there quoted)."

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"After the liquidation it became of course the duty of the liquidator to realise the assets, and it became the duty of Mr Brown, as agent for the Assets Company, to take steps to ensure that the price would pay the claim of his clients as first mortgagees. They both depone that they made various efforts in that direction without success, but that Dick, Kerr, & Company, the second mortgagees, were at last induced to become the purchasers of the whole Cable Corporation assets at a price equal to the claim of the Assets Company. Practically what Dick, Kerr, & Company agreed to was to clear their second mortgages of the mortgages of the Assets Company, which were in front of them.

"This agreement was embodied in a contract dated 22d May, to which the parties were the liquidator, the Assets Company, and Dick, Kerr, & Company. By this agreement the liquidator and the Assets Company agreed to sell to Dick, Kerr, & Company all their interest in the various assets of the Cable Corporation in the hands of the liquidator, which assets are enumerated in a schedule to the agreement, and seem to have been of a very miscellaneous character. One of them consisted of the shares in the Edinburgh Northern Tramways Company. The price was fixed at £43,314, 19s., to be payable at the periods mentioned. The assets were not assigned, and were not to be assigned until payment to the extent specified. Full payment has not yet been made, and the shares of the Edinburgh Company have not yet been transferred to Dick, Kerr, & Company. They are still in the names of the nominees of the Cable Corporation and the Assets Company. The agreement was besides necessarily dependent on the sanction of the Court being obtained to the act of the liquidator, and provision was made for the event of that sanction being refused. Now, it appears that an application to the Court for confirmation of the agreement was strongly opposed by Mr Bullivant, a gentleman who had been chairman of the Cable Corporation, and was besides an unsecured creditor. He complained that the interests of the Cable Corporation were sacrificed by the agreement, and that the assets were worth much more than the sum which Dick, Kerr, & Company agreed to pay. His views and that of the liquidator were supported by affidavits, with the result that, after discussion and investigation, the agreement was confirmed, but not until 6th August. The fact that the agreement was judicially confirmed after discussion in Court may negative the idea that the price to be paid by Dick, Kerr, & Company was too little, but it throws no light on the other question, whether it was too much, which is what the pursuer's argument in this case certainly implies.

"While the agreement was thus in abeyance, Mr Brown further occupied himself in endeavouring to get the Stockbridge line constructed. He did so, he says, because he believed that the construction of that line would greatly increase the value of the shares of the Edinburgh Company, and because he was materially interested in increasing the value of that property, because if the agreement with Dick, Kerr, & Company was not carried out, he had to consider the Edinburgh shares in the light of a security which he might have to hold. He expresses his view thus:—'My interest for the Assets Company was first of all, if I could, to sell the assets for an amount not less than our mortgage, and secondly, if I failed in that, to make the asset as valuable as I could to hold.' His difficulty, however, was that there was no money wherewith to pay a contractor, and that any contractor would require to be satisfied with an issue of shares and debentures. He says that he considered the Edinburgh Company at the time was in bad credit, and that its shares were worth little or nothing.

"In these circumstances, after endeavouring in vain to induce the

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Assets Company to embark on his scheme, he had recourse to Dick & Company, who at first refused to make the venture, but ultim agreed to offer for the line. He depones that he thought it wo utterly useless to advertise for offers. The bargain with Dick, K Company was made on 1st June at a meeting of the directors Edinburgh Company, when there were present Messrs Balfour, Bro Salmon, and it was afterwards embodied in the agreement date June, which this action seeks to reduce. The parties to that agre are the Patent Cable Corporation and its liquidator, the Edi Northern Tramways Company, and Dick, Kerr, & Company. Its m stipulations are (1) that Dick, Kerr, & Company should constru Stockbridge section, and should pay the debts of the company £3000; and on the other hand, that the contract price should be £ whereof £60,000 should be satisfied in fully paid-up shares, and £ in mortgage debentures. This agreement received the confirmation Court on the following day—16th June 1888.

"The execution of this contract has proceeded notwithstandi action, and the Stockbridge section has been opened, but th been done under a provisional arrangement as to the payment of Kerr, & Company, in the event of the agreement of 15th June reduced. No plea of bar arises or is stated.

"The contract had not been submitted to the shareholders of the burgh Northern Tramways Company when this action was raised. said that this happened through oversight, but it was afterwards con at a general meeting. The confirmation was a matter of course, b the majority were the nominees of the Assets Company."

The Lord Ordinary, on 25th March 1890, pronounced this interlo —"Finds (1) that it has not been proved that the agreement libell entered into fraudulently and collusively, to the prejudice of the pu (2) that it is not reducible at the pursuer's instance in respect that been entered into in contravention of the Edinburgh Northern Tra Act, 1884; (3) that it is not reducible at the pursuer's instance ground that the directors who made it were disqualified: Therefore the reasons of reduction, and assoilzies the defenders from the conc of the action, and decerns," &c.*

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* "OPINION.—[After the narrative quoted above]—The first argume rested on the want of any competition for the contract, and on the clause agreement with the Magistrates of Edinburgh and Leith, schedules C an the Act above quoted. The plea has been dealt with by Lord Kinnear- 16 R. p. 656]. I concur in and refer to his opinion. I think the ob not one which the pursuer has any title to take, and I think that th persons *in titulo* to take it are the Magistrates of Edinburgh and the Mag of Leith. I do not consider that the case *The Caledonian Railway Co* March 13, 1874, 1 R. (H. L.) 8, quoted by the pursuer, supports his tion. It merely shews that such agreements have statutory force, but n the statute converts them into agreements with the public or with ind shareholders.

"I think the plea that the contract was illegal because the directo disqualified is also bad, and that the pursuer as an individual shareholc no title to plead it. I did not understand the pursuer's counsel to ple the directors had no true qualification, and were disqualified because the mere nominees of the Assets Company. If such an argument had been I rather think it must have been disallowed on authority,—Buckley, Lindley, p. 301; *Pulbrook* v. *Richmond Consolidated Mining Company*, Div. 610. The objection that the directors were disqualified because the interested in the contract appears to me not well founded, whether the d

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The pursuer reclaimed, and argued;—The agreement of 15th June 1888 ought to be set aside upon two grounds. I. It was *ultra vires* of be regarded as representing the interests of the Cable Corporation or of the Assets Company. In either case their interests, supposing they had interests, were the same as those of the Edinburgh Company. There was no conflicting duty. They were not contracting with the company, but for it. It was argued that this was not so if the contract of 1888 were to be regarded as what it professes to be, supplemental to and a mere modification of the prior contracts of 1884 and 1886; but although there may be subtlety in this view, there is, I think, no substance. The contract of 1888 was really a new contract. The plea pressed by the pursuer is an equitable plea, founded on the assumption of a conflict between the personal interest of a director and his duty as a director, and where there is no such conflict the rule has, I think, no place. During the debate I felt a little doubt whether the directors did not fall to be regarded as the nominees of Dick, Kerr, & Company, in which case the argument of the pursuer would have had more force. But I think they cannot be so regarded; and I rather think that even if they were, the objection to the contract which would thence arise would be one which could be, and has been, waived by the majority of the company.

"The plea founded on fraud raises more difficulty, because it involves the consideration of intricate and complicated negotiations and arrangements, in which it may well be that fraud may lurk. Although it may generally be the case that a contract which is a fraud on a company is not void but only voidable, and may be accepted and validated by the company, and that where that is the case the title of a single shareholder to reduce it cannot be sustained, yet it does not seem doubtful that the rule admits of this exception, that where a contract amounts to a fraud by a majority of shareholders on the minority, such a contract may be reduced at the instance of any shareholder who has been so defrauded.—*Atwool* v. *Merryweather*, L. R., 5 Eq. 464; *Menier* v. *Hooper's Telegraph Works*, 1874, 9 Ch. App. 350; *Mason* v. *Harris*, 1879, 11 Ch. Div. 97. The previous decision of the Court in this case amounts to a judgment to that effect.

"The present is clearly a case to which that principle is applicable. If there has been any fraud it has been a fraud practised by the majority of the shareholders on the minority, and against which the minority could have no remedy except through the Court. If such a fraud has been proved in this case, the contract ought to be reduced. Now, whether there has been such a fraud or not is just a jury question, as to which impressions and opinions may differ, but my own impression was when the proof was being led, and remains after consideration and examination of the documents, that no fraud has been proved. I think that the evidence of Mr Harold Brown is substantially true, and while it shews that he was looking keenly and acutely after the interests of his own clients, it does not shew that he disregarded or acted adversely to the interests of the Edinburgh Northern Tramways Company.

"The pursuer's conjecture is intelligible enough, and it cannot be said that his suspicion is altogether unreasonable. The idea seems to be that Mr Brown, in order to secure payment of the £43,314, 19s. due to the Assets Company, agreed with Dick, Kerr, & Company to secure to them through the influence of the Assets Company the contract for the Stockbridge section on too favourable terms, if they in return would pay the debt due to the Assets Company by the Cable Corporation, which must in that view be held to have exceeded the value of the Cable Corporation assets. All the witnesses concerned deny most absolutely that there was any such agreement; and there certainly was none unless these witnesses are all to be disbelieved. There is no direct proof whatever of such an agreement. There may, however, have been a fraud without any such express agreement, and indeed it was in no view to be expected that such an express agreement would be proved. The device of filling the directorate of the Edinburgh Northern Tramway Company with nominees of the Assets Company may

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the company. (*a*) The terms of the contract were that Dick, Kerr, & Company were to be paid £75,000, £60,000 in fully paid-up shares, and £15,000 in mortgage debentures. But by the 39th section of 47 and 48 Vict. cap. ccxli. (Edinburgh Northern Tramways Act, 1884), the Tramways Company could not issue shares in payment of expenses to the extent of more than four-fifths of their liability, or in other words they could not make an issue of capital without a cash payment to the amount of one-fifth of the nominal value of the shares. Dick, Kerr, & Company had not made any cash payment. Accordingly it followed that the company could not give them any shares. (*b*) There had been an issue of shares at a discount in this case, inasmuch as £75,000 of shares had been given to Dick, Kerr, & Company in payment of work done, which only represented a cost to them as contractors of £25,000. Such an issue was struck at by the provisions of the Companies Acts, 1862 and 1867, and the point had been conclusively settled by the case of *Klenck*.[1] II. The agreement ought also to be set aside because it was tainted with fraud. The minority of the shareholders, of whom the pursuer was one, had been defrauded by the majority. It was only through the Court that the minority could obtain a remedy, and it was not necessary in order to entitle the minority to have this remedy that they should have suffered an individual wrong. If the majority divided the company property the company was thereby wronged, and

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excite suspicion and challenge inquiry, but such suspicion cannot, I think, supply the proof of a direct fraud.

"It might be shewn that the conditions of the contract are so unfair as themselves to prove fraud, and they would prove fraud if the pursuer's contention were established, that the contract price is three times what it ought to have been; but I think there is nothing of the kind established. Parties are not much at variance as to the probable cost of making the Stockbridge section. Both sides put it at £25,000 or thereby. The question is not about that at all but about the value at the time of the shares of the company. £60,000 to be paid in shares, having regard to the financial condition of the company, was a very different thing from £60,000 to be paid in money. Evidence has been led on both sides on this point. It would serve no good purpose to examine it; but after considering it, I am not prepared to say that the contract price was excessive, or so excessive as to warrant the conclusion that it must have been agreed to in fraud of the company. There was evidence led by engineers and contractors that contractors might have been got at more reasonable terms; and it is said that the contract should have been put up for competition. *Ex facto* evidence of this kind must be considered with caution, and I do not see in it sufficient reason to disbelieve the evidence of Mr Brown and the other witnesses, who are satisfied that it would have been useless to attempt to get outside contractors. It was submitted for the pursuer that the proceedings adopted by the Assets Company, the removal of the Edinburgh directors, and in particular the appointment of a judicial factor, were taken with the deliberate intent of discrediting the Edinburgh Company, and reducing the nominal value of the shares, so as to enable them the more readily to deter competitors, and to favour Dick, Kerr, & Company. I cannot find that such a design has been proved, and I find no sufficient ground for inferring it.

"The question is not whether the directors made a bad bargain, but whether they made the bad bargain knowingly or in disregard of the interests of the company, with the intent to sacrifice the interests of the company and the minority, in order to save and protect the interests of the predominating shareholder, whose nominees they were? I am of opinion that that has not been proved, and that the reasons of reduction ought to be repelled."

[1] Klenck v. East India Co. for Exploration and Mining, Dec. 21, 1888, 16 R. 271.

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was for it to sue. But if the company declined to sue, there was then an exception to the general rule, which was given effect to in *Foss* v. *Harbottle*,[1] and the minority were entitled to sue without conjoining the company. This exception to the rule of *Foss'* case was supported by the case of *Merryweather*,[2] the rule in which had been applied in more recent cases,[3] one of which, that of the *North-West Transportation Company*, was very much in point. Not that it was in the power of a minority to challenge the action of a majority in every case of the kind. For instance, it had been held that a single shareholder could not, on behalf of himself and all other shareholders except the directors, ask an injunction to restrain the directors from carrying out a proposed compromise, which was alleged to be very prejudicial to the company, without submitting it for the approval of the shareholders.[4] But the present was a case where the majority had obtained a benefit to the prejudice of the minority. Dick, Kerr, & Company, who were practically the directors of the company from 1st June 1888 (when the Assets Company agreed to sell to them their building), were to receive £75,000 of the shares of the company in return for work which cost them only £25,000. The truth was that all parties to the agreement under reduction were interested to see the contract price fixed at as large a sum as possible, and so were the Assets Company, who had a leading share in bringing about the agreement, as Dick, Kerr, & Company were indebted to them in the sum of £43,314, 19s. The evidence pointed to this that the agreement was made by the directors *ultra vires* with the knowledge of the company, and against the interests of the shareholders, with a firm of contractors who were the nominees of the directors. If the majority of the company had voted themselves shares *ultra vires* that would have justified the interference of the Court, and this was what they really had done in a modified way. There were elements here which were wanting in the case of the *Transportation Company*, and this was just the case which was figured by Sir Richard Baggallay of the exercise by the directors of the company of their voting power of so oppressive a character as to invalidate the adoption of the agreement. It was to be inferred from the nature of the transactions that the agreement now under reduction was dependent upon the previous agreements and contracts which were set forth on record, and that they were counterparts of one another, and all hung together. The result was that by the contract of 22d May 1888 (to which the Assets Company and the liquidator of the Cable Corporation were parties on the one hand), it was arranged that the Assets Company should hold the whole shares of the company in the names of nominee shareholders in trust for the Assets Company in security, and that Dick, Kerr, & Company practically stepped into the position of the Cable Corporation, and the property passed to them subject to the lien which the Assets Company had for the price of £43,314, 19s. After that date the shares could not have been sold without the leave of Dick, Kerr, & Company, for the nominee shareholders became trustees for Dick, Kerr, & Company. The contract of 1st June was for work to be done, and no specification or estimate was taken.

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[1] Foss v. Harbottle, March 1843, 2 Hare's Chanc. Reps. 461.

[2] East Pant du United Lead Mining Co., Limited, v. Merryweather, 1864, 2 Hemming and Miller's Reps. p. 254, and Atwool v. Merryweather, reported in note to L. R., 5 Equity, 464; Lindley's Company Law, 572.

[3] North-West Transportation Co. v. Beatty, 1887, L. R., 12 App. Ca. 589; see also Menier v. Hooper's Telegraph Works, 1874, L. R., 9 Chanc. Apps. 350; Mason v. Harris, 1879, L. R., 11 Chanc. Div. 97.

[4] Macdougall v. Gardner, 1875, L. R., 1 Chanc. Div. 13.

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Accordingly, it was impossible to fix a proper price for the work, and indeed the real value of it was left indefinite, because payment was to be made, not in money, but in money's worth. There was nothing to show how the value of the shares—in which the price of the work was to be paid—was arrived at.

Argued for the respondents;—The questions at issue were really questions of fact. There did not appear to be much difference between the parties on the law of the case, which was well settled. I. No doubt had been thrown upon the views expressed by Lord Kinnear in the note appended to his interlocutor at the previous stage of the case (16 R. 655). The grounds upon which a contract between a director in his representative capacity and himself as an individual could be set aside, were fully set forth in the old case of *Blaikie*.[1] Such a contract might be well made, although, if it was *ultra vires*, it was absolutely void, or if it was brought about by fraud or undue influence, it would fall to be set aside. There was no case in which it had been held that, in the absence of these two elements, a minority could get the better of a contract which had been made by the majority and approved by the company.[2] Upon the merits of the case the directors were not the nominees of Dick, Kerr & Company, when the contract was entered into, and the contract had to be confirmed by the Court. When the agreements of 7th May and 14th June were entered into the Tramways Company were in such a position that it was necessary for the salvage of the property to find someone to advance the money necessary to enable them to meet their pressing liabilities. The time they had was also very limited. In regard to the want of specification for the Stockbridge line, the parties found that they could proceed upon the lines of the specification for the first section. It supplied a sufficiently intelligible basis as to the cost of the second, the cash price of which was about £25,000. The bargain was a fair one, seeing there was nothing to offer to the contractors beyond shares and debentures. The reclaimers had not succeeded in making out any case upon the head of fraud. II. It was said that the agreement was *ultra vires* because it involved the issue to Dick, Kerr, & Company of shares at a discount. This contention had not been raised upon record and there was no plea to meet it. The Court could not therefore entertain it. The pursuer's shares were in the same position. But further it was to be remembered that the agreement was executed under the greatest difficulties, at a time when no other way of carrying it through was possible. It was not necessary that a money consideration should be given for shares; money's worth was sufficient.[3]

At advising,—

Lord Adam.—This is an action of reduction of an agreement dated 15th June 1888, entered into between the Cable Corporation, John Annan, the liquidator of that company, the Tramways Company, and Messrs Dick, Kerr, & Company.

The main ground of reduction is that the agreement was entered into by the

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[1] Blaikie Brothers v. Aberdeen Railway Co., Nov. 19, 1851, 14 D. 66, 1 Scot. Jur. 49, July 20, 1854, 17 D. (H. L.) 20, 26 Scot. Jur. 622, 1 Mac. 461.

[2] Lindley on Companies (5th ed.), 572.

[3] Pell's case, 1869, L. R., 5 Chanc. Apps. 11, adversely commented on in Leeke's case, L. R., 11 Equity, 100, but reverted to and adopted in Jones' case, 1870, L. R., 6 Chanc. Apps. 49; *cf.* also United Kingdom Mutual Society Assurance Association, 1887, L. R., 19 Q. B. D. 110.

parties fraudulently and to the prejudice of a minority of the shareholders of the Tramways Company, of whom the pursuer Mr Rixon is one.

In order to understand the fraud alleged it is necessary to explain the situation in which the several parties to the agreement stood to each other at its date.

The Tramways Company was incorporated by the Edinburgh Northern Tramways Act, 1884, which authorised the construction of certain tramways, and, *inter alia*, one called the Golden Acre section, and another called the Stockbridge section.

It may be premised that the shares of the Tramways Company have never been offered or issued to the public, so that that company had no cash with which to pay for the construction of the tramways, their only means of doing so being by the issue of shares or debentures of the company.

On the 24th October 1884, the Tramways Company entered into a contract with the Cable Corporation, by which the latter undertook the construction of the two sections of the tramways before mentioned.

By this contract the Cable Corporation undertook, at their own cost, to provide the land, and to erect buildings thereon for the company's works, and to pay the cost of and incident to obtaining the company's Act.

The price or consideration to be paid by the company was £93,000, but as the cost of the lands and buildings to be erected thereon had not been fixed, but had only been estimated at £7250, it was agreed that should the actual cost exceed or fall short of that sum the contract price should be correspondingly increased or diminished.

The price was to be paid, as to £5000 thereof, by the allotment and issue to the Cable Corporation, or to persons to be nominated by them in writing, of 500 fully paid-up shares of the company, and the balance by monthly instalments on the certificates of the engineers. In the event of the company not paying in cash, the Cable Corporation agreed to accept payment in Lloyd's bonds—in fully paid-up £10 shares of the company, to be issued either to the corporation themselves, or in their option to their nominees—or in mortgage debentures; and the company undertook not to issue, without the previous sanction of the corporation, any shares beyond 150 shares necessary for the directors' qualifications except in payment to the corporation.

On the 25th October 1884 an agreement was entered into between the Cable Corporation and Messrs Beattie and Mann, who had been promoters of the Tramways Company, by which it was agreed that Messrs Beattie and Mann should relieve the corporation of their obligation to pay the costs of and incident to obtaining the Tramway Company's Act, and in respect of that undertaking that the corporation should pay them a sum of £17,000 to cover such costs. This sum was to be paid as follows—£5000 in cash on the execution of the agreement; £8500 in debentures of the Cable Corporation on the opening of any part of the Tramway Company's line; and £3500 by the transference of Tramway Company's shares to that amount by the Cable Corporation to Messrs Beattie and Mann.

It appears that £5000 was paid on the 25th October 1884 in cash by the Cable Corporation to Messrs Beattie and Mann, and that they also paid, under the agreement of 24th October, £2000 as the price of the ground required for the tramway works, and that the company issued 150 shares for the qualification of the directors. Neither of the agreements, however, appear to have been

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further implemented at this time. The construction of the tramway lines w not proceeded with in consequence of disputes and litigations having taken pla between the parties. These, however, were ultimately compromised, and t result of the compromise was embodied in a supplementary agreement of 2 July 1886. By this agreement the Cable Corporation granted to the Tramwa Company licence to use certain patents, and agreed to pay the costs of obtaini an Act for extending the time for constructing the tramways, and in resp thereof the contract price was increased from £93,000 to £98,000.

It was further agreed that the Cable Corporation should be at liberty proceed with the execution of both the Golden Acre and Stockbridge secti of the tramways, or either of them, and that should they select to proceed w only one of such sections, it should not be compulsory on them to carry the other, save and except that they should execute and supply the neces buildings, boilers, &c., for the whole tramways embraced in the contract. the event of the Cable Corporation only carrying out one section a deduct was to be made from the contract price, the amount, in case of difference, to settled by arbitration.

The Cable Corporation proceeded with the execution of the Golden A section only, which was completed and opened for public traffic on 3 January 1888.

At this date 4500 fully paid-up shares of the company had been issue payment of the contract price and otherwise, with the result that of these sh about 3190 were held by the Cable Corporation or their nominees, and remainder—1310—apparently almost wholly by the nominees of Messrs Bea and Mann. It is unnecessary, however, for the purposes of this case to go i detail in this matter, because it is obvious that the Cable Corporation, thro their nominees, had the means of acquiring the entire control of the Tramw Company.

In July 1886 the Cable Corporation borrowed from the Debenture Comp £40,000, in respect of which the Cable Corporation issued to the Deb Company £40,000 in first mortgage debentures of £100 each. These consti a first charge on the capital and whole assets of the Cable Corporation.

In November 1887 the Assets Company purchased from the Debenture C poration £39,600 of these debentures, and to that extent became first mortga on the assets of the Cable Corporation.

In December following the Cable Corporation became insolvent, and Assets Company resolved to realise the assets of the corporation in orde secure payment of their debt. The Assets Company appear to have left i the hands of their agent, Mr Harold Brown, to take such proceedings as m appear to him to be necessary or desirable for this purpose.

As has been stated, part of the Cable Corporation assets consisted, be debentures, of 3190 shares of the Tramways Company. Mr Brown was satisfied with the management of that company, and in December 188 intimates to the directors that the Assets Company were determined to the control of the company, and in February 1888 he procured or compelled resignation of the then directors and the appointment of new directors, were nominees of the Assets Company. After this Mr Brown became for the Tramways Company as well as of the Assets Company.

On 13th December 1887 the Assets Company, in virtue of powers conta in the debentures acquired by them as aforesaid, appointed the defender

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be the receiver of all the property charged by the debentures, and on ruary 1888 they obtained an order from the Court of Chancery duly g Mr Annan receiver and manager on behalf of themselves and the benture-holders of the company. On 14th January 1888 an order e at the instance of a creditor for winding up the Cable Corporation, 13th February 1888 Mr Annan was appointed by the Court official r. So far as I can see there was nothing irregular or improper in these gs.

these proceedings were being taken Mr Brown was endeavouring to purchaser for the assets of the Cable Corporation, and among others he o the defenders Messrs Dick, Kerr, & Company.

Kerr, & Company were in this position. They had, as subcontractors e Cable Corporation, constructed the Golden Acre section of the tram- They were creditors of the corporation to a large amount, holding mort- stponed to those of the Assets Company. They were thus deeply d in the successful realisation of the assets of the Cable Corpora- ny surplus, after payment of the Assets Company's debts, would go to

ssets Company, however, refused to sell the assets at a sum which would fficient to pay their debt in full. That debt amounted with interest to , 19s., and Dick, Kerr, & Company ultimately agreed to purchase at e. The terms of the purchase are set forth in an agreement dated 22d 38, to which Mr Annan, as liquidator of the Cable Corporation, the ompany, and Dick, Kerr, & Company are parties. By this agreement 19s. of the purchase-money was payable to the Assets Company on the n of the agreement, £10,000 on the 22d November 1888, and £29,000 2d May 1889. It was further agreed that if the said sums of £10,000 ,000 should not be paid, the said sum of £3714, 19s. should be forfeited, assets resold as the Court might direct. It was further stipulated that idator and the Assets Company should forthwith apply for the sanction ourt to the agreement, and that if such sanction should not be obtained hree months from the date of the agreement, the agreement should , and the Assets Company should repay the said sum of £3714, 19s. ction of the Court was subsequently obtained, but not until August

greement being contingent on the sanction of the Court, it is obvious the event of such sanction not being obtained, the assets, including the y Company's shares, would be left on the Assets Company's hands. Mr says, and I believe quite truly, that seeing this, and believing that it y doubtful whether the Court would sanction the sale, and also that it sible that Messrs Dick, Kerr, & Company might not be able to implement art of it, he resolved to do what he could to increase the value of these that he thought that the success of the company depended on the Stock- section of the tramway being constructed, as buildings and machinery en erected to work both sections, and that, entertaining these views, he l Dick, Kerr, & Company to undertake the construction of that section tramways, and accordingly the agreement of 15th June 1888 sought to ced was entered into.

parties to this agreement are the Cable Corporation and Mr Annan, the tor, the Tramways Company, and Dick, Kerr, & Company.

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By it Dick, Kerr, & Company undertook to construct the Stockbridge sectio of the tramways, and to provide from time to time such sum, not exceedi £3000, as might satisfy the present creditors of the company, except the clai of Messrs Beattie and Mann.

The price to be paid by the Tramways Company was £75,000, where £60,000 was to be paid in fully paid-up shares of the company, and £15,0 in mortgage debentures, to be satisfied by monthly instalments of shares a debentures upon monthly certificates by the engineers of the line.

It was further agreed that the Cable Corporation and the liquidator sho release the company, and that the company should release the Cable Corporat and the liquidator of all claims *hinc inde*.

The liquidator undertook forthwith to apply for the sanction of the Court the agreement, and if such sanction was not obtained within six months agreement was to be void, and in the event of the company being at any t wound up by the Court, Dick, Kerr, & Company were to be at liberty to de mine the agreement.

The sanction of the Court was applied for and obtained on 16th June 18 so that the agreement became a binding agreement. It is this agreement w is sought to be set aside on the ground of fraud, and the fraud alleged is forth in the 13th article of the condescendence.

Shortly stated, the fraud alleged is that Dick, Kerr, & Company agree purchase from the Assets Company the assets of the Cable Corporation much larger sum than the assets were worth, and that the Assets Compan order to reimburse Dick, Kerr, & Company, agreed to obtain for them, by m of the control they had of the Tramways Company, a contract for the cons tion of the Stockbridge section at a price sufficient not only to pay for the struction of the line, but also to repay them for their over-payment to the A Company in respect of their purchase of the assets of the Cable Corpora No doubt if this were true the contract would be a fraud on the Tram Company, and to their prejudice to the extent of such over-payment, a will further be observed that the loss would fall, *ex hypothesi*, on the s holders of that company other than the Assets Company, because that com would be reimbursed for their loss as shareholders by their gain as sellers o assets of the Cable Corporation.

I agree with the Lord Ordinary that there is no direct proof whatever o such fraudulent scheme. All the persons concerned are examined as witn and they deny most emphatically that there was any such agreement or such scheme as that alleged.

It appears to me that the pursuer can have no possible case unless h shew in the face of these denials that fraud is nevertheless necessarily to b sumed from the facts and circumstances of the case.

The Lord Ordinary remarks that there may have been a fraud without such express agreement. It might be shewn, he says, that the conditions o contract are so unfair as in themselves to prove fraud, and they would fraud if the pursuer's contention were established, that the price was times what it ought to have been; but there is, he says, nothing of the established, and this seems to be the main ground on which the Court is to presume the existence of fraud.

I agree with the Lord Ordinary that there is nothing of the kind establi The actual cost of the construction of the Stockbridge section would appe

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t £25,000. The price in the contract was £75,000, but this included which Dick, Kerr, & Company were to advance in payment of the com- debts. This price, however, was merely nominal, as £60,000 was to be shares of the company and £15,000 in debentures. The company had , and could only pay in shares and debentures. The real price therefore ed on the value of these shares and debentures at the time. The shares icular were of very little value, and in my opinion it is not shewn that ce was excessive. The price was a speculative one; whether it has out a good or a bad bargain for Dick, Kerr, & Company there is no evidence .

her, in considering the probability or improbability of any such fraudu- eme having been entered into, it appears to me that it would have been improvident arrangement for the Assets Company to have entered into assumption that the contract price was an extravagant one. The agree- or the purchase of the assets of the Cable Corporation by Dick, Kerr, & ny was contingent on a very doubtful event—that the sanction of the should be obtained to it, and this sanction had not been obtained on the une, when the agreement sought to be reduced was entered into. But reement was not contingent on sanction being obtained to the agreement May, so that it was very probable that the Assets Company might have ft with the Cable Corporation assets in their hands, and have still been to pay the contract price under the agreement of 15th June to their own shareholders of the Tramways Company.

oes not appear to me to be probable that so acute an agent as Mr Brown have advised the Assets Company to embark in a scheme likely to lead a result. I can see no evidence of fraud with reference to the agreement June.

it is further maintained by the pursuer that the agreement of 15th June ntered into by the directors, who held their qualification in trust for, and nder the control of, the majority of the shareholders of the company, with areholders for their benefit, and to the prejudice of the company, and that ore the agreement is null and void, or at least voidable. It is true in point of at the directors were the nominees of the Assets Company and were under control, and that the agreement was entered into for their benefit; but it r their benefit only because they were shareholders of the company, and e it was believed to be a contract for the benefit of the company. It is hat the interest of the Assets Company and the Tramways Company in atter was identical. Whatever was for the benefit of the shareholders of mpany was for the benefit of the company.

e directors were in no way under the control of Dick, Kerr, & Company, ere not contracting in their interest.

reover, the agreement has since been confirmed by the company at a al meeting, and if, as I think, there is no fraud in the matter, that is con- e.

e only other matter that requires to be referred to is the plea that the contract *ra vires* of the company because it did not form the subject of competition. plea is founded on a clause in a contract between the Lord Provost, strates, and Town-Council of Edinburgh and the promoters, which is con- d by the incorporating Act, to the effect that all the works to be executed ld form the subject of competition and contract. I concur with Lord

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Kinnear and the Lord Ordinary in thinking that this is a stipulation whi only be enforced by the parties to that contract, and that the pursuer title to insist in it.

On the whole matter, I am of opinion that the Lord Ordinary's interl ought to be affirmed.

The LORD PRESIDENT and LORD M'LAREN concurred.

THE COURT adhered.

A. & G. V. MANN, S.S.C.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents

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Dec. 18, 1890. Avon Steamship Co., Limited, v. Leask & Co.

AVON STEAMSHIP COMPANY, LIMITED, Pursuers (Respondents).—*Ja —C. S. Dickson.*

LEASK & COMPANY, Defenders (Appellants).—*W. Campbell—Salt*

Ship—Carriage of goods—Delivery.—In discharging a cargo of salt, in bulk, part of the cargo was lost through defects in the gearing of the by reason of which some of the contents of the buckets in which the s swung ashore was jerked out, and fell between the ship and quay. The party bore that the cargo was to be "brought to and taken from alongside." that this obligation had not been implemented, and that the ship was li the loss.

Ship—Demurrage.—The time occupied in loading a vessel is not, absence of stipulation, to be lumped with the time occupied in discharg to the effect of working off by extra despatch in the one operation de incurred by delay in the other.

A charter-party provided,—"Cargo to be loaded and discharged as steamer can receive and deliver during usual working hours. If detained, demurrage to be paid at the rate of £12 per day." At the loading the ship was detained a day and a-half beyond the time in wh could have been loaded. The ship's agent, in advising the despatch vessel, wrote to the shippers,—"If you give us really good despatch and m charges at Peterhead, I will try and get my folks to meet you in this n On the arrival of the ship at the port of discharge extra time was worke the result that the vessel was discharged a day sooner than she would ha under ordinary conditions. In an action raised for the demurrage for a a-half, the shippers claimed that they were entitled, lumping the pe loading and discharge, to escape on payment of a half day's demurrage. (*diss.* Lord Young) that they had no such right under the charter-par the letter of the ship's agent imported no such right, and therefore t full amount of demurrage incurred at the port of loading was due.

2D DIVISION. Sheriff of Aberdeen, &c. I.

BY charter-party dated 6th July 1889, the Avon Steamship Co agreed to carry for Leask & Company, shipbrokers, &c., Peterhead, of salt amounting to 650 tons or thereby in bulk from Liverpool to head. The charter-party bore,—"The said cargo to be brought to and from alongside free of expense and risk to the ship." Further,—" to be loaded and discharged as fast as steamer can receive and during usual working hours. If longer detained, demurrage to b at the rate of £12 per day. It is also agreed that the owners of th vessel shall reserve to themselves the right of lien upon the cargo on board, for the recovery and payment of all freight, dead freig murrage, and all other charges whatsoever."

The bill of lading bore, and it was not disputed, that in loadi Liverpool there had been "delay 1½ days." The ship's agent, w to Messrs Leask & Company just before the ship went to sea, s "The 'Avon' sails from Liverpool to-night, and should reach y

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Sunday. I am sorry this steamer has been delayed 1½ days or so waiting cargo. If you give us really good despatch and moderate charges at Peterhead, I will try and get my folks to meet you in this matter."

On arrival of the ship at Peterhead, Leask & Company, at considerable expense to themselves, by working overtime, beginning at four in the morning and working till eleven at night, succeeded in unloading the vessel in a day less than would have been required had they worked ordinary working hours only.

In unloading the vessel at Peterhead, which is a tidal harbour, it was found that the arm of the derrick, by which the tubs or buckets of salt were swung out of the hold, was too short to swing them on to the quay, and that it was necessary to rig up an additional derrick. As the tubs passed from the one to the other, they were so jerked or shaken that a considerable quantity of salt was lost between the ship's side and the quay.

Messrs Leask & Company paid the freight less £6, 10s. 9d. The Ship Company now sued them for this balance of freight, and for demurrage in respect of the delay at Liverpool. They pleaded their charter-party.

The defenders explained, with regard to the former claim, "that through the defective gearing of the ship, a considerable portion of the cargo was lost in being unshipped. The deduction from freight of £6, 10s. 9d. here referred to, represents the value of short delivery, after allowing for natural wastage according to custom." They pleaded accordingly.

With regard to the latter claim, they referred to the letter of the pursuers' agent, and narrated the extra despatch given in unloading. On this they pleaded;—3. (1) Any delay in loading was compensated for by extra despatch in unloading; and (2) by the terms of the charter-party no demurrage is therefore due.

After a proof, from which the facts above set forth appeared, the Sheriff-substitute (Brown), after findings in fact, found in law, "that the defenders, not having received the whole of the cargo shipped, are entitled to retain the balance of freight sued for, and that the negotiations between the parties, and the proceedings that followed thereon, constitute an implied agreement that unusual despatch in the unloading of the vessel should be imputed *pro tanto* in satisfaction of the claim for demurrage: Decerns against the defenders for the sum of £6, being the balance of demurrage due, with interest as concluded for; and, *quoad ultra*, assoilzies the defenders from the conclusions of the action." *

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* "NOTE— . . . The pursuers, relying on the terms of the charter-party that the cargo 'is to be brought to and taken from alongside free of expense and risk to the ship,' and on the general principle of law, that the duty of providing and making proper use of sufficient means for the discharge of the cargo lies with the charterer, contend that their obligation does not go beyond delivery at the ship's side, or over the rail, and that the merchant must bear any loss against which he has failed to make adequate provision. The defenders, on the other hand, take up the position that the ship should have come to Peterhead prepared to discharge her cargo according to the custom of the port, and that the waste of the cargo having resulted from the failure to have proper appliances to deliver, the charterer must suffer. I feel myself unable to decide the case entirely on a choice between these two opposing views. In my opinion, the charterers are wrong in their contention that the custom of the port is incorporated with the contract, for there is not a particle of evidence that the parties contracted with reference to it, or that it was known beyond one side, or that notice of any kind was given of it, and it seems to me to be settled law in this class of case, that unless local usage is made part of the contract, or was known to both parties,

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The Sheriff (J. G. Smith) on appeal, recalled that interlocuto found "that under the charter-party there is a balance of freight d the pursuers of £6, 10s. 9d., and that £18 is also due for demurrag

it cannot be regarded. Reference indeed was made by the defenders recent case of *Wyllie* v. *Harrison & Company*, Oct. 29th, 1885, 13 R. 9 it seems to me they take no advantage from anything that was there de because, in the language of more than one Judge, the local custom was 'woven into the contract,' and I do not read the observation of Lord that the words, 'as customary,' although not expressed, were implied to that any local usage was thereby incorporated with the contract, or to doubt on the general doctrine that a particular custom is not binding with ence to which parties do not contract. The real point of the defenders, case stands, it seems to me, is not so much that the discharge of the car regulated by the custom of the port of Peterhead, as that there is scarce appreciable difference between that and the measure of the pursuers' obl to deliver under the contract.

"On the other hand, I think the pursuers maintain the general princip delivery at the ship's side or over the rail determines the subsequent risk with the charterer somewhat too broadly. That is undoubtedly the rule, admits of being qualified by circumstances (*Postlethwaite* v. *Freeland*, Ca. (H. L.) 599), and, in my opinion, the facts of this case, when fairly preted, operate very materially to control the result. The cargo in questi delivered in bulk, and the carts on which the defenders say it fell to charged, according to the custom of the port, were ranged as nearly as p alongside the ship. A cargo in bags might be literally enough taken over merchant at the ship's rail, but it is difficult to see that buckets or tubs salt could be similarly handed. The pursuers quoted the case of *The Shipowners' Company* v. *Grimond*, July 4th, 1876, 3 R. 968, in illustra their obligation to deliver under the contract, but there the cargo, stowed in was left on the quay, and it appears to me not an unreasonable interpreta the ship's duty in this case to hold that the merchant was entitled to delivery, and if so, I think it is quite plain, upon the evidence, that it simple an operation to put the salt upon the carts as to deposit it upon the But my interpretation of the evidence is that a number of defects in the g of the vessel, *e.g.*, the shortness of the arm of the derrick, which had to be co sated by the rigging up of another, the heaviness of the ship's chains, a undue proximity of the masts to the hatches, made it impossible for the give proper discharge in one way or another. Salt was lost not only b the quay and the ship's side, but on the ship itself, and, in my opinio defenders succeed in shewing that the original cause of the whole mischi the unfitness of the vessel, with her appliances, to discharge such a carg tidal harbour like Peterhead. The attempt made to shew that an appr loss was sustained in carting the salt from the breakwater, in my op wholly failed.

"I feel that the second question in the case is attended with difficulty. is no stipulation in the charter-party providing for the defenders' cont that they are entitled to lump the delay in loading the vessel with the de given in discharging, so as to bring out the true balance of damage sus by the ship, and in connection with this point, the pursuers, in the very argument submitted on their behalf, relied on the case of *Marshall*, 1880, 6 Q. B. D., 231. It seems to me, however, that that case has only a application, because there there was a question of different rates, requirin two parts of the contract to be separated, and there are here, in addition, ci stances of a very special character. The claim and counter claim are *ej generis*, and there being nothing in the charter-party to exclude compens I think the pursuers cannot be heard after having, through their auth agent, induced the defenders to incur trouble and expense in giving facil the discharge of the cargo, to say that a mere promise to adjust the diff does not operate, at least *pro tanto*, to discharge the claim to demurrage.

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ted to have been incurred at the port of loading: Therefore repels defences; decerns in terms of the conclusions of the summons."*

he defenders appealed, and argued;—The lay-days here in which ship was "to be loaded and discharged" were by the charter-party ped together. The case of *Marshall*[1] implied that there were circum- ces in which demurrage might be compensated by despatch at the other inus, for the judgment there was put on the separation of the two ations in the charter-party.[2] As regarded the obligation of the ship to ver, that was satisfied not by merely placing the goods on the rail, but anding them to the consignee on the wharf.[3] That might be qualified llegation and proof of custom in any particular port,[4] for the custom he port was imported into all contracts. But here there was neither gation nor proof of any such custom. If then the ship was bound to the goods on the quay, she had insufficient appliances for doing so; e the loss; hence the liability.[5]

rgued for the pursuers;—No lumping of the two periods was to be umed,[6] and it was certainly not contracted for. If it were to be held liability for demurrage could be thus wiped out, what became of the over the cargo for demurrage, for it must be all discharged before it d be ascertained whether there was or was not any demurrage? The

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"NOTE.— . . . I think it is very likely that, in emptying the salt the carts, and in carrying it to the steelyard, a considerable quantity was on the quay. But is the ship answerable for this? It is the duty of a el to deliver the cargo by raising it from the hold and swinging it on to the r, and if any loss arises in that part of the operation, which is clearly trace- to her fault, she is responsible. But when the goods cross the rail, the terers' men being there to receive them, her responsibility ends, and if any thereafter happen, which is due to the manner in which the goods are lled or the carts laden, the charterer is himself answerable. The case of *ish Ship Co.* v. *Grimond*, 3 R. 968, so states the rule, and I think on the ence the proof fails to attach any responsibility to the ship.

The second question in the case turns on the meaning of a certain letter, ten in the following circumstances by the ship's agent to her addressees n she was on her voyage. At Birkenhead, the port of loading, demurrage he extent of £18 had been incurred, and the letter says in effect—'You ady owe us £18 for delay in loading, but if you give us really good despatch moderate charges at Peterhead, I will try and get my folks to meet you in matter.' It is evident that this did not amount to a contract—even when d on, it is nothing but a promise to negotiate for some concession on the of a ship, but how much was to be conceded was left quite uncertain, and gether the letter is too indefinite in its terms to bind the ship to anything. ppose that, before the ship left Birkenhead, the £18 had been paid, could the enders have got it back on her arrival in Peterhead, because, on the strength the above letter, instead of confining themselves to the stipulated ten hours ay, they had kept working from four in the morning till eleven at night, as point of fact they did? In other words, could they have claimed 'despatch ney' when both the charter-party and the subsequent correspondence were nt about it? I apprehend not, and, therefore, with some reluctance, I am ged to hold that the original charter-party remains without qualification the measure of the rights of the parties."

Marshall v. Bolckow, Vaughan, & Co., 1880, L. R., 6 Q. B. D. 231.

See Scrutton on Charter-Parties, sec. 130, p. 224.

British Shipowners Co., Limited, v. Grimond, July 4, 1876, 3 R. 968.

J. & A. Wyllie v. Harrison & Co., Oct. 29, 1885, 13 R. 92.

Postlethwaite v. Freeland, 1880, L. R., 5 App. Ca. 599, Lord Bramwell, at p.

Marshall, *ut cit.*

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obligation to discharge was satisfied when the goods were placed on the ship's rail.[1] She was not bound to do anything outside herself.[2]

At advising,—

LORD TRAYNER.—The claim of the pursuers in this action consists of two items,—(1) the sum of £6, 10s. 9d., which they say the defenders have improperly deducted from freight due to them, and (2) £18 for demurrage.

With regard to the first item, it appears from the record and proof that there was a short delivery of the cargo in question to the value of the sum now in dispute, and that the defenders retained that amount out of the freight due by them to the pursuers. There can be no doubt,—indeed it is not disputed,—that the defenders were entitled to set off the amount of the short delivery against the freight, provided the short delivery arose from any cause for which the ship is responsible. The proof makes it quite clear how the short delivery was occasioned. The cargo (which was salt in bulk) was taken out of the vessel's hold in tubs, and in swinging it across from the vessel to the wharf, considerable quantities of the salt were thrown or jerked off and fell into the water between the ship's side and the wharf. This, farther, appears to have been caused not by any carelessness on the part of the stevedore's men, but by the inefficient character of the ship's appliances for delivering the cargo. Even if the loss had been occasioned by the carelessness or fault of the stevedore's men, the ship would have been responsible, because the stevedore and his men were the servants of the ship, not of the consignee. But however the loss was occasioned, it was occasioned before the cargo was delivered to the consignee. It was maintained by the pursuers that they were not responsible for any loss which happened after the cargo had passed over the ship's side—that the ship fulfilled its obligation by putting the cargo on the ship's rail; and the case of *Grimond* (3 R. 968) was cited as an authority for these propositions. The decision in that case does not support the pursuers' contention. It was there held that delivery had been completed when the cargo had been put over the ship's side into the hands of the consignee's servants, which is a very different thing from merely swinging the cargo over the ship's side or placing it upon the rail of the ship. Apart from this, the extent of the pursuers' duty in reference to the delivery of the cargo must be ascertained from the terms of their charter-party. Now, it is there provided that the cargo is "to be brought to and taken from alongside free of expense and risk to the ship." The ship therefore is to put the cargo at the port of delivery "alongside," as the consignee is only bound to take it from "alongside." But "alongside" is necessarily outside of the ship, and consequently, putting it on the ship's rail would not be compliance with this provision of the contract. Nor would merely swinging the cargo over the rail of the ship be fulfilment of the contract in any reasonable sense. The meaning of such a stipulation as that in the charter-party in question is that the shipowner or charterer shall in delivering the cargo place it outside and alongside the ship in a place from which and at which the consignee may take it. I am therefore of opinion that the loss of cargo in the present case took place while

[1] Per Lord Gifford in British Shipowners Co., Limited, *supra*.

[2] Scrutton, sec. 43, p. 97; Holman v. Dasnieres, 1886, 2 Times L. R. 480 (Q. B. Div.), and 607 (Court of App.); Fletcher v. Gillespie, 1826, 3 Bingham, 635; Nottebohn & Co. v. Richter and Others, 1886, 18 Q. B. D. 63.

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cargo was still under the control of the ship, and before delivery was com-
ed, and that for that loss the ship is responsible.

now come to the other item in the pursuers' claim, namely, the claim for
urrage. It is admitted that demurrage to the extent sued for was incurred
he port of loading, but the defenders maintain (1) that that claim was
ed by extra despatch at the port of discharge; and (2) that the pursuers
ed to give up their claim for demurrage incurred in the loading if they got
od despatch" at the port of discharge, and that this was, in point of fact,
n. The first of these views depends on a construction of the clause in the
ter-party. It provides,—"Cargo to be loaded and discharged as fast as
ner can receive and deliver during usual working hours." Under this pro-
n the defenders maintain that they are entitled to lump the time occupied
oth loading and discharging, and that they are not liable for demurrage if
can shew that the time occupied both in loading and discharging did not
ed the time in which the ship would have received and delivered the cargo
ring usual working hours." I cannot adopt this construction of the charter-
y. I think the obligations to load and to discharge are separate. Each of
e operations is to be performed "as fast as the ship can receive and deliver,"
a failure in the performance of either as stipulated results in the obligation
ay demurrage. Two considerations go to strengthen this view in my mind.
first is that where it is intended to lump the time for loading and discharg-
his is usually stated expressly in the charter-party, and the second is that
e defenders' view was adopted it would virtually read out of the charter-
y the important provision that the ship should have a lien on the cargo for
urrage—(*Marshall*, 6 Q. B. D. 231). The defenders' other ground of
nce, that the pursuers agreed to give up their claim for demurrage on a con-
n which was fulfilled, has not been substantiated. The pursuers' letter
d on to prove this defence does not amount to an abandonment or discharge
e claim for demurrage already incurred, but merely indicates that if extra
atch was given in the discharge of the cargo, an effort might be made to
ge that claim favourably for the defenders. I think the defenders read the
uers' letter as meaning more than that, and that they gave extra despatch
he discharge of the cargo at extra cost and trouble to themselves, in the
f that they would thereby get rid of the claim of demurrage. Whatever I
think of the pursuers' fairness or unfairness in insisting on that claim in
circumstances, I am of opinion that they are not barred from insisting upon
nd are entitled to decree for the amount of the demurrage incurred at the
of lading.

ORD YOUNG.—My brother Lord Trayner was good enough to favour me with
rusal of the opinion which he has just read, and I entirely concur with him
he first point. I think that the cargo was lost to the extent stated, owing
he fault of the ship.

n the other point I should not have ventured to differ from his Lordship
it not involved a question of law, and an important question of law, upon
ch, therefore, I think it my duty to state my opinion and the grounds of it.
he question, which I regard as a question of importance, is as to the mean-
and effect of such a clause as we find in the charter-party now before us with
ect to demurrage, and the application of it to the facts which existed here.
question is whether delay at the port of loading can be made up by extra

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despatch at the port of discharge. The clause bears "Cargo to be loaded discharged as fast as steamer can receive and deliver during usual wor hours. If longer detained, demurrage to be paid at the rate of £12 per da

If on any day at the port of loading no cargo is furnished by the shipper a the ship is not bound to permit the shipper to make up for that by working do tides the next day. But the ship may act otherwise if it pleases; it may the shipper to work double tides another day. If the ship invites him to d and he does it with the result that the ship is not in the end unduly dete at the port of loading, there would be no demurrage there. I make the observation with regard to the port of discharge. There is no obligation o ship to allow delivery to go on day and night. But here, again, if the invites him to make up for delay at the port of lading, and he does so, wit result that the ship is not unduly delayed, taking the two periods togeth am of opinion that there is no claim for demurrage.

The claims are *ejusdem generis;* for necessary and unavoidable detentio ship gets nothing extra. That is covered by the freight. If there is detention the cost of that is regulated by the contract. According to sense the result is that if, taking the loading and discharge together, there extra detention, then nothing is due beyond the freight.

I repeat that the shipper cannot make up for the delay once incurred e with the approbation of the ship. But here the ship invited, nay solicited shipper to do this. The letter we have before us may not amount to a con But the invitation was acted on. In discharging the vessel they worked teen instead of ten hours, and that they did for the sake of the ship. The it because the ship solicited it, to let her away, and this letter induced the do so, in the expectation that it would be taken into account as agains undue delay at Liverpool. The shipowner now turns round and says there no contract. He may be right, but I am certainly not disposed to assist in that contention.

The only authority cited to us as against the law which I have indicat in my opinion the law of this case was a case before two Judges of the Qu Bench in 1880. I think that case is not in point, but if it were I shoul assent to it. I should be much more willingly ruled by your Lordships' opi But there was not the same stipulation in the charter-party as we have her

There is only one argument which I shall notice, viz., that the view taking would deprive the ship of her lien for demurrage. That I might a call a captious argument. There is a lien for freight as well as demurrage. master might have kept as much of the cargo as he thought necessary to s freight and demurrage. But there is no proposal to retain any part of the till demurrage is paid, and, if it had been made, the question to be de would have remained the same. My opinion is therefore with the S substitute, and I should have gone further. I think that at the solicitati the ship the delay at Liverpool was completely made up at the port of disch

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred with Trayner.

THE following interlocutor was pronounced:—"Recall the i locutor of the Sheriff-substitute, of date 6th June 1890, and o Sheriff, of date 22d July 1890: Find, in fact, that the purs failed to deliver the cargo in question to the value of £6, 10s

and, in law, that the pursuers are liable in payment of that amount to the defenders: Find that the defenders are liable to the pursuers in the sum of £18 in name of demurrage, and decern against the defenders for payment to the pursuers of that sum: *Quoad ultra* assoilzie the defenders from the conclusions of the summons."

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Murray v. Parlane's Trustee.

WALTER MALCOLM MURRAY, Pursuer (Respondent).—*Murray—Craigie.*
REV. JOHN M'EWAN (Parlane's Trustee), Defender (Reclaimer).—*C. S. Dickson—Guy.*

Discharge—Confusio—Right in security—Ground-annual.—A lady, by trust-disposition and settlement, directed her trustees to dispone certain heritable subjects to a person named, "under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it." Prior to the date of her settlement the truster had obtained assignations to the only ground-annuals affecting the subjects. She subsequently paid up a bond affecting the subjects, and took an assignation thereto. *Held* (1) that the bond had been extinguished *confusione*, and that the disponee was entitled to the property free of the burden of this bond, but (2) (*diss.* Lord Young) that he must take the property under burden of the ground-annuals, that being the intention of the truster as expressed by her settlement.

2D DIVISION. Lord Kinnear. M.

In 1863 Mr Robert Johnston, a builder in Glasgow, had acquired certain land on which he built houses, which were called "Cleveland Buildings." In order to facilitate further building undertakings, he sold these Cleveland buildings to Charles England, his nephew, Mr England undertaking to pay two ground-annuals of £19, 4s. 1d. and £19, 18s. 1d. to the Bank of Scotland. The contract incorporating the sale and the creation of these burdens was dated in 1863. By back-letter England declared that he held the subjects in trust for Johnston, and bound himself to reconvey when required to do so.

Mr England, by bond and disposition in security of even date with the contract of sale, burdened the subjects with a sum of £1800 borrowed from one Simons. No part of this sum was ever paid to England, Johnston receiving it all.

Mr Johnston died in 1868, leaving a universal settlement in favour of his wife.

At Mrs Johnston's request England disponed, on 4th August 1868, the subjects to Thomas Murray, an old friend of her own, who again granted her a back-letter in the same terms as that granted before by England to her husband.

In 1871 the widow, having paid up debts due by her husband to the bank, obtained an assignation to the ground-annuals over Cleveland Buildings, and recorded it in the Register of Sasines.

By trust-disposition and settlement dated 11th March 1873 the widow, who had now become Mrs Parlane, directed her trustees to convey the subjects in question to Thomas Murray, "under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it."

In 1874 she paid up the debt due to Simons of £1800, taking an assignation to the bond. The title to the subjects still stood in Murray.

Mrs Parlane died in 1889, and Murray then raised an action to have it declared that he was entitled to the subjects, and that they were no

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longer affected by the bond, or by any right of ground-annual. He p
the trust-settlement.

The defender, Mrs Parlane's trustee, pleaded that they were not
to convey except under burden of the bond and ground-annuals.

In the course of the process Thomas Murray having died, h
Walter Malcolm Murray, was sisted as pursuer in his room.

On 6th August 1890, Lord Kinnear (Ordinary) found and decla
terms of the summons as regarded the bond, and *quoad ultra* ass
the defender.*

The defender reclaimed, and argued;—"Confusion is not an ab
extinction, but rather a suspension of obligations . . . the tak
an assignation and not a discharge did clear the mind of the defunc
the debt and credit should divide after his death."[1] "The form

* "OPINION.—The question depends upon the intention of the testa
expressed in her will. She gives the pursuer certain property in G
'under burden of any heritable securities that may affect the same, and t
duty, ground-annual, and other burdens affecting it, with entry as at th
immediately preceding' her death. The pursuer is therefore entitled
property free from the burden of all securities, except such as validly af
land, when the will comes into operation. But the bond for £1800 in
of Peter Simons, did not so affect the land. At the date when the w
executed, the testatrix, as representing her late husband, was debtor in th
But she paid up the money in July 1874, and obtained an assignation
own favour from the creditor; and the debt being thus extinguished, th
was necessarily disburdened of the security. It is not material that by th
of the title the land was held by the pursuer and not by the testatrix her
the pursuer was a mere trustee for the testatrix, and held the lands
behoof alone. It is said that, by taking an assignation instead of a dis
the testatrix indicated an intention that the debt should be kept up as
the estate, but assuming it to be a reasonable inference, the debtor's in
would be unavailing to create or maintain a security upon land. If th
were still affected by the bond after the testatrix had paid the debt, it
that she must have held a security over her own estate preferable to an
bond which she might have granted to other creditors, either before or af
date of the assignation. This appears to me an untenable position. Th
debtor in the bond being also sole proprietor of the subjects disponed in se
the security was necessarily extinguished as soon as the debt was paid.

"The ground-annuals are in a different position. These are *ex fac*
deemable rights, and no authority has been cited for holding that an irr
able right in land, completed by infeftment, can be extinguished *con*
The case of *Robertson* (Morr. 3044) is distinguishable, because a wads
redeemable right. It would appear to me to have been competent f
testatrix to keep up the ground-annuals as separable rights in her own
if she desired to do so; and the only question, therefore, is wheth
intended them to pass to the pursuer along with the property. The te
the settlement are, in my opinion, conclusive to the contrary. There is a
able distinction between the terms of the direction applicable to the g
annuals, and that which applies to heritable securities. The latter are r
to generally as securities which may affect the property, which can only
such as may be found to affect it when the will comes into operation. F
ground-annuals are mentioned along with feu-duties as existing burde
which the property is actually affected when the will is executed. It do
appear that the subjects were ever burdened with any other ground-annua
that now in question, to which the testatrix had already acquired right
date of the will. I think it follows that the pursuer must take the pr
subject to the burden of the ground-annual. The language appears
susceptible of no other construction. . . ."

[1] Stair, i. 18, 9; see also More's Notes, cxxxvi.

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transaction is assignation, not receipt. This is an element in the question."[1] "Confusion is not presumed."[2] If confusion was not to be presumed, there was at the most no positive evidence of intention.

Argued for the pursuer;—"If no interest of the creditor interferes to make it desirable to keep up the debt it is held to be satisfied and extinguished *confusione*."[3] "Confusion . . . is not admitted in any case where there is a distinction of character or interest in the person who, being debtor, afterwards becomes creditor in that debt."[4] "Where anyone is *pleno jure* the ultimate debtor and creditor in the same debt without relief, that situation in general amounts to confusion and extinguishes the debt."[5] "By the law of Scotland obligations are extinguished *confusione* when the same person becomes both debtor and creditor in his own right, because no person can be creditor or debtor to himself."[6] What interest was there in the creditor here, making it desirable to keep up the debt? None. What distinction of character or interest was there in her? She was *pleno jure* debtor and creditor without right of relief. Therefore *confusio* operated. Nor was there any room for distinguishing the ground-annual from the bond. They were both mere securities, the accompanying conveyance being to insure punctual payment. Nor was it reasonable to make the distinction the Lord Ordinary had made between the bond and ground-annual. The bond was plainly intended to be discharged, and no reason could be suggested why the ground-annuals should not follow the same course.

At advising,—

Lord Justice-Clerk.—The late Mrs Parlane directed her trustees to convey to the pursuer certain heritable property in Glasgow, but she declared this conveyance to be "under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it." At that time there was against this property a bond for £1800 in favour of Peter Simons. Mrs Parlane, who was the representative of her late husband, was the debtor in that bond, but it appears that in 1874 she obtained an assignation of the bond, and so extinguished the bond. The property was thus freed and relieved of the bond. The Lord Ordinary has held that the bond was extinguished *confusione*, and I am clearly of opinion that his Lordship was right: the security has ceased to exist.

But there is another question in the case, viz., whether certain ground-annuals secured over the property still subsist, and whether the disponee must take the property under burden of them. Now, before the testator executed her deed she had herself become entitled to the ground-annuals. That being so, it was argued that they do not now affect the lands, and that the disponee is not bound to take the lands under that burden.

That is quite a different question from the question about the heritable bond. These ground-annuals are *ex facie* irredeemable, and the fact that they are in

[1] Per Lord Justice-Clerk Patton in Fleming v. Imrie, Feb. 11, 1868, 6 Macph. 363, 40 Scot. Jur. 191.

[2] Per Lord Corehouse in M'Kenzie v. Gordon, Jan. 16, 1838, 16 S. 311, 10 Scot. Jur. 193, aff. March 26, 1839, M'L. and Rob. 117.

[3] Bell's Pr. sec. 580.

[4] Per Lord Corehouse in M'Kenzie v. Gordon, *ut cit.*

[5] Per Lord Neaves in Love v. Storie, Nov. 6, 1863, 2 Macph. 22, Lord Neaves at p. 31, 36 Scot. Jur. 10.

[6] Per Lord Mackenzie in Lord Blantyre v. Dunn, July 1, 1858, 20 D. 1188, 30 Scot. Jur. 709.

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her person united with the right to the property does not militate against the idea that she could give her property to another under that burden. The question will turn on the terms of the deed by which the grant is made. Now, not only does she make a general declaration that the property is to be taken with its burdens; she does more, she expresses distinctly that he is to take it under the burden of the ground-annual affecting it.

That is a distinct expression of her will, and I am accordingly of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD YOUNG.—With respect to the heritable security there is no difficulty. I agree with your Lordship and with the Lord Ordinary.

With respect to the ground-annuals I have had great difficulty, and on the whole I am disposed to read the will differently from your Lordship and the Lord Ordinary. I think the meaning of the will is—the pursuer is to take the property as he would have taken it had he been her heir in the property, *i.e.* under burden of the feu-duty, ground-annuals, and heritable bonds affecting it at her death; the pursuer is to take the property with all its engagements,—its obligations. Any of these obligations she might remove during her life she would remove for his benefit. She bought up the heritable debt. That was then gone, and gone for his benefit.

I think the same reasoning applies to the ground-annuals, which did exist and which were removed. She bought them up also. There is no longer in the sense of her will a ground-annual over her property.

LORD RUTHERFURD CLARK.—I agree in the result of the Lord Ordinary's opinion.

As regards the heritable bond there is not much difficulty. I think it was extinguished *confusione*.

The matter of the ground-annuals is different and somewhat difficult. The position of matters is this—before the will was made the testator had become both debtor and creditor in the ground-annuals. The question is whether they were thus extinguished *confusione*. I do not agree with the Lord Ordinary that this was prevented by the fact of there being two separate estates. A ground-annual is nothing more than an obligation for payment of an annuity secured over the heritable estate. That is quite a different matter from the two estates of *dominium utile* and superiority for example, which never can be consolidated *confusione*.

What moves me is the intention of the testator; I think she intended the ground-annuals to be a burden on her gift, and I do not think we should allow *confusio* to operate so as to defeat that intention.

LORD TRAYNER.—I am not prepared to dissent from the Lord Ordinary's view that the ground-annuals, being irredeemable rights, perfected by infeftment, could not be extinguished *confusione*. But, however that may be, I agree with him in thinking it clear that the testatrix intended that the pursuer should take the lands in question under burden of the ground-annuals. As regards the heritable debt of £1800, I agree with the conclusion at which the Lord Ordinary has arrived, for the reasons given by him.

THE COURT adhered.

MILLER & MURRAY, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

JAMES BROWN, Appellant.—*C. S. Dickson—Aitken.* No. 63.
THE BOARD OF TRADE, Respondents.—*Sol.-Gen. Pearson—Johnston.*

Dec. 18, 1890.
Brown v. Board of Trade.

Ship—Shipping casualty appeal—The Merchant Shipping Act, 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 242—"*Wrongful act or default*"—*Expenses.*—In an inquiry at the instance of the Board of Trade into the circumstances of the loss of a steamship in the Bristol Channel, it was proved that she suddenly sprang a leak at night when a few miles from shore; that the master, who was on the bridge, was at once informed of the leak by the engineer, and on looking into the engine-room saw an inrush of water through the engine-room floor; that he thereupon gave orders to have the engines stopped, but failed to have the water-tight bulkhead closed and to use the pumps; that he then took to the boats along with the crew, and the vessel sank shortly afterwards. The Sheriff-substitute found that the master was in "default," in terms of the 242d section of the Merchant Shipping Act, 1854, and suspended his certificate.

The Court *refused* an appeal by the master, holding that his failure, through unreasonable panic, to take measures open to him with a view to saving the ship amounted to a "default" on his part, but found no expenses due, as the bulk of the evidence led and printed related to a portion of the case which was departed from by the Board of Trade when the case came before the Court of Session.

1st DIVISION. C.

JAMES BROWN, formerly master of the steamship "Ashdale," of Glasgow, appealed under the 2d section of the Shipping Casualties Investigations Act, 1879, &c., against a decision of the Sheriff-substitute of Lanarkshire (Erskine Murray) with assessors, finding that he had been in fault, in terms of the 242d section of the Merchant Shipping Act, 1854,* in prematurely abandoning his vessel, and suspending his certificate for *six months*. The decision appealed against was given on the conclusion of a formal investigation held at Glasgow on 17th and five following days of October 1890 into the circumstances attending the loss of the "Ashdale," an iron steamship of 117 tons register, in the Bristol Channel, on 10th September 1890.

In their report to the Board of Trade, the Court found, "for the reasons stated in the annex hereto, that the 'Ashdale' sank in consequence of an inrush of water into her engine-room, the cause of which is not apparent: suspends master's certificate for six months. . . ."

Appended to the report was an annex from which it appeared that the "Ashdale" was on a voyage from Cardiff to Tralee when the accident occurred. It bore, *inter alia*;—"After taking in a full cargo of coals, with a little coke and bunker coal, she left Cardiff at 3 P.M. of the 9th September, at her usual draught when loaded, with a freeboard of about 12 inches, having on board a crew of eleven hands all told, including James Brown, the master, who held a certificate of competency No. 91,514, Thomas Dearness, engineer, and Duncan M'Kerrell, the second mate. After adjusting compasses she discharged her pilot off the Nash Point between 5 and 6 P.M., and proceeded down the Bristol Channel at full speed, making seven knots per hour, the weather being fine, the wind light, and the sea smooth. From 8 P.M. to twelve noon it was the master and second mate's and second engineer's watch, during which the course steered was W. by N., and a light was seen and passed, which the second mate supposed was the Bull Light, but which was in reality Lundy Light.

*The Merchant Shipping Act, 1854, sec. 242, enacted,—"The Board of Trade may suspend or cancel the certificate . . . of any master or mate in the following cases (that is to say):— . . . (2) If upon any investigation concluded under the provisions contained in the eighth part of this Act . . . it is reported that the loss or abandonment of or serious damage to any ship, or loss of life has been caused by his wrongful act or default . . ."

No. 60.

Dec. 18, 1890.
Rixon v. Edinburgh Northern Tramways Co.

By it Dick, Kerr, & Company undertook to construct the Stockbridg of the tramways, and to provide from time to time such sum, not e £3000, as might satisfy the present creditors of the company, except th of Messrs Beattie and Mann.

The price to be paid by the Tramways Company was £75,000, £60,000 was to be paid in fully paid-up shares of the company, and in mortgage debentures, to be satisfied by monthly instalments of sh debentures upon monthly certificates by the engineers of the line.

It was further agreed that the Cable Corporation and the liquidato release the company, and that the company should release the Cable Co and the liquidator of all claims *hinc inde*.

The liquidator undertook forthwith to apply for the sanction of the the agreement, and if such sanction was not obtained within six mo agreement was to be void, and in the event of the company being at wound up by the Court, Dick, Kerr, & Company were to be at liberty mine the agreement.

The sanction of the Court was applied for and obtained on 16th Ju so that the agreement became a binding agreement. It is this agreeme is sought to be set aside on the ground of fraud, and the fraud alleg forth in the 13th article of the condescendence.

Shortly stated, the fraud alleged is that Dick, Kerr, & Company a purchase from the Assets Company the assets of the Cable Corporat much larger sum than the assets were worth, and that the Assets Com order to reimburse Dick, Kerr, & Company, agreed to obtain for them, of the control they had of the Tramways Company, a contract for the tion of the Stockbridge section at a price sufficient not only to pay for struction of the line, but also to repay them for their over-payment to th Company in respect of their purchase of the assets of the Cable Cor No doubt if this were true the contract would be a fraud on the T Company, and to their prejudice to the extent of such over-paymen will further be observed that the loss would fall, *ex hypothesi*, on th holders of that company other than the Assets Company, because that would be reimbursed for their loss as shareholders by their gain as selle assets of the Cable Corporation.

I agree with the Lord Ordinary that there is no direct proof whateve such fraudulent scheme. All the persons concerned are examined as w and they deny most emphatically that there was any such agreement such scheme as that alleged.

It appears to me that the pursuer can have no possible case unles shew in the face of these denials that fraud is nevertheless necessarily to sumed from the facts and circumstances of the case.

The Lord Ordinary remarks that there may have been a fraud with such express agreement. It might be shewn, he says, that the condition contract are so unfair as in themselves to prove fraud, and they woul fraud if the pursuer's contention were established, that the price w times what it ought to have been; but there is, he says, nothing of t established, and this seems to be the main ground on which the Court to presume the existence of fraud.

I agree with the Lord Ordinary that there is nothing of the kind esta The actual cost of the construction of the Stockbridge section would ap

failed to exercise a judgment at all, and so it differed from the cases cited by the appellant.

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At advising,—

LORD PRESIDENT.—The steamship "Ashdale," of which the appellant was master, was in the months of August and September last sailing under a time charter, and in obedience to instructions by the charterers she loaded a cargo of coal at Cardiff to be carried to Tralee. At 3 P.M. of 9th September she left Cardiff. About 1.5 A.M. of the 10th it was found that the vessel had sprung a leak. The fact was made known to the master, who was then on the bridge, by the chief engineer, Dearness, who rushed on deck, shouting that the ship was sinking. The master looked down into the engine-room, where he noticed water coming up under the platform, in what appeared to him to be two large spouts. Thereafter the master and whole crew betook themselves to the boats saved their lives, and left the ship to sink, without any effort to keep her afloat

We have carefully considered the evidence laid before the Court below, and have received valuable advice and assistance from the two Elder Brethren of the Trinity House who sat with us as assessors in the hearing of the arguments of counsel; and in accordance with their advice, and with our own view of the evidence, we have come to the conclusion that there is no valid ground for impeaching the judgment of the Court below.

In the circumstances in which the master was placed he had a double duty to discharge, to take all possible and necessary measures to save life, and also to save the ship. These duties may come into conflict, but they are not incompatible, and the master was not entitled to devote himself entirely to the one without giving any consideration to the other. He failed to give orders to close the sliding door in the water-tight bulkhead, or to use the pumping gear with which the ship was well supplied. In short, he did nothing towards stopping or abating the leak, and at last, on the suggestion of one of the crew, he gave orders to stop the engines, which put an end to all chance of saving the ship.

It is impossible to resist the conclusion that in so acting the master was under the influence of a panic, originated no doubt by the chief engineer, but a panic which it was the duty of the master to resist and quell. It is precisely in such an event that the master is bound not only to exercise self-control and to apply his own judgment calmly to the emergency, but also by every means in his power to influence the crew by giving distinct and peremptory orders, and so to dispel the panic.

We are not called on to determine whether if the master had done his duty the ship would, or would probably, have been saved. The question is whether he did his duty, and gave the ship a chance of remaining afloat till she could be rescued, or whether he failed therein, and we cannot resist the conclusion that there was such failure.

Two cases were cited on behalf of the appellant, one which occurred in this Court—(*Watson* v. *Board of Trade*, 22 S. L. R. 22)—and another, which is reported in L. R. 7 Prob. Div. 207. But these cases exhibit a contrast to the present. In each the master, in a position of great peril and embarrassment, exercised his judgment calmly and to the best of his ability in deciding between two courses. In each he committed an error of judgment, as was proved by the result. But he was absolved from all blame, because he adopted what in a case of great difficulty his experience and judgment dictated to him as the better course of two.

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But here the fault is no error of judgment, but a failure by the master to exercise his judgment at all,—a surrender of his judgment to the influence of an unreasonable panic. This is a fault utterly unworthy of and inconsistent with the character of a British seaman. We therefore refuse the appeal.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Solicitor-General moved for expenses as the appeal had been unsuccessful,[1] but the Court were of opinion that no expenses should be given, in respect that a large portion of the evidence at the investigation had related to a portion of the case which was departed from by the Board of Trade at the hearing before the Court of Session.

THE COURT refused the appeal, but found no expenses due.

BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—DAVID TURNBULL, W.S.—Agents.

No. 64.

Dec. 19, 1890. Renney v. Magistrates of Kirkcudbright.

JAMES RENNEY, Pursuer (Respondent).—*Asher—Younger.*
MAGISTRATES OF KIRKCUDBRIGHT, Defenders (Reclaimers).—*C. S. Dickson—Crole.*

Ship.—Reparation—Harbour—Contributory negligence of master of vessel—Expenses.—A sailing vessel, on entering a harbour, got aground and suffered damage, for which the owner sued the harbour trustees. At the time of the accident the vessel was within the limits of the jurisdiction of the harbourmaster, but there were two local pilots on board, and it was proved that the accident was due to the fact that a wrong course was steered. Both the harbourmaster, who gave directions from the shore, in answer to inquiries from the vessel, and those on board the vessel were ignorant that the tide had begun to ebb, thus making the navigation more difficult.

In an action of damages at the instance of the owner of the vessel against the harbour trustees, *held* (*rev.* judgment of Lord Trayner) that although the harbourmaster was in fault in the directions which he gave, there was contributory negligence on the part of those in charge of the navigation of the vessel, and defenders *assoilzied*.

The defenders were found entitled to expenses.

1ST DIVISION. Lord Trayner. C.

THE vessel "Janets and Ann," of Chester, of 175 tons gross measurement, arrived from Dublin off Kirkcudbright on the afternoon of Friday, 23d March 1889.

On her way into the harbour, and when within the jurisdiction of the harbourmaster, she struck upon a bank and sustained considerable damage, amounting to, as alleged, £300, for which Mr James Renney, the owner of the vessel, brought an action against the Magistrates of Kirkcudbright, as trustees of the harbour.

The pursuer averred that the accident was occasioned by the faulty directions of the harbourmaster, which those in charge of the vessel had obeyed, as they were bound to do.

The defenders averred that if those in charge of the vessel had steered a proper course, and had obeyed the orders of the harbourmaster, no accident would have happened.

The pursuer pleaded;—The pursuer having suffered the loss and damage sued for through the fault of the defenders, or those for whom they are responsible, is entitled to decree as craved.

The defenders pleaded, *inter alia*;—(2) The alleged injury to the said vessel the "Janets and Ann" not having been caused by any fault or negligence on the part of the defenders, or of those for whom they are responsible, they are entitled to absolvitor, with expenses. (3) Those

[1] The "Arizona," April 13, 1880, L. R., 5 Prob. Div. 123.

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harge of the said vessel having disobeyed, or not timeously obeyed, orders of the harbourmaster, the owner is not entitled to recover dam- for any injury sustained by the said vessel. (4) The grounding of vessel having been caused, or materially contributed to, by the fault ose in charge of the vessel on the occasion in question, the defenders t to be assoilzied.

he result of the proof as to the nature of the accident and its causes thus summarised in the Lord Ordinary's note:—"It is proved that, n the schooner had reached a point in the river about 130 or 140 s from the west pier of the dock, she was in mid-channel, or nearly She was, at all events, in a sufficient depth of water to float safely, if she had dropped anchor there, or had proceeded up the river on course she was then following, she would not have gone aground. At point, however, she put her helm a-port, and, in consequence, took a se which led her on to the bank or shore, where she grounded. When schooner was at the point I have mentioned, a man on board of her ed Smith [he was one of two local fishermen who had been taken on d the vessel as pilots] hailed the defenders' harbourmaster, who was ding on the west pier-head, and asked him to let them know when to anchor. This was a proper proceeding on the part of Smith, because schooner was then within the jurisdiction of the harbour authorities, subject (as is admitted on record) to the harbourmaster's orders. harbourmaster heard Smith hailing (although, as he says, he did not what Smith said), and in reply waved his arm, and cried out 'Come which was interpreted by Smith to mean that the schooner was to e on towards where the harbourmaster was standing, to do which essitated the porting of the helm, and the helm was accordingly ported. y soon afterwards, Smith, who knew the schooner was approaching a gerous bank or beach, hailed the harbourmaster again, asking him to sure and tell them when to drop anchor, the reply to which was the ntinued waving of the harbourmaster's arm, and another call to 'Come .' Smith saw the waving, but did not hear the call, which the harbour- ster admits he gave. Almost immediately after Smith had hailed the ond time, the harbourmaster gave orders to drop the anchor, and at the ne moment the schooner struck."

t further appeared that neither the harbourmaster nor those on board vessel knew that the tide had begun to ebb, in which case it appeared t a vessel in order to get into dock should have come on in the channel, ich at low water was only from 30 to 40 yards wide, and been warped the harbour by lines. The harbourmaster deponed that his duty was fined to the berthing of ships—and that he had nothing to do with navigation.* The master of the vessel and the pilots deponed that understood that they were taking the course pointed out by the bourmaster, whom it was their duty to obey.

he Lord Ordinary (Trayner), on 11th June 1890, gave decree against defenders in terms of the conclusions of the summons.†

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* The harbourmaster deponed as to his duties,—"Those in charge of the el are bound to obey my orders when they come into the dock. I would have spoken to them if they had not spoken to me. I do not give orders how they are to come in; my outlook is to protect the property. . . . Don't you give orders as to how they are to come into the dock? (A.) I I give orders, if I see any danger with regard to the property, to let go the or. (Q.) Or with regard to the ships? (A.) I have nothing to do with the s when I am not on board."

† "OPINION.—(After the narrative of the facts quoted above)—The defenders' ention is, that the harbourmaster had nothing to do with the navigation of the

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The defenders reclaimed, and argued;—The duty of the harbou within the limits of his jurisdiction was defined by the 52d sectio Harbours, Docks, and Piers Clauses Act, 1847.* But neither tha nor the bye-laws of the harbour trustees, which proceeded upon put the harbourmaster into a position of responsibility for the na of the vessel. Upon the evidence in the case there was clearly on the part of those in charge of the navigation, no proper course been steered, nor other precautions taken in entering the harb these circumstances, there was what amounted to contributory ne on the part of the master and his pilots, and, that being so, the could not recover.[1] The maritime rule that where damage resul the fault of both pursuers and defenders the loss was equally applied solely in collision cases.[2]

Argued for the pursuer;—The accident was due to the faul harbourmaster only, for from the time when the vessel came wi prescribed limits he had control. He was ignorant of the stat tide, and consequently gave wrong directions, which led to the sh

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schooner, and that his order to 'Come on' merely meant that the schoon not drop anchor, but proceed, leaving it to those on board to look after t she was to follow, and that, if she took a course which led her agrou must bear the consequences themselves. I was rather disposed at first this view, but, on further consideration, I have come to a different co I quite agree that in ordinary circumstances a harbourmaster is not re for the navigation of any vessel entering his harbour. But, if, within diction, he issues orders for handling the vessel in a certain way, with of bringing her into dock, or into a certain berth in the dock—orders v vessel is bound to obey—then I think he and his employers are respon the consequences which follow from obedience to his orders. Now harbourmaster order the schooner to port her helm? . . . I am in think that the harbourmaster ordered, either by word or by signalling, known to and understood by nautical men, that the schooner should ' on a port helm. If he did, then he did what was wrong, and, by his to the grounding of the schooner, and the consequent damage. . .

"Another point against the harbourmaster is this,—he saw w schooner was, and where she was going. He could have ordered he anchor instead of ordering her to 'come on,' and if he had done so soo he did, no accident would have happened. He did not, however, schooner to anchor in the river; he intended to bring her into do order he gave to anchor was given with the view of warping the scho dock from that point. His order to anchor, however, was delayed and the obvious reason of this is, that he did not know until after the took the ground that the tide was ebbing. If he had known that, I b would have given the order to anchor before the schooner had got so pier-head.

"The result I have reached on the whole case (but not without son tion and difficulty, for my first impression was rather in favour of the de is, that the schooner being within the jurisdiction of the harbour au the harbourmaster gave orders to the schooner which she was bound that the orders were wrong, and that obedience to them was the cau schooner grounding."

* The Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27) enacted;—"The harbourmaster may give directions for all or any of th ing purposes (that is to say), for regulating the time at which, and the in which any vessel shall enter into, go out of, or lie in or at the harbou or pier, and within the prescribed limits, if any, and its position, mo unmooring, placing and removing, whilst therein."

[1] The "Cynthia," Nov. 1876, L. R., 2 Prob. Div. 52.

[2] Boettcher v. Carron Co., Jan. 17, 1861, 23 D. 322, 33 Scot. Jur. 1

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put upon the port helm, the primary cause of the accident. The master was bound to obey the orders of the harbourmaster even although these orders were injudicious.[1] The bye-laws of the harbour trustees were very distinct as to the duty of those on board ship to obey the harbourmaster.[2]

But on the assumption that those in charge of the ship were also at fault, the Admiralty rule applied, and the loss must be equally divided.[3] Further, although the pursuer might have been guilty of negligence contributing to the accident, yet if the defenders could by the exercise of ordinary care and diligence have avoided the accident, the pursuer's negligence would not excuse them.[3]

At advising,—

LORD PRESIDENT.—I entirely agree with the Lord Ordinary in thinking that the harbourmaster was in fault, and that that fault conduced to the stranding of the vessel. His Lordship says,—"The harbourmaster saw where the schooner was, and where she was going. He could have ordered her to drop anchor instead of ordering her to 'come on,' and if he had done so sooner than he did, no accident would have happened. He did not, however, mean the schooner to anchor in the river; he intended to bring her into dock. The order he gave to anchor was given with the view of warping the schooner into dock from that point. His order to anchor, however, was delayed too long, and the obvious reason of this is, that he did not know until after the schooner took the ground that the tide was ebbing. If he had known that, I believe he would have given the order to anchor before the schooner had got so near the pier-head." That certainly shews great fault on the part of the harbourmaster, because, above all things the duty of that official is to direct where a ship ought to anchor. It is indispensable that he should know what the state of the tide is, and yet it is made very plain upon the evidence that he did not know that it was ebbing, and, accordingly, he could not be in a position properly to direct the course of the vessel.

I may observe at the same time that I do not think that a harbourmaster is directly responsible for the navigation of a vessel. That was in the hands of the master and pilots whom he had taken on board, who were certainly not pilots in a very high sense of the term, but nevertheless were acquainted with the navigation of the river. The navigation of the vessel remained in their hands, but it was for the harbourmaster to say whether she should go into the harbour, or go into a part of the river from which she could be warped to the dock, or whether she should cast anchor, and in adopting the third of these

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[1] "Excelsior," 1868, L. R., 2 Ad. and Eccles. 268; The "Bilbao," 1860, 1 Lushington, 149.

[2] Bye-laws framed in 1861 provided;—"16. Masters of vessels refusing to obey the harbourmaster shall be liable in a penalty not exceeding £5 sterling, and all expense incurred by the harbourmaster in mooring or shifting vessels shall be paid by the masters or owners of such vessels."

Subsequent bye-laws framed in 1869 provided;—"First. Vessels entering the harbour of Kirkcudbright must anchor opposite to the Moat Brae when ordered by the harbourmaster, and haul into the dock by warping, under a penalty not exceeding £1 sterling."

[3] Shand's practice, i. 414; *cf.* also Owners of the "Thames" v. Owners of "Lutetia," Nov. 20, 1884, 12 R. (H. L.) p. 1.

[3] Radley v. London and North-Western Railway Co., Nov. 1876, L. R., 1 App. Ca. 754, Lord Penzance, p. 759.

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alternatives, and rejecting the second, the harbourmaster, I think, was cl
fault, as the Lord Ordinary has found.

But then there remains a very serious question, how far the injury
the vessel by her being stranded was caused also by the contributor
gence of those in charge of her navigation, and there I am disposed on th
to differ from the Lord Ordinary. Indeed, I hardly think his Lordsh
applied his mind to a consideration of that question, as I do not see that
course of his note he has suggested whether there was or was not contr
negligence, or given any opinion upon that point. Looking to the evid
have come to the conclusion that there was contributory negligence, and
the evidence is very strong. There are several witnesses to whom I m
who give very important evidence regarding the ignorance which see
exist on board the vessel as well as on shore as to the condition of the ti
the mischief which arose from the porting of the helm by those who
charge on board. It seems to me impossible to dispute that but for th
mistake which was committed in the navigation of the vessel by porti
helm when it ought to have been starboarded and a middle course k
accident would not have occurred. That is not at all inconsistent w
fault of the harbourmaster, but it shews, I think, very plainly that the
the harbourmaster was not the sole cause of the misfortune, and that
the improper navigation in porting the helm the accident would no
occurred. The necessary consequence is that the mistake in navigation
part of the master of the vessel and his assistants, who were pilots, was
conducive to the injury done to the vessel, or rather to her stranding.

The conclusion accordingly at which I arrive is, that there was clear f
the part of the harbourmaster on the grounds set forth by the Lord Or
and fault conducive to the result, but that there was also just as clear f
the part of those navigating the vessel, and also directly conducive to the
Accordingly, I think the pursuer cannot recover, because his servants in
of the vessel were, I do not say equally in fault—it is not necessary to c
to what extent—but to blame for conduct directly conducive to the ac
Therefore, upon the ordinary rule of law, I think the defenders fall
assoilzied.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

The defenders' counsel moved for expenses, which he submitted
follow the ordinary rule even in a case of contributory negligence.[1]

The Court pronounced the following interlocutor:—"Reca
said interlocutor: Find that the fault of the harbourmast
which the defenders are responsible, directly led to the str
of the 'Janets and Ann,' the vessel in question, on the oc
libelled; but find further that the persons in charge of the
gation of the said vessel were in fault in porting the helm w
should have been starboarded, and that this fault directly con
to the stranding of the said vessel: Therefore sustain the fourt
in law for the defenders: Assoilzie them from the conclusi
the summons, and decern: Find the defenders entitled t
penses," &c.

J. & J. Ross, W.S.—John Bell, W.S.—Agents.

[1] King v. North British Railway Co., Oct. 29, 1874, 12 S. L. R. 53

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Hughes' Trustees v. Corsane.

KENNEDY AND OTHERS (Mrs Hughes' Trustees), Parties of the First Part.—*W. Campbell.*
ELIZA ANDERSON HUGHES OR CORSANE AND OTHERS, Parties of the Second and Third Parts.—*Johnston.*
JEMIMA BROWN HUGHES OR M'GRADY AND OTHERS, Parties of the Fourth, Fifth, Sixth, Seventh, and Eighth Parts.—*D.-F. Balfour—C. S. Dickson.*

table and Moveable—Heritable bond—Succession—Titles to Lands Act, 31 *and* 32 *Vict. c.* 101), *sec.* 117.*—A truster directed her trustees to the residue of her "moveable means and estate" among certain persons, with regard to the disposal and division or destination of" her "heritable she directed it to be valued, and "divided, apportioned, and disposed certain other persons. Besides other property, heritable and moveable, d possessed of two bonds and dispositions in security in favour of her- d her executors or assignees whomsoever, and of a bond of annuity with tion in security in favour of herself and her heirs or assignees whom-

that the three bonds were to be regarded as part of her moveable

HELEN MITCHELL WHYTE OR HUGHES, a widow, died on 27th Feb- 1890, leaving a trust-disposition dated 23d August 1889.

2D DIVISION. M.

directed her trustees, by the third purpose of her trust, to divide the e of her "moveable means and estate" among certain persons, and fourth purpose of her trust she provided thus, viz.:—"In regard to sposal and division or destination of my heritable estate, it is my nd intention, and I direct and appoint my trustees, so soon after ath as they may find it convenient, to cause the same to be valued o competent valuators to be appointed by them, and divided, appor- , and disposed of, all as in manner hereinafter mentioned, and that bly to and in accordance with said valuation, and I appoint and my trustees to make said division into four equal parts or shares, ign, convey, and make over" these shares to certain other persons. her death the truster's estate consisted (1) of property which was ubtedly moveable, (2) of house property, and (3) of two bonds and sitions in security in ordinary form, taken to her, "her executors and ees whomsoever," and a bond of annuity and disposition in security our of her and her heirs or assignees whomsoever. The obligant in ond having sold the subjects, the buyer granted a similar bond in r of Mrs Hughes and her heirs, executors, or assignees. was doubted whether these bonds fell to be disposed of as "moveable s and estate" or as "heritable estate" under the fourth purpose of the To settle the question a special case was presented to the Court e trustees, as first parties; those interested under the clause dealing moveable estate, as second and third parties; and those interested in g the bonds distributed under the clause dealing with the heritable e, as parties of the fourth, fifth, sixth, seventh, and eighth parts. e questions were,—"Whether the said bond of annuity and disposi-

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31 and 32 Vict. c. 101, sec. 117.—"From and after the commencement of Act no heritable security . . . shall . . . be heritable as regards uccession of the creditor in such security, and the same . . . shall be able as regards the succession of such creditor, and shall belong after the of such creditor to his executors or representatives *in mobilibus*, in the manner and to the same extent and effect as such security would, under aw and practice now in force, have belonged to the heirs of such creditor."

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tion in security, with the relative bond of annuity, as also the sa bonds and dispositions in security for £750 and £400 respectively, and which of them, fall to be disposed of by the first parties under terms of the third purpose of the said trust-disposition and settle or, Whether the same, or any and which of them, fall to be dispose the trustees under and in terms of the fourth purpose of the said disposition and settlement?"

The second and third parties argued;—This point was determ *Guthrie's* case,[1] and could not have come up again but for certain *dicta* in the cases of *Hare*[2] and *Cunningham*.[3] No doubt in thes it had been said that the Act of 1868 only dealt with successions *a tato*, but in the former case the Court were only dealing with the making up a title, and, in the latter, nothing at all turned on the tion between testate and intestate succession. But, even if the A so limited, the authority of *Guthrie's* case and the present case w affected, for the truster here, in using the terms "moveable" and able," was invoking the law of intestate succession, the only succession law in which these terms had any meaning. Again, the tion to have the heritable estate valued pointed in favour of its ing the house property only. Valuation was inappropriate to bon

The fourth and other parties interested in the heritable estate —The *dicta* in *Hare's* case were very plain, and the point was ob considered, for Lord Shand, who differed from the rest of the Court, it expressly, and took a different view from that of the majority statute must be read as if there had been a clause saving its opera cases of testate succession.

At advising,—

LORD JUSTICE-CLERK.—The question before us in this special case is two sums of money fall to be disposed of under one or the other of t poses of the will of the testator. The third and fourth purposes of t relate, the one to what is to be done with the "moveable" estate, the what is to be done with the "heritable" estate of the deceased. The qu whether the sums of money are heritable or moveable.

That question seems to be very much the same as was before the Cou case of *Guthrie* (1880, 8 R. 34), and any difficulty we felt in the pres arose from the case of *Hare* (1889, 17 R. 105), in which it was said t clause of the Act of 1868, which makes heritable bonds moveable, relat to cases of intestate succession.

But it appears to me that the provision of the Act to which I have r although it may only refer to cases of intestate succession, puts the dire a person who gives a general direction as to what is to be done with her able" and "moveable" estate, in the same position as if she had provid the law—*i.e.*, the Act of Parliament—should determine what the mea these general terms should be. That being so, I come to the conclusi these sums are to be disposed of under the third, and not under the four pose of the trust.

LORD YOUNG concurred.

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[1] Guthrie, Oct. 23, 1880, 8 R. 34.
[2] Hare, Nov. 25, 1889, 17 R. 105.
[3] Cunningham v. Cunningham, Nov. 30, 1889, 17 R. 218.

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LORD RUTHERFURD CLARK.—The truster disposed of her moveable estate in favour of certain legatees, and we have now to determine whether a bond of annuity and two bonds and dispositions in security are included in that estate, or are to be considered as heritable estate. I am of opinion that they are moveable.

What is moveable estate and what is heritable estate can only be settled by the law. There is no other standard. For in disposing of her moveable estate, the truster disposes of that part of her estate which in the eye of the law is moveable, or in other words, of that part of her estate which would by law descend to her executors and not to her heir.

It is admitted that the bond of annuity and bonds and dispositions in security by force of the recent statute would descend to executors. They are therefore moveable estate, and must pass to the legatees of the moveable estate. In determining this question we must refer to the whole law as it stands at the death of the truster—whether common law or statutory—and not to a part of it.

The only difficulty which I have felt was from the recent decision in the case *Hare*. But I have conferred with the Judges who took part in that decision, and they are satisfied that our present judgment does not in any way conflict with it. Of course the right of succession in testacy is settled by the will of the testator, and not by the statute. But the statute must not the less be taken into account in determining what is moveable and what is heritable.

THE COURT answered the first question in the affirmative.

J. & J. GALLETLY, S.S.C.—WATT & ANDERSON, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

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Dec. 19, 1890. Miller's Trustees v. Miller.

LADY MARY LEITH OR MILLER AND OTHERS (Sir William Miller's Trustees), First Parties.—*Johnston—Macfarlane—Pitman.* JOHN ALEXANDER MILLER, Second Party.—*Sol.-Gen. Pearson—G. W. Burnet.*

Succession—Trust—Directions to trustees to manage estate, after it had vested in beneficiary, until beneficiary attained twenty-five years of age—Repugnancy.—A testator directed his trustees to hold and manage, "as absolute proprietors," certain heritable property for behoof of his second son until the latter attained the age of twenty-five, when they were to denude in his favour, declaring that the property should not vest in him till he attained the age of twenty-five, or married with the consent of the trustees after attaining the age of twenty-one.

The testator also directed his trustees to hold the whole residue of his moveable estate in certain shares for his children. The vesting clause was in similar terms to the vesting clause regarding the heritage, but there was no similar direction as to management. The trustees were, however, given an unlimited discretion as to the application of the annual interest of the shares of residue, and it was declared that on the sons' attaining the age of twenty-five, and the daughters attaining that age or being married, they were to be entitled absolutely to any accumulations of interest on their respective shares, and the trustees were directed to pay over the same to them accordingly.

The son, after attaining the age of twenty-one, but before attaining the age of twenty-five, married, with the approval of the trustees.

Held by a majority of seven Judges (*diss.* Lord Young and Lord Trayner) that the son's right to the heritage and to his share of the moveable estate having vested in him upon his marriage with the consent of the trustees, he became then entitled to call upon the trustees to denude in his favour.

Lord Young and Lord Trayner were of opinion that the direction to the trustees to hold and to manage until the son attained twenty-five years of age (which

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they held was applicable to both the heritable and moveable estate inconsistent with the right of fee given to the son, and was a valid an direction.

Per the Lord President,—"There is, in my opinion, a general rule, th a comparison of a long series of decisions of this Court, that wh operation of a testamentary instrument the fee of an estate or parts of whether heritable or moveable, has vested in a beneficiary, the Court w if possible, relieve him of any trust management that is cumbrous, un or expensive."

2D DIVISION, with three consulted Judges. M.

SIR WILLIAM MILLER, of Manderston, Bart., died on 10th Oct survived by his widow and by four children, of whom the se John Alexander Miller.

Sir William left a trust-disposition and settlement, dated 6th 1876.

In the second purpose of the deed he directed his trustees his wife, Dame Mary Leith or Miller, the free liferent use, oc and enjoyment of, *inter alia*, his house No. 1 Park Lane, Londo mansion-house of Manderston, Berwickshire, until his eldest son, it was destined in the fifth purpose, should attain the age of tw and also of the dwelling-house on the estate of Barneyhill, Ha shire. The deed further provided,—"*Quarto*. Subject to the life vision in favour of my said wife *secundo* before written, I d said trustees to hold my lands and estate of Barneyhill, and t other lands and heritable or real estate of every description within the shire or county of East Lothian, with the whole books, and household plenishing of every description in the house of Barneyhill, for behoof of my second son, John A Miller, and the heirs of his body in fee; whom failing, . *Quinto*, My said trustees shall manage, as absolute proprietors, estates in Berwickshire, and house in London, and estates Lothian, for the party entitled thereto under these presents, u party attains the age of twenty-five years,—my said trustees, s the before-written provision in favour of my said wife, allow party such occupation of the whole or any part thereof as they sider best; and upon said events happening, my said truste denude of said lands and estates in favour of the party to whom are respectively destined: . . . And I hereby declare that n my said several lands and estates shall vest in such of my chi may be entitled thereto under these presents until he or she at age of twenty-five years, or is married after attaining twenty-o of age, with the consent and approbation of my said trustees, w event shall first happen: . . . *Septimo*, My said trustees sh the whole residue and remainder of my moveable or personal m estate for behoof of my whole children, including the heirs who to my heritable and real estates, in the following shares or pro viz.:—Nine-twentieths for my eldest son, seven-twentieths for m son, and two-twentieths for each of my daughters: . . . said trustees shall have unlimited discretion in the applicatio annual interest or proceeds of the share of residue to which ea children may be entitled in fee or in liferent, and shall apply s thereof as they may deem necessary and proper for the mai clothing, education, upbringing, and advantage of the said childre tively: . . . And upon my said children attaining the age of five years being sons, or attaining that age or being married in t of their being daughters, they shall be entitled absolutely to any lations of annual interest or proceeds on their respective shares,

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rustees shall pay and make over the same to them accordingly: And hereby specially declared that the provisions out of residue, hereby ived in favour of my sons, shall not vest in them until they attain ge of twenty-five years, or marry after attaining twenty-one years of with the consent and approbation of my said trustees, whichever shall first happen."

19th September 1888 John Alexander Miller, the second son, ned the age of twenty-one, and subsequently married Miss Inez ell Innes with the consent and approbation of his father's trustees. share in the residue of his father's moveable estate amounted to ,000 or thereby.

was dissatisfied with the allowance made to him by his father's ees, and maintained that having married after attaining the age of ty-one years with the consent and approbation of the trustees, he was led to a conveyance in his favour of the lands and estate of Barney- nder burden of the liferent in favour of his mother, and also to have eyed to him his seven-twentieths share of the residue, with the mulations thereof.

e trustees, on the other hand, maintained that they were bound by erms of Sir William's trust-settlement,—notwithstanding John Alex- r Miller's marriage with their consent after twenty-one,—to continue anage the heritable estate, and to hold his share of the residue until ttained the age of twenty-five.

special case was accordingly presented to the Court by (1) Sir Wil- 's trustees, and (2) by John Alexander Miller.

he questions of law for the opinion of the Court were,—"(1) Whether, he circumstances above set forth, the parties of the first part are bound nce to convey to the party of the second part, subject to the liferent vision in favour of his mother, Lady Miller, the lands and estates of neyhill, or whether they are bound to retain and manage them until attains the age of twenty-five years? (2) Whether, in the circumstances ve set forth, the parties of the first part are bound at once to make ment to the second party of his seven-twentieths of the residue of Sir liam Miller's personal estate, or whether they are bound to hold the e, applying the annual income thereof as directed by Sir William ler until the second party attains the age of twenty-five years?"

n 29th October 1890 the Second Division, after hearing counsel, ointed the case to be argued before them and three Judges of the First ision.

rgued for the first parties;—(1) Upon a sound construction of the l, the truster's intention was that his trustees should hold and manage estate of Barneyhill for behoof of the second party until he attained age of twenty-five, and that notwithstanding it had vested in him re that period by his marriage after twenty-one, with their consent. regarded his moveable estate, his intention was to the same effect, ugh not express, as in the case of the Barneyhill estate, his intention to be implied from the general terms of the deed, and especially from clause in the seventh purpose as to holding accumulations of income l the second party attained the age of twenty-five. That clause ially distinguished between sons, whose accumulations of income were e handed over to them at twenty-five, and daughters, whose accumu- ns of income were to be handed over to them at the age of twenty- or at marriage, *i.e.*, at the term of vesting. (2) The next question whether the truster had the power to attach such a condition to an lute gift. By the law of England it was true that a testator could make an absolute gift of the beneficial interest in an estate, and at

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the same time withhold from the beneficiary, or postpone his full enjoy ment of it,[1] but the English authorities on the point shewed that the Cour had proceeded upon the view that at the age of twenty-one the beneficiar had power to charge, sell, or assign his vested interest, and that powe was regarded as necessarily involving a right in the beneficiary to imme diate payment. Such a condition or restriction was not, however, illeg by the law of Scotland, and the Courts would give effect to it if otherwis the intention of the truster would be defeated.[2] It was a wise and reason able provision in the interests of the second party that he should not hav the management of heritable and moveable estate of such value until h had acquired greater experience than he would be likely to have at th age of twenty-one. The postponement of the right of management di not prevent his settling it by marriage-contract. There was no repugnanc between the gift and the condition attached to it, the retention by th trustees for the purpose of management being merely for a limited tim Moreover, the trust required to be kept up for other purposes. In th cases of *Archibald's Trustees* and *Brown*,[3] where the Court had refused t give effect to a direction by a testator postponing the enjoyment of a veste interest, it was to be remarked that the reason for the postponement pr sent to the truster's mind was not personal to the legatees, and had flow off, and with it the need for further postponement.

Argued for the second party;—As regarded Barneyhill, the testato had clearly provided that the estate should vest in the second party o his marriage after twenty-one with consent of the trustees. The dire tions as to holding and managing this estate were not in conflict wi and did not supersede the express provision as to vesting. Though n clearly expressed, it was evidently the truster's intention that the manag ment of the trustees should terminate simultaneously with vestin whether that took place at twenty-five or on marriage after twenty-on As regarded the residue, the provision as to vesting was the same. The was, however, no express direction as to holding or managing, and nothi to shew, even by implication, that the testator had contemplated or i tended that the management of the personal estate should be retained b the trustees after it had vested in the beneficiary. Assuming, howeve that there was a direction applicable both to the heritable and moveab estate to manage until the beneficiary attained twenty-five, it was ve from repugnancy. Vesting had taken place as regarded both portions the estate, and it was quite settled that where, by the operation of a te tamentary trust, a person had become vested in an absolute fee, he cou not be restricted in the enjoyment of it, unless there were other ulterior trust purposes to be served which necessitated the retention the estate in the hands of the trustees.[4] Here there were no such pu poses. *Christie's*[5] case was very special, and ought not to be follow

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[1] Williams on Executors, p. 1404; Saunders v. Vautier, 1841, 4 Beavan, 11 Rocke v. Rocke, 1845, 9 Beavan, 66; Curtis v. Lurkin, 1842, 5 Beavan, 14 *Re* Young's Settlement, 1853, 18 Beavan, 199.

[2] Christie's Trustees v. Murray's Trustees, July 3, 1889, 16 R. 913; Campbel Trustees v. Campbell, July 17, 1889, 16 R. 1007.

[3] Archibald's Trustees v. Archibald, &c., June 15, 1882, 9 R. 942; Brown Brown's Trustees, Feb. 27, 1890, 17 R. 517.

[4] Brown v. Brown's Trustees, *supra*; Archibald's Trustees v. Archibald, & *supra*; Jamieson v. Lesslie's Trustees, May 28, 1889, 16 R. 807; Duthi Trustees v. Forlong, July 17, 1889, 16 R. 1002.

[5] Christie's Trustees v. Murray's Trustees, *supra*; *cf.* Clouston's Trustees Bulloch, July 5, 1889, 16 R. 937.

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The direction that the trustees should hold the estate and residue till the second party attained twenty-five was as repugnant to the right of fee vested in him as would be a direction to hold till he attained the age of 100, or until his death.

At advising,—

LORD PRESIDENT.—There is, in my opinion, a general rule, the result of a comparison of a long series of decisions of this Court, that where by the operation of a testamentary instrument the fee of an estate or parts of an estate, whether heritable or moveable, has vested in a beneficiary, the Court will always, if possible, relieve him of any trust management that is cumbrous, unnecessary, or expensive. Where there are trust purposes to be served which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator. But I am not aware of any case in which the mere maintenance of a trust management without any ulterior object or purpose has been held to be a trust purpose in the sense in which I have used that term. In this case the testator has directed his trustees to hold the estate of Barneyhill for behoof of his second son John Alexander and a series of heirs substituted to him, subject to a liferent use of the mansion-house in favour of his widow. The trustees are to manage the estate as absolute proprietors till the party entitled attain the age of twenty-five. But the testator further declares that no part of the estate shall vest in the party entitled thereto until he attain the age of twenty-five, or be married after attaining the age of twenty-one with the consent and approbation of the trustees, "whichever event shall first happen." This declaration though expressed in a negative form is a negative-pregnant, and involves a corresponding affirmative that the estate shall vest on the beneficiary either attaining twenty-five years of age or being married after twenty-one with the consent of the trustees. Marriage with consent after twenty-one (the event which has happened) is thus made precisely equivalent in its effect to attaining the age of twenty-five. But on the heir attaining the age of twenty-five the trustees are expressly directed to provide in his favour. I am of opinion that the same effect must follow the equivalent event of the heir marrying after twenty-one with the consent of the trustees.

The same considerations, I apprehend, must regulate the question regarding the disposal of the second son's share of the residue of the moveable estate, the declaration as to vesting being expressed in terms identical with those of the corresponding declaration regarding the heritable estate destined to the second son.

I am therefore for answering in the affirmative the first alternative of each of the questions submitted to us in the special case.

LORD JUSTICE-CLERK.—I entirely concur in your Lordship's opinion.

LORD YOUNG.—I have listened with all attention to your Lordship's judgment, and I am not sure whether the conclusion at which your Lordship has arrived is put upon the construction of this will according to the testator's intention, or whether it is put upon the ground that the testator's intention, about which there is no doubt, is such as the law will not give effect to. If the judgment is put upon the former ground, the question is one of no interest

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or importance whatever except to the parties in this case, and of very them, because it is a mere question of the construction of this particu which is a very long instrument, and certainly not taken from the styl and may never occur again. I may say for my own part that I would suggested the idea of sending a question of the mere construction of and the intention which is to be imputed to the testator in the constr it, to be argued before seven Judges as a question of difficulty and ance.

If, however, the judgment is put upon the other ground, viz., that t tion of the testator that his trustees shall hold and manage property right to it is vested in the beneficiary, is an intention which cannot by of Scotland be accomplished, then I consider that we are discussing a of first-rate importance.

I think it was hardly argued to us—I did not so understand it—wit to the heritable estate—the estate of Barneyhill—that the truster's was doubtful, that after the estate had vested in the beneficiary to had designed it, the trustees should nevertheless hold it and manage they were absolute proprietors, although for this son, until he attaine of twenty-five. That his marriage after he attained the age of twenty the consent of his trustees was equivalent in the truster's opinion to reaching the age of twenty-five is an idea which I do not think was in argument, and certainly did not occur to my mind.

The question of construction upon the will which was argued before a very important question—is, whether the language taken throughou sufficiently the intention so that we shall judicially act upon it, that tees are to retain and manage the personal estate in the same way as able estate, for, as was pointed out (and quite truly), while the int express with respect to the landed estate it is not so with respect to m but only to be implied. The contest between the parties was, whet were just and sufficient grounds for implying it or not, and that is a qu construction. Whether that was an intention the law would give ef whether it should be disregarded upon the ground of repugnancy (for no other), was the important and difficult question which we of the Sec sion, before whom the case came, thought so important and difficult opinion of seven Judges should be taken upon it.

Now, I shall deal with it accordingly, because it would be unfortu this discussion which we have had should terminate in a conclusion th the testator had no such intention at all, and that no question of impo difficulty arises upon the assumption that he had none.

I shall endeavour to point out, in the first place, that that is the int the testator, not to be implied, but expressed in as clear language as I could have used. And then I shall consider the question, whether u assumption it is an intention which the law will give effect to, or o the law will deny effect to, on the only ground that we were asked effect to it, namely, that it was repugnant to something else which done.

Now, it is the fifth purpose of the trust which we are interested i begin by pointing out that the estate which is the subject of that fifth was conveyed by the testator to his trustees on a complete legal title. conveyed to them, and they are infeft in that estate at this moment as pr

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oubt with a trust imposed on them with respect to it, but they are the ors of the estate, and there are no others.

here is the trust purpose we are now interested in with reference to te of which they are the proprietors with a complete legal title—"*Quarto*, to the liferent provision in favour of my said wife, *secundo* before I direct my said trustees to hold my lands and estate of Barneyhill" Lothian, with pictures, and so on, "for behoof of my second son John er Miller, and the heirs of his body in fee, whom failing," &c.

that is plain enough. They are to hold. There is nothing here about and there is nothing about withholding the conveyance; but then he *Quinto*, My said trustees shall manage, as absolute proprietors, my said n Berwickshire, and house in London, and estates in East Lothian" Barneyhill), "for the party entitled thereto under these presents until ty attains the age of twenty-five years." Now, who is "the party thereto under these presents"? It is, as it happens, John Miller. He is father's death apparently about twenty. He is said to be twenty- w, and his father has been dead for three years. He might have been ore his father died, and who would have been "the party entitled thereto ese presents" in that case? The heir of his body—a baby in the cradle have been. He would have been "the party entitled thereto under esents." Now, I read the direction again,—"The trustees shall manage, ite proprietors," that estate "for the party entitled thereto under these until said party attains the age of twenty-five years." Is that a lawful or is it not? If it is a lawful direction it must be given effect to. I case of John Miller being dead, and his heir a child, "the party entitled nder these presents." The right of that child is "by these presents." tees to whom the property title was given are directed to hold until he is ve. Is that bad? I have never heard a suggestion of a reason for that bad. It is said to be repugnant. Repugnant to what? to pro- that a man shall give to his son or his grandson an estate through the of trustees who are directed to hold it till he attains the age of twenty- heard it suggested, and I thought it could hardly be suggested seriously, t is just as repugnant as if he had directed the trustees to hold it for the ry until he was fifty or a hundred. If it were a hundred, there might, I e repugnancy. I think that would possibly come within the application of nguage which your Lordship used. It would be a cumbrous, unnecessary, ensive trust, and I think the Court would very fittingly disregard it. But own part, I say that until this case occurred I had never before heard it d that a father might not give an estate to his son or to his grandson the medium of trustees, directing the trustees to hold and manage it until he was twenty-five years of age. Is there anything contrary to nse in that? anything cumbrous, unnecessary, or so absurdly expensive e Court will interfere with it and direct the trustees to pay no attention to rection of the trust? It occurs to a father who is settling his estate— l not be for my boy's own interest that he should have it before he is five. The property is not likely to be so well managed by a young man wenty-five as it will be after he has attained that age, and using my best our and judgment to do what is best for him, I direct it to be managed tees for him till he is twenty-five, and to be then handed over to him." void from repugnancy?

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I think it was an idea early impressed on my mind—I can hardly tel came there—that the bountiful giver—the person giving an estate to an might prescribe the age—and twenty-five is the most common of all in prac which with respect to that estate the beneficiary should be held to com Is that contrary to the law of Scotland, or has it been suggested hithe that is contrary to the law of Scotland, or that it is void from repugna think it is a familiar idea, and that is what I should have read here. Th "come of age" are not technical words. What is meant by them is tha law of Scotland generally (unless there is something in the particular c person shall not have the full power of entering into contracts and of m without the aid of others until he is twenty-one. There are many ex to that, *e.g.*, a young man going into business before he is twenty-one, might multiply illustrations, but it would be idle. Now, here this gi "Twenty-five is the age at which I wish my son to be put into posse my estate, and not before that." I think if the suggestion had been Sir William Miller that his son would be a first-rate manager of the with the approval of the trustees, he married a girl of eighteen, Sir would have expressed himself somewhat strongly.

Now, I want to know whether the thing is absolutely illegal, so that i be accomplished, or is the proposition merely this, that the right way t plish it has not been taken here? I think in a question of this inte importance we should declare in terms either that the thing is illegal, and that the law will not sanction it, and that there is no way in which it can b plished—or, that it may be accomplished, but that this deed is bungled end; and that some different course ought to have been taken—and then, it would be only fair to point out that course. The father wishes his son, be an infant in the cradle, or his grandson to have his estate, but not to be possession or management of it till he is twenty-five. Can that be done if it cannot be done by the mere giving it to trustees on a complete leg with explicit directions to that effect, point out how it can be done ot I must say that I am startled by the suggestion that that is illegal— father is entitled to have such an idea in his mind, and that the law will whatever he does in order to accomplish it. The vesting of the right coming into possession are totally different things. There is nothi common, as I have pointed out already, than for complete vesting to ta in the merest infant. But the withholding of possession is another mat gether. A father or any other person may have any of a variety of rea desiring that an estate shall not be put into the management of his son he desires to be the proprietor of it, until he is twenty-five.

In the case of *Christie's Trustees*, July 3, 1889, 16 R. 913, we decide mously, the Lord Justice-Clerk giving the leading judgment, that a direc a testator to his trustees not to convey an estate to his son who was con vested with the beneficial right and interest in it, but to retain it and it, was good and effectual. The direction was not limited to five years, an application to the Court to order the trustees to disregard the dire the testator to hold and manage the property, the Court refused to give a order to the trustees.

Now, there is no question here about creditors. We have nothing to creditors. This property may be subject to the debts of the beneficia suppose it is. We are saying nothing to the contrary, and the beneficia

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disregard his father's will, and disappoint all his father's expectations, and the expectations of all his friends, by getting involved in debts, and his property may be taken in payment of them. We are not concerned with that. What we are asked to do now is to order these trustees, at the instance of the son, to disregard his father's express directions, and instead of holding and managing the estate till he is twenty-five, to convey it at once and directly to him. Now, that is an order to the trustees at the instance of the beneficiary, the son, which I, for my part, will be no party to make, and which I must protest against. I think, and upon the same grounds that the Court unanimously proceeded upon in the case of *Christie*, that it is in the will of the bountiful giver to give the express direction he has given, and that the trustees to whom he has given the property title with these orders ought not to be directed by this Court to disregard them. The right of creditors is another matter altogether.

Now, I have endeavoured to point out that this direction is irrespective of the vesting, and that the clause about marriage after twenty-one with consent of the trustees affects the vesting only, but would have no more effect upon this direction to hold and manage with respect to John than mere birth would have had with respect to the son of John. I suppose that if John had predeceased the testator, leaving a son, the vesting would have taken place in that son *a morte testatoris*. I do not think that doubtful, but the direction to the trustees to hold in his behoof till he was twenty-five is irrespective of that vesting altogether. The clause which regulates the vesting is—"And I hereby declare that no part of my several lands and estates shall vest in such of my children as may be entitled thereto under these presents until he or she attains the age of twenty-five years." If John had died leaving a child there might have been a question whether this grandchild would have come in terms of this clause as one of "my children," and, in my present opinion, I think there would have been strong—irresistibly strong—grounds for holding that he did not, and that the declaration preventing vesting until he should have attained the age of twenty-five, or had married after twenty-one with consent of the trustees, had no application to such a child. Therefore there would be vesting—at all events I can put the case in arguing the question that there would be vesting *a morte testatoris*, and vesting in the infant *a morte testatoris*. Is the direction to the trustees to hold till he is twenty-five bad by the law of Scotland? I think it is not. Now, that disposes of the question so far as Barneyhill is concerned.

I think in the course of the argument I put the question whether the direction to hold and manage till the beneficiary reached the age of twenty-five was to be applied with respect to the residue. Upon that question, difficult as I say I think it, I have come to the conclusion that it is. I cannot read that will and resist the conclusion that that was the testator's intention. The will produced upon my mind the judicial conviction that that was the testator's intention, and it is very much more important, if it be, that it should be carried out with respect to the residue than with respect to Barneyhill. The residue of the estate—that is to say, the personal estate, this young man's share of which is worth on half a million—is invested in a variety of ways. The trustees are to realise it, they are to ingather it; and does it occur to anybody as irrational on the part of the father to think and to direct his trustees accordingly—"All that property will not be safe in the hands of a young man under twenty-five. I

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direct you therefore to manage it till he attains twenty-five, and not to hand i over before then"? And it is no more startling than to say no father or othe bountiful giver can by the law of Scotland do such a thing, any more than he ca tell them to hold it till the man is a hundred. I altogether dissent from tha I think it is foreign to the cases which are illustrative of the doctrine of repu nancy,—the familiar and typical illustration of which is where a man giv to another in property, money, or anything else, but on the condition that h shall not pay his debts with it, having the idea, I suppose, of a great auth and statesman, who thought that paying debts was just throwing away goo money. Well, the law would not allow that. There is repugnancy in tha and that is a typical case of repugnancy; but the notion that a direction trustees to manage a property till a son attains years of discretion comes withi the same rule of law to which that belongs—the same doctrine and princip of law to which that belongs—is, I think, contrary to good sense. I ha already, I think, sufficiently pointed out that he does not make these bene ciaries proprietors. They have not the trust-estate. The property is in th trustees, and all that they can call upon the trustees to do is to execute th trust with respect to it—that is to say, they are to execute the truster's dire tions in so far as they are lawful. If these are unlawful, of course they to be neglected. Whether they are unlawful or not is a question of difficul and importance at least—upon which we thought it expedient to take the jud ment of seven Judges.

I am for answering the question in conformity with these views which I ha stated.

LORD RUTHERFURD CLARK.—I am of the same opinion as your Lordship i the chair.

It is admitted that the fee is vested in Mr Miller. I hold that as th absolute owner he is entitled to require the trustees to denude in his favo and that any direction of the testator to the contrary cannot receive effect.

I do not think that the law allows of any restriction on the owner of absolute fee, and in my opinion the direction that the trustees shall manage th estate till Mr Miller reaches twenty-five is just as repugnant to the right of which is vested in him as a direction to manage the estate till he reaches an other age, or it might be till his death.

I may say that in the case of *Christie* I had very great doubt, and I assente to the decision only because I thought that there were special circumstanc connected with it which do not occur here.

LORD ADAM.—I concur with your Lordship in the chair, and with Lo Rutherfurd Clark.

LORD M'LAREN.—My opinion may be expressed very shortly.

Ever since I knew anything of the law of trusts I have considered it to be settled and indeed an elementary proposition that where trustees hold proper for a person in fee, that is a simple trust which the Court will execute b divesting the trustees at the suit of the person interested. It seems to me tha a beneficiary who has an estate in fee has by the very terms of the gift the sam right of divesting the trustees, and so putting an end to the trust, which th truster himself possessed, because under a gift in fee the grantee acquires all th ht in the property which the truster had to give. It seems to me to be no

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only an unsound proposition in law, but a logical impossibility, that a person should have an estate in fee, and that some other person should at the same time have the power of withholding it. This I understand to be a well-settled principle. It is laid down by writers of authority on the law of England, and I have never had any doubts about its being the law of Scotland, although in view of this case being sent to us for consideration, and of the difference of opinion expressed, I must admit that it is an undecided point.

There are only two exceptions, so far as I know, to the operation of this general rule, as I understand it, and these are founded upon civil disability—I mean the case of marriage and the case of minority or mental incapacity. The case of minority or mental incapacity is only an apparent exception, because the trustees are only possessors in the character of guardians of the estate of a beneficiary who is not in the position to manage the property for himself. The case of a married woman is a real exception, but it is impossible to read the opinions of the eminent Judges by whom the doctrine of "separate estate" was established without seeing that they regarded it as an exception constituted for reasons of policy to a rule which was otherwise clear and invariable. My opinion therefore is in accordance with that delivered by your Lordship in the chair.

LORD TRAYNER.—I concur in the result reached by Lord Young, and concur also in every one of the reasons which his Lordship has given for reaching the conclusion which he has expressed.

THE COURT pronounced this interlocutor:—"In conformity with the opinion of the majority of the Judges present at the hearing, answer the first alternative of the first question, and also the first alternative of the second question in the affirmative: Find and declare accordingly, and decern."

J. & F. ANDERSON, W.S.—HENRY & SCOTT, S.S.C.—Agents.

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Dec. 19, 1890.*
Brown & Co. v. M'Callum.

JAMES BROWN & COMPANY, Pursuers.—*Jameson—Shaw.*
JOHN M'CALLUM AND OTHERS, Defenders.—*M'Kechnie—Guy.*

Bankruptcy—Preference—Compensation—Reduction—Title to sue—Act 1696, c. 5—*Bankruptcy Act*, 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 10 *and* 11.—The Bankruptcy Act, 1856, secs. 10 and 11, does not deprive an individual creditor of his title to reduce illegal preferences under the Act 1696, cap. 5, alleged to have been granted to his prejudice.

1ST DIVISION.
Ld. Kinnear.
C.

BY disposition dated 16th, and recorded 17th March 1888, Archibald Bowie, a partner of Archibald Bowie & Sons, builders in Glasgow, disponed a property situated in West Scotland Street there in favour of John M'Callum, Haircraigs, Denny, and Robert Bowie, Crosslands, Baldernock. M'Callum and Robert Bowie were cautioners to the Clydesdale Bank for a cash-credit to Archibald Bowie, under a bond dated many years previously, and the disposition was by back-letter declared to be in security of this obligation.

On 21st June 1888 the estates of Archibald Bowie and of his firm were

* Decided Dec. 12, 1890.

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direct you therefore to manage it till he attains twenty-five, and not to over before then"? And it is no more startling than to say no father bountiful giver can by the law of Scotland do such a thing, any more tha tell them to hold it till the man is a hundred. I altogether dissent fr I think it is foreign to the cases which are illustrative of the doctrine o nancy,—the familiar and typical illustration of which is where a m to another in property, money, or anything else, but on the condition shall not pay his debts with it, having the idea, I suppose, of a grea and statesman, who thought that paying debts was just throwing aw money. Well, the law would not allow that. There is repugnancy and that is a typical case of repugnancy; but the notion that a dir trustees to manage a property till a son attains years of discretion come the same rule of law to which that belongs—the same doctrine and of law to which that belongs—is, I think, contrary to good sense. already, I think, sufficiently pointed out that he does not make thes ciaries proprietors. They have not the trust-estate. The property i trustees, and all that they can call upon the trustees to do is to exe trust with respect to it—that is to say, they are to execute the truste tions in so far as they are lawful. If these are unlawful, of course to be neglected. Whether they are unlawful or not is a question of and importance at least—upon which we thought it expedient to take ment of seven Judges.

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ion by the defender Reid to Mr Colledge cannot be pleaded in bar of this ction, in respect (1) that it was made after matters had become litigious, nd constitutes in the circumstances a contempt of Court on the part of n officer of Court; (2) that it was made in defraud of the legal rights of he pursuers and other creditors; (3) that the right of a trustee in bankuptcy to challenge a deed is personal to him *qua* trustee, and intransissible; and (4) that the said assignation cannot divest the pursuers of heir right of challenge, or confer on any third person a title to object to heir exercising such right.

The defenders pleaded;—1. The pursuers' statements being irrelevant, nd insufficient to support the conclusions of the summons, the action ught to be dismissed, with expenses. 2. The pursuers having no interest o maintain the present action, it ought to be dismissed, with expenses. . The defender Robert Reid, as trustee foresaid, having, with the conent of the commissioners on the said sequestrated estates, legally sold nd disposed of the whole unrealised assets of the said sequestrated estates, nd the pursuers' right to pursue the present action being thereby barred, he action ought to be dismissed, with expenses. 4. The pursuers having o interest in respect of set-off or compensation, or otherwise to ask decree n the present action, it ought to be dismissed, with expenses.

On 20th May 1890 the Lord Ordinary (Kinnear) reported the cause to the Inner-House as incidental to the process of sequestration for rent then depending under appeal.*

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* "NOTE.—The Lord Ordinary thinks it proper to report this case, because the process of reduction is incidental to another process at present depending before the First Division.

"The latter process is an action of sequestration and sale instituted by the defenders in this action, Messrs M'Callum and Bowie, against the present pursuers, in the Sheriff Court of Paisley, to enforce payment of the rent of certain premises, forming part of the subjects conveyed in the disposition now under reduction. The pursuers pleaded in defence that Messrs M'Callum and Bowie were not the true owners of the property, that the premises occupied by them formed part of the sequestrated estate of Archibald Bowie & Sons, and that, in a question with the true owners, they were entitled to set off the claim for rent against a debt due to them before the date of the disposition in question. Judgment was given against them in the Sheriff Court. They appealed to the First Division, and proceedings in the appeal have been sisted until the present action should be disposed of, or brought before the Court.

"It is not disputed that the disposition in question is reducible, at the instance of a prior creditor, under the Act 1696, cap. 5. But it is said that it is not for the interest of the general creditors that it should be set aside, and that the pursuers have no separate interest to insist in the reduction. The trustee in the sequestration, who had declined to be a party to the summons of reduction, has now been sisted on his own motion as a defender, and adopts the defences stated for the original defenders, M'Callum and Bowie.

"If the plea of compensation is otherwise well founded, it would appear to the Lord Ordinary that the pursuers have a good title and sufficient interest to reduce the conveyance, so far at least as they are concerned, and so as to enable them to maintain that it must be treated as invalid for the purposes of the other action. The main question in controversy in the present case, therefore, depends upon the merits of the pursuers' case in the appeal before the First Division.

"The trustee alleges that, with the consent of the commissioners, he has sold his whole right and interest in the property in question, including all right and title competent to him to challenge or impugn the validity of the disposition, and it is argued that the pursuers' right to maintain the present action has been excluded by the sale. But the sale was admittedly carried through after the

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sequestrated under the Bankruptcy Statutes, and Robert Reid, Glasgow, was appointed trustee.

At the date of the sequestration James Brown & Company, ve blind manufacturers, South Portland Street, Glasgow, were tenants of the property conveyed by the disposition, and on their refusal the rent due therefor at Martinmas 1888, an action for sequestrati sale was brought against them in the Sheriff Debts Recovery Co Renfrewshire at Paisley, in the name of M'Callum and Robert Bow disponees in the disposition.

Brown & Company defended the action on the ground that the pu were not the proprietors of the subjects in question, that the tru prietors were Archibald Bowie & Sons, and that they (the defender entitled to retain the rents to compensate a counter claim agai sequestrated estate.

The Sheriff-substitute (Cowan) repelled the defences, and granted On appeal the Sheriff adhered.

Brown & Company appealed to the Court of Session, and thereaf 4th November 1889, brought an action against M'Callum and Bowie concluding for reduction of the disposition above mentioned the Act 1696, c. 5.

The pursuers averred;—(Cond. 3) "The said Archibald Bowie the date of the said disposition, or within sixty days after the regis thereof, and he still is, in a state of notour bankruptcy, having b 13th March 1888 charged under an extract registered protest at stance of James D. Thomson, timber-merchant, Grangemouth, dat March 1888, and recorded in the Sheriff Court Books of Renfre 12th March 1888, and which charge expired on 19th March 1889, w payment of the debt, and was followed by sequestration of th Archibald Bowie's estates under the Bankruptcy Statutes on 21st 1888." (Cond. 4) "The said disposition was voluntarily granted said Archibald Bowie, and was taken by the defenders fraudulent in satisfaction or further security of a prior debt due by the said Arc Bowie or his said firm to the defenders, and in order to disappoi defeat the rights of the pursuers and the said Archibald Bowie's creditors, and in preference of the rights of the pursuers and said creditors. . . ." (Cond. 5) "The pursuers were at and prior date of the said disposition, creditors of the said Archibald Bo Sons and Archibald Bowie to the extent of £62, 4s., being the balan for work done and goods supplied to them, and the said debt is sti paid."

On 22d January 1890, before the record was closed, the trustee consent of the commissioners on the sequestrated estates, exposed f by public roup, after due public notice and advertisement, at the price of £600, the whole unrealised assets of the sequestrated estat cluding, *inter alia*, his whole right and interest in the property con by the disposition, and including all right and title competent to trustee, to challenge or impugn the validity, *inter alia*, of the dispo The subjects were purchased by Thomas Colledge, writer in Glasgo

On 1st February 1890 the trustee, to whom the action had be pointed to be intimated on 11th December, on his own motion, was as a defender to the action.

The pursuers pleaded;—1. The defender Reid has no title or in to defend the present action. 2. In the circumstances condescend the disposition libelled is reducible under the Act 1696, chap. 5, common law, and the pursuers are entitled to decree as conclude with expenses. 3. The defences are irrelevant. 4. The pretended as

tion by the defender Reid to Mr Colledge cannot be pleaded in bar of this action, in respect (1) that it was made after matters had become litigious, and constitutes in the circumstances a contempt of Court on the part of an officer of Court; (2) that it was made in defraud of the legal rights of the pursuers and other creditors; (3) that the right of a trustee in bankruptcy to challenge a deed is personal to him *qua* trustee, and intransmissible; and (4) that the said assignation cannot divest the pursuers of their right of challenge, or confer on any third person a title to object to their exercising such right.

The defenders pleaded;—1. The pursuers' statements being irrelevant, and insufficient to support the conclusions of the summons, the action ought to be dismissed, with expenses. 2. The pursuers having no interest to maintain the present action, it ought to be dismissed, with expenses. 3. The defender Robert Reid, as trustee foresaid, having, with the consent of the commissioners on the said sequestrated estates, legally sold and disposed of the whole unrealised assets of the said sequestrated estates, and the pursuers' right to pursue the present action being thereby barred, the action ought to be dismissed, with expenses. 4. The pursuers having no interest in respect of set-off or compensation, or otherwise to ask decree in the present action, it ought to be dismissed, with expenses.

On 20th May 1890 the Lord Ordinary (Kinnear) reported the cause to the Inner-House as incidental to the process of sequestration for rent then depending under appeal.*

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"The latter process is an action of sequestration and sale instituted by the defenders in this action, Messrs M'Callum and Bowie, against the present pursuers, in the Sheriff Court of Paisley, to enforce payment of the rent of certain premises, forming part of the subjects conveyed in the disposition now under reduction. The pursuers pleaded in defence that Messrs M'Callum and Bowie were not the true owners of the property, that the premises occupied by them formed part of the sequestrated estate of Archibald Bowie & Sons, and that, in a question with the true owners, they were entitled to set off the claim for rent against a debt due to them before the date of the disposition in question. Judgment was given against them in the Sheriff Court. They appealed to the First Division, and proceedings in the appeal have been sisted until the present action should be disposed of, or brought before the Court.

"It is not disputed that the disposition in question is reducible, at the instance of a prior creditor, under the Act 1696, cap. 5. But it is said that it is not for the interest of the general creditors that it should be set aside, and that the pursuers have no separate interest to insist in the reduction. The trustee in the sequestration, who had declined to be a party to the summons of reduction, has now been sisted on his own motion as a defender, and adopts the defences stated for the original defenders, M'Callum and Bowie.

"If the plea of compensation is otherwise well founded, it would appear to the Lord Ordinary that the pursuers have a good title and sufficient interest to reduce the conveyance, so far at least as they are concerned, and so as to enable them to maintain that it must be treated as invalid for the purposes of the other action. The main question in controversy in the present case, therefore, depends upon the merits of the pursuers' case in the appeal before the First Division.

"The trustee alleges that, with the consent of the commissioners, he has sold his whole right and interest in the property in question, including all right and title competent to him to challenge or impugn the validity of the disposition, and it is argued that the pursuers' right to maintain the present action has been excluded by the sale. But the sale was admittedly carried through after the

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On 4th July 1890 the Court allowed the trustee to withdraw fro process, and sisted Thomas Colledge as defender in his room, and *die* remitted to the Lord Ordinary to allow the parties a proof of averments.

In addition to the facts above set forth it appeared from the proc the property in question was very largely burdened with heritable The trustee deponed that he had not raised an action of reduction deed because he had no funds, and did not wish to incur expense he saw whether the property would realise anything. An arrang had been come to between him and the bondholders and M'Callu Robert Bowie by which the property was to be managed for the co good of all concerned, any surplus rents being consigned in ba joint names for behoof of the parties who should be found to have to them. Meantime the trustee did not abandon his right to b reduction of the deed. Under this arrangement the action for re been brought by the trustee in the names of M'Callum and Robert Matters had continued in this position until the trustee sold the as the estate to Colledge on 22d January 1890.

The Lord Ordinary, on 22d July 1890, having heard counsel o proof, of new reported the cause to the Inner-House.

Argued for the pursuers;—There was here a proper case of com tion between the rent due by them to the bankrupt estate and their as creditors against the estate. It did not signify that the rent w payable till after the sequestration. It was contracted previousl was a liquid debt.[1] In these circumstances they had an inter reduce the conveyance as it was in prejudice of their right of com tion. The pursuers were therefore creditors prior to the conveyanc were prejudiced by the conveyance, and accordingly they had a goo to reduce it under the Act 1696, c. 5.[2] Their title was not diced by the provisions of the Bankruptcy Act of 1856. Tha gave the trustee a title to reduce in the interests of the general of creditors, but that was a title quite distinct from the title of a creditor under the Act 1696, cap. 5, and the title of such a credito not affected by it. If the interests of a prior creditor were affect had a title to reduce even if the interests of the general body of cre should be prejudiced by the reduction. But in this case there w such question. The reduction could affect the heritable creditors The question was therefore one between one creditor and anothe fell within the case of *Wright*.[2] The defender Colledge had neithe nor interest to defend. The trustee's title to reduce was quite di from the pursuers' title, and the conveyance of his title therefore di operate as a conveyance of the pursuers' title. Further, the conve was *pendente lite*, and was therefore ineffectual in a question wit pursuers.

Argued for the defenders;—(1) The pursuers were not entitled to

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action had been intimated to the trustee. The latter avers upon record th general creditors have no interest in the reduction. The interest which undertaken to sell, therefore, is that of the pursuers'; and the argument is during the dependence of a litigation, the defender may destroy the pu title, by selling the subject-matter of the suit to a third person. It appe the Lord Ordinary that the pursuers' right cannot be in any way affect such a transaction."

[1] Bell's Comm. (M'L. edn.) ii. 119, 122, 124, 132, 139, (5th edn. 125, Goudy on Bankruptcy, 545; Fraser v. Robertson, 1881, 8 R. 347.

[2] Wright v. Walker, March 7, 1839, 1 D. 641, 11 Scot. Jur. 396; Ma Reid, 1704, M. 1183; Barclay v. Lennox, 1783, M. 1151.

compensation against the claim for rent. The rent was not due at the date of sequestration. When it fell due at Martinmas following the pursuers were bound to pay it to the persons then entitled to it.[1] (2) The pursuers had no title to reduce the deed. The Act of 1856 vested the right to challenge such deeds in the trustee, and took it from the individual creditors. Under the Act 1696, cap. 5, the right to challenge was competent to prior creditors only.[2] The Act of 1856 vested it in the trustee for behoof of the whole body of creditors. A reduction contrary to the interest of the whole body of creditors was therefore incompetent. Here the pursuers were seeking to obtain a reduction which was in their own interest only and contrary to the interest of the general body of creditors. Since the Act of 1856 there was no case in which an individual creditor had pursued an action of reduction under the Act 1696, cap. 5, after sequestration.[3] (3) The pursuers had no interest to pursue the reduction. The effect of the sale by the trustee to Colledge was that if reduction was obtained it would accrue to the benefit of Colledge, and not of the pursuers. That transaction was one which was within the powers of the trustee under the Bankruptcy Act, and it was carried out by him according to its provisions. (4) There was not sufficient evidence at the date of the deed, or within sixty days thereafter, of notour bankruptcy under the Act 1696, cap. 5.[4]

At advising,—

LORD KINNEAR.—There are two actions to be disposed of between the same parties. The first is an action of sequestration and sale in the Debts Recovery Sheriff Court of Renfrewshire at the instance of John M'Callum and Robert Bowie, as proprietors of certain subjects in the parish of Govan in that county, against James Brown & Company, as tenants of these subjects, in respect of their failure to pay the rent due at Martinmas 1888. Brown & Company pleaded in defence that the pursuers were not the proprietors of the subjects in question, that the true proprietors were Archibald Bowie & Sons, whose estates had been sequestrated, and that they (the defenders) were entitled to retain the rents to compensate a counter claim at their instance against the sequestrated estate. The Sheriff repelled the defences, and if the question were to be determined according to the state of the title as it stood when the action was brought, that was probably a sound judgment. But the case was appealed to this Court, and before the appeal had been heard, an action of reduction was raised by Brown & Company for the purpose of setting aside the title of M'Callum and Bowie. Proceedings in the appeal were sisted until the reduction should be disposed of, and we have therefore to consider the merits of this second action before we can dispose of the appeal.

The title on which the action of sequestration is based is a conveyance *ex facie* absolute by Archibald Bowie in favour of John M'Callum and Robert Bowie. But it is admitted that this absolute conveyance is qualified by a back-bond whereby the disponees acknowledge that it was in reality granted in security for repayment of whatever sum they might be required to pay as the

[1] Thomson v. Jamieson, Dec. 11, 1830, 9 S. 168; Elmslie v. Grant & Maclean, Dec. 15, 1830, 9 S. 200, 3 Scot. Jur. 135; Bell's Prin. sec. 573; Martin v. Marshall, 12 D. 1172, 22 Scot. Jur. 522.

[2] Mann v. Reid, *supra;* Barclay v. Lennox, *supra;* Bell's Comm. (M'L.'s edn.) ii. 194, (5th edn. 208).

[3] Henderson v. Robb, Jan. 18, 1889, 16 R. 341.

[4] Macrae v. Sutherland, Feb. 9, 1889, 16 R. 476.

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granter's cautioners under a cash-credit bond for moneys advanced to h the Clydesdale Bank. The conveyance is therefore a mere security, a ground on which it is challenged is that it creates an illegal preference the Act 1696, cap. 5, as a voluntary conveyance granted within sixty d bankruptcy in farther security of a prior debt to the prejudice of th creditors of the granter. I do not think it doubtful that this objec well founded, and that the conveyance is reducible under the statute indeed, I do not see that this is seriously disputed by the defenders. minute of admission they admit, among other things, statements co in the 3d article of the condescendence. Now, that statement is tha said Archibald Bowie was at the date of the said disposition withi days of the registration thereof, and he still is, in a state of notour bank having been on 13th March 1888 charged under an extract registered pr the instance of James D. Thomson, timber-merchant, Grangemouth, da March 1888, and recorded in the Sheriff Court Books of Renfrewshi March 1888, and which charge expired on 19th March 1888, without p of the debt, and was followed by sequestration of the said Archibald estates under the Bankruptcy Statutes on 21st June 1888."

It is only necessary to add that the guarantee by the defenders to th had been granted many years ago, that there was a large balance due bank when the conveyance under reduction was granted, that the insolvency was perfectly well known both to himself and to his agen that the conveyance was granted for no other purpose but to give the ca a security for their claim of relief. That the conveyance was granted tarily there can be no question. The evidence shews that it was prep the bankrupt's agent, Mr Jackson, without any demand from the de and even without any previous communication with them. They ap have known nothing about the matter until they were presented by Mr with a security for which they had never asked. I have not been able to the evidence any satisfactory explanation of the reasons for granting this ance, and certainly I can find no ground in law upon which it can be su

But then the trustee in the sequestration, for reasons to which I shal immediately, has not attempted to reduce this security as an illegal pre and it is said that if he thinks fit to leave it standing, the pursuers as in creditors have no interest and no title to set it aside. Their interest a tors is clear enough, because the effect of an action of this kind is to the estate for distribution. But besides this interest, which they have mon with the other creditors, they have a special interest of their own aside a conveyance which, if it stands, will exclude their plea of retent in other words, will defeat a security which they claim to possess over the sequestrated estate. We cannot now determine the validity of their right to retain, because there may be other interests involved which represented in this process. But the grounds on which they maintai right are perfectly intelligible, and will probably be found to be valid effect of the reduction should be to bring back the property over wh illegal preference extends into the sequestrated estate so as to make the by virtue of the vesting clauses of the statute, the proper creditor in th for rents. Whether that will be so or not I do not say at present, reason I have stated. But it is enough for the purpose of this action t pursuers have a good interest to set aside an illegal preference, if it be

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in order that they may be enabled to maintain their security in the sequestration, even although we cannot now determine, as against the other creditors, that that security will be effectual.

If they have a sufficient interest, it can hardly, I think, be disputed that they have a good title under the Act of 1696, because it is admitted that they are prior creditors, and because the right of reduction conferred by the statute is not given to the general body, but to those prior creditors whose interests are prejudiced. But then it is said that although an individual creditor might have reduced under the Act of 1696, that right has now been transferred by the Bankruptcy Act of 1856 to the trustee in the sequestration, so that since that statute the trustee alone has a title to reduce, to the exclusion of the title of individual creditors in any circumstances. I think this an untenable construction of the statute. The 11th section enables the trustee to set aside any deed or alienation which is voidable by statute or at common law, for behoof of the whole body of creditors, although such deed or alienation could not previously have been set aside except for behoof of a limited class of creditors. But there is nothing in that enactment to deprive a particular creditor of any right which he may have possessed either at common law or by statute, independently of the Act of 1856. It may very well be that a single creditor, by reason of a security which he holds over part of the bankrupt's estate, may have an interest either adverse to the general body of creditors, or in which they do not participate; and in such a case the trustee may have no interest, and therefore no title to reduce for behoof of the general body. But then the trustee takes the estate for behoof of the general body, subject always to the securities which existed at the date of the sequestration; and it seems to me to follow that the creditors who hold such securities cannot be deprived of their right to make them effectual by setting aside any fraudulent or illegal preference which may stand in the way of their legal operation, merely because the statute has extended to the whole body of creditors the benefit of certain challenges, which were previously available only to a particular class. The pursuers' position is that they held a good legal security over a part of the bankrupts' estate, but they cannot make their security effectual because it is apparently excluded by a conveyance which they allege to be a fraudulent alienation to their prejudice. If the trustee had thought fit to reduce such a conveyance, he would have recovered the property, which has been wrongfully alienated, for the benefit of the whole body of creditors, but subject always to the preferable security. For a right of retention is a security in the sense of the statute; and the estate in the trustee's hands is subject to the security created by that right, just as clearly as it is subject to a preferable security created by disposition and infeftment. It follows that if the trustee does not think fit to take action the pursuers may reduce for their own benefit an illegal preference which stands in the way of their legal right.

But it is said that the trustee has resolved not to challenge the defenders' conveyance not merely because the general creditors have no interest, but because it would be against their interest to set it aside. And the argument is that the pursuers ought not to be allowed to reduce to the prejudice of the general body of creditors. Now, in the first place, I do not see that there is any party to this process who has any title to maintain the interest of the creditors. The trustee was sisted as a defender, but on his own motion he was allowed to withdraw, on the ground that in the course of the process he had sold the whole assets of the bankrupt estate to Mr Colledge, and had therefore no longer any interest in the

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matter, and on that statement Mr Colledge was sisted in his room. The of the trustee therefore is that the creditors have no interest in the this action, and will not be affected by it in any way; and I do not Mr Colledge can be heard to contradict that position, and so displace th upon which he was allowed to appear as a defender.

But then it is argued, as I understand the defenders' case, that the of the pursuers' title must be determined with reference to the circums which they brought this action, and that at that date the trustee oppos because he thought the proceedings which they instituted would be p to the creditors. It is true that the trustee appeared in the process and the defences of the disponees, M'Callum and Bowie. It appears to m doing so he placed himself in a somewhat singular position, becaus endeavouring to maintain an illegal preference; and I am unable to satisfactory explanation of his reason for taking that course. It is poss the heritable creditors might have an interest in resisting the reduction it is possible that they may lose some part of the rents by the exercis pursuers' alleged right of retention; and, on the other hand, they nothing by the reduction, because their securities are preferable bot defenders and to the trustee. But, if it was in their interest that th appeared as defender, he was going altogether beyond the scope of his d was no part of his duty to maintain an illegal preference, merely becaus security-holders have an indirect interest in keeping it up, in order another security, which *ex hypothesi* is perfectly just. The supposed in the heritable creditors must therefore, in my opinion, be disregarde there is nothing in the evidence to shew that the unsecured creditors wi judiced. The only difference which this action can make in the sequestra ceedings is, that the subjects will be freed from the burden of an illegal sec the benefit of all the creditors according to their several interests; and difference which, on that being done, the pursuers' claim will make is, t may obtain full payment of a part of their debt by the exercise of a retention, instead of merely ranking for a dividend. If the unsecured have such an interest in the rents as to make this of any importance it would seem to follow that they must have a corresponding interes subject which produces the rents, and in that case they would gain mor recovery of the subject itself than they would lose by the retention of t But we have no such statement as to the position of the estate as w required in order to ascertain exactly the manner in which creditors affected by this action. And it does not appear to me to be necessary should inquire further. It is sufficient that the pursuers' claim to ret receives effect in the sequestration, is preferable to the claims of u creditors. It follows that if they should lose anything by the claim be tained, that is a loss to which they must submit. They cannot defea preference by setting up against it a preference which the law disallows.

For the same reason the only other ground on which the defence i tained appears to me to be equally unfounded. It is said that the tru sold the whole assets of the estate, together with his title to reduce t veyance in question, to the defender Mr Colledge, and that the sale must effect under the provisions of the Bankruptcy Act. It is not explained reduction of a security will prejudice the purchaser. But it is unnece consider whether the purchaser will be prejudiced. His position is, t

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virtue of his purchase he has acquired a right from the trustee to support the conveyance against the pursuers' challenge; and this position is untenable for two reasons. In the first place, assuming that the trustee might assign his own title to reduce for the benefit of the general body of creditors, it is manifest that he could not assign the preferable right of an individual creditor. In the second place, if he could have sold to the pursuers' prejudice before the litigation began, he certainly could not do so after the action had been raised. Now, the process was intimated to the trustee in obedience to an interlocutor of the 17th of December, the sale was carried through on the 22d of January, and the trustee was sisted as a defender on the 1st of February, for the purpose apparently of maintaining that he had defeated the pursuers' title by selling the right which formed the subject of litigation during the course of the process. I remain of the opinion which I expressed in reporting the case, that the pursuers' title cannot be affected by such a transaction.

The result is that, in my opinion, the pursuers are entitled to decree in the action of reduction, to the effect of enabling them to maintain their plea of retention in the sequestration. The reduction destroys the title of Messrs M'Callum and Bowie to maintain the action in the Sheriff Court; and the Sheriff's interlocutor must therefore be recalled, and that action must be dismissed.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

THE COURT pronounced the following interlocutor:—"Find, declare, and decern in terms of the conclusions of the libel against the original defenders John M'Callum and Robert Bowie, and also against the compearing defender Thomas Colledge: Find the said defenders conjunctly and severally liable in expenses, and remit," &c.

R. AINSLIE BROWN, S.S.C.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

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HENRY STAPLETON EDWARDES AND ANOTHER, Pursuers (Reclaimers).—*Rankine—J. Wilson.*
FREDERICK ROBERT HUGHES AND ANOTHER (Edwardes' Trustees), Defenders (Respondents).—*M'Kechnie—Peddie.*

Succession—Marriage-contract—Vesting—Conditio si sine liberis—Alimentary provision—Discharge.—In an antenuptial marriage-contract a wife conveyed a sum of £4000 to trustees for the purposes,—(2) That, in the event of the marriage being dissolved by the predecease of the wife, "leaving a child or children of the marriage," the trustees should pay the annual produce of the fund to her husband "during his life, for his liferent and alimentary use only," excluding creditors and assignees, and that after his death the capital should be paid over to the child or children of the marriage, to the sons on attaining majority and to the daughters on attaining majority or being married. In the event of the failure of children when the term of payment arrived the fee was to be subject to the disposal of the wife by will, with power to the trustees to convey or pay over the capital or fee of the estate at any time after the wife's death and the failure of issue, "on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will." (3) In the event of the marriage being dissolved by the predecease of the husband, the wife was to enjoy an alimentary liferent of the £4000, and after her death the interest was to be applied for behoof of the children during their minority, and on their majority (or marriage in the case of daughters) the capital was to be paid over to them. It was further declared that if such child or children should all die before their mother, or

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although they should survive her, "should they all die before attaining n and without leaving issue of their own bodies," the capital was to be d of according to the wife's will, or, in the event of her leaving no wil given to her heirs and executors. It was further provided that the provi the children should not be payable or become vested interests until a death of the longest liver of the spouses and until the children majority.

The marriage was dissolved by the predecease of the wife, who was s by one son, and who left a will in which she made over all she possesse husband.

In an action by the husband and the son (who had no children) for p upon their joint discharge of the £4000, the trustees pleaded that th bound to uphold the trust for the protection of the alimentary liferen surviving husband as well as for the eventual interest of the possible the son.

Held (1) that the clause in the deed giving, in certain events, the power to pay over the capital on obtaining the husband's discharge of rent shewed that it was not intended that the trust should be kept up protection of his liferent; (2) (*diss.* Lord Adam and *rev.* judgment of Lo cairney) that the terms in which the provisions to children were expr the clause providing for the event of the husband's predecease, mak failure of children "without issue" a condition precedent to the wi affecting the capital in the event of her children surviving her and dyin the term of payment, shewed that the provisions to "children" in th providing for the event of the wife's predecease were limited to childre marriage, excluding their issue, and that in the event of the son dyin the term of vesting, whether he left or did not leave issue, the capita vest in the husband under his wife's will, and therefore that the capit ultimately vest either in the son or the father, and that they were en payment on their joint discharge.

Question, whether the *conditio si sine liberis* was applicable to prov children in marriage-contracts.

Opinion (*per* Lord Kincairney) that it was.

1st Division. Lord Kincairney. C.

On 20th February 1855 an antenuptial contract of marriage was into between Henry Stapleton Edwardes, doctor of medicine at mouth, and Miss Mary Jane Naish. The first part of the marria tract set forth the obligations entered into by Dr Edwardes. The part of the deed set forth that Miss Naish on her part disponed a veyed to the marriage-contract trustees a sum of £4000 which h presented and "paid to her in the view of her marriage" by h father, Frederick Robert Hughes, and also the whole other estat she presently possessed, or which she should acquire during th sistence of the marriage, in trust for the following purposes:—F payment to herself of the annual income of the foresaid sum of and of the other means and estate hereby conveyed for her own p and alimentary use: "Second, that, if the marriage happen to be di by the predecease of the wife, leaving a child or children of the m the trustees shall pay the said free interest or annual produce to h husband during his life for his liferent and alimentary use only, and w declaration also that the same shall not be assignable by him nor att for his debts or deeds; and the capital of the said sums and estate conveyed shall be paid and made over to the said child or children first term after their father's death, and after their attaining majority case of sons, and in the case of daughters on their attaining majority o married as after mentioned: And if there are no children alive at t solution of the marriage by the wife's predecease, or though there then exist a child or children of the marriage, in case of the death of them before the terms of payment of their provisions as aforesa

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said interest or annual produce shall still be paid to the surviving husband during his life, for his liferent and alimentary use as aforesaid; but the whole capital or fee shall be at and subject to the wife's disposal by will or other writing, whether executed according to the law of England or Scotland, and the said trustees on the death of the surviving husband shall be bound to convey or pay over the same to the disponees or assignees under any will or other writing which she may execute, and failing her executing any other such will or writing, then to her own nearest heirs and executors whomsoever, but with power to the trustees to convey or pay over the capital or fee of the said estate at any time after the death of the predeceasing wife and the failure of issue, on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will or settlement, or of her heirs and executors failing her executing a will or settlement disposing of the said fee or capital: Third, in the event of the marriage being dissolved by the predecease of the husband, and that a child or children of the said marriage be then existing, the trustees shall pay the said interest or annual produce of the said income and estate, after deducting necessary expenses, to the said Mary Jane Naish during her life for her liferent and alimentary use only: and declaring that in this event also the same shall not be assignable by her or attachable for her debts or deeds, or the debts or deeds of any future husband she may marry; and after her death the trustees shall pay or apply the whole future interest or annual produce thereof to or for behoof of such child or children during their minorities after their mother's death, and the capital of the shares of the said children, in the said sum of £4000, and their mother's other means and estate foresaid, shall be payable to them after her death, on their respectively reaching majority in the case of sons, or in the case of daughters on their attaining majority or being married, whichever of these events shall first happen: But declaring always, that if such child or children should all die before their mother, or, although they should survive her, should they all die before attaining majority and without leaving issue of their *own* bodies, then and in that event the said sum of £4000, and other means and estate of the said Mary Jane Naish hereby conveyed, or what may be then remaining thereof, shall still continue to be held by the said trustees for the purpose of paying the free interest or annual produce thereof, to the said Mary Jane Naish during her life, but for her liferent and alimentary use only, and exclusive always of the *jus mariti* or right of administration of any future husband the said Mary Jane Naish may marry as aforesaid, and declaring that the same shall not be assignable by her nor be liable to be attached for her debts or deeds, or for the debts or deeds of any husband she may marry: But declaring, nevertheless, that in the event of the said Mary Jane Naish surviving her said intended husband, and of the failure of issue of the said intended marriage, it shall be in the power of the said Mary Jane Naish to test upon and dispose of by will or other writing the capital or fee of the said sum of £4000, and other estate hereby conveyed by her, in any way or manner she may think proper, to take effect after her decease, and the said trustees shall be bound to denude themselves of this trust, and to convey and make over at her death the said estate under her charge to the party or parties in whose favour she may have devised or left the same, and failing her leaving any such will or settlement, then the said trustees shall convey and make over the same to her heirs and executors."

The deed further declared that while the trust subsisted the trustees should have power, with consent of the spouses or of the survivor, and

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after the death of the survivor should themselves have power to spend sum not exceeding £300 for behoof of each child,—"Declaring also tha with exception of the power last above given to encroach upon a portio of the capital of their shares, the foresaid provisions for the children this marriage shall in no case be payable until the first term of Whitsu day or Martinmas after the death of the longest liver of their father mother, nor whether before or after that period until they respectivel attain the age of twenty-one years complete in the case of sons, or in t case of daughters until their attaining that age or being married, nor sha their provisions become vested interests, or be transmissible by them unt after the death of the longest liver of their father and mother, and af their respectively attaining majority if sons, or attaining majority or bei married if daughters, which provision shall be divisible among the childre if more than one, as the parents or survivor of them may by any writin under their hand direct, and failing such direction, equally among them

The marriage which followed subsisted till 10th June 1862 when M Edwardes died, survived by her husband and by one child, Henry Frederi William Edwardes.

Mrs Edwardes left a will, executed at Alexandria on 17th April 18 by which she made over to her husband absolutely all she then possess or might thereafter possess, by any ways or means.

On 7th November 1889 an action was raised by Dr Edwardes and h son, Henry Frederick William Edwardes, against the trustees acting und the above marriage-contract, to have it declared that the pursuers had f and absolute right and title to the securities representing the sum £4000 settled by Mrs Edwardes in the marriage-contract, and to have t defenders ordained to transfer and pay to them the same, with the interes and dividends accrued, upon their joint discharge.

The pursuers averred that the pursuer H. F. W. Edwardes had no chi or issue living, that the pursuer Dr Edwardes was by virtue of his decea wife's will in right of everything belonging to her, and that they we therefore entitled to demand and to receive transfer and payment of t sum sued for.

The pursuers pleaded;—(1) The pursuers being the only persons havi a right or interest in the sums sued for, decree ought to be pronounced concluded for.

The defenders denied that the pursuers were the only persons interest in the sum sued for, and pleaded;—(1) On a sound construction of t marriage-contract, the term of payment has not yet arrived, and the acti is premature. (2) The trust subsists for the protection of the liferent the pursuer Henry Stapleton Edwardes, which is alimentary, and n assignable by him nor subject to his debts or deeds, and the pursuers a not entitled to discharge the liferent. (3) The pursuers holding no prese vested interest in the trust-estate, the discharge proposed to be grant would be insufficient and ineffectual.

On 6th June 1890 the Lord Ordinary (Kincairney) sustained the fi and third pleas in law for the defenders, and assoilzied them from t conclusions of the summons, and decerned.*

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* "OPINION.—This is an interesting but a special case, and I do not think is ruled by any of the cases which were referred to. . . .

"The provisions of the trust, so far as they bear on the events which ha occurred, are these:—The trustees are directed (1) to pay to Mrs Edwardes t interest of her estate, exclusive of the *jus mariti*, and protected from the credit of herself and her husband. (2) The second purpose provides for the event the wife's predecease. It is provided that, if she shall predecease leaving a chi

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The pursuers reclaimed, and argued;—The Lord Ordinary had held that the *conditio si sine liberis* applied to the deed in question, and that

of the marriage, the trustees shall pay the interest of her estate to her husband during his life, for his alimentary use, and not attachable for his debts; and it is provided that the capital shall be paid to the child or children at the first term after their father's death and on majority, and if there are no children alive at the dissolution of the marriage, 'or though there should then exist a child or children of the marriage, in case of the death of all of them before the terms of payment of their provisions as aforesaid, the said interest or annual produce shall still be paid to the surviving husband during his life for his liferent and alimentary use as aforesaid,' but the capital shall be at the wife's disposal by will or writing, and the trustees, 'on the death of the surviving husband, shall be bound to pay the same to the disponees or assignees under any will or other writing which she may execute, and failing her executing any other such will or writing, then to her own nearest heirs and executors whomsoever.'

"There follows a power to the trustees to pay the capital at any time after the death of the predeceasing wife and the failure of issue on obtaining the consent and discharge of the surviving husband, the liferenter, and of the beneficiaries under the wife's will, or of her heirs and executors if she shall not leave a will.

"The third purpose of the trust provides for the event of the predecease of the husband. The provisions are similar to those in the second purpose, but although it is proper to consider them, still, the event to which they relate not having happened, it is not necessary to advert to them further.

"The deed confers certain powers to make advances, and proceeds to declare that, with the exception of the power last above given to encroach upon a portion of the capital of their shares, the foresaid provisions for the children of the marriage shall in no case be payable until the first term of Whitsunday or Martinmas after the death of the longest liver of their father or mother, nor whether before or after that period, until they respectively attain the age of twenty-one years complete, 'nor shall these provisions become vested interests or be transmissible by them until after the death of the longest liver of their father and mother, and after their respectively attaining majority.'

"These are the main provisions of the marriage-contract so far as bearing on existing circumstances, and it appears to me that there can be no serious doubt (1) that under that deed the only right conferred on Dr Edwardes, the husband, is an alimentary liferent, and that the trustees are directed to hold the funds for that liferent; (2) that no right has vested in the younger pursuer, the son; and (3) that the trustees are absolutely prohibited from paying the estate to the son while the father is alive. In the case of *Scott's Trustees* v. *Brown & Co.*, 19th May 1882, 9 R. 798, a very similar deed was submitted to the Court for construction, and it was held that there was no vesting in the children till after the death of both father and mother. But in the present case the unambiguous and express declaration of the truster as to vesting seems to foreclose any question on the point.

"Further, I think it cannot be doubted that the ordinary condition *si sine liberis decesserit* is implied in this deed—that is to say, that it contains an implied institution in favour of the issue of the younger pursuer if he shall die without himself acquiring a vested interest in the estate.

"Mrs Edwardes left a will, executed at Alexandria on 17th April 1860, by which she made over to her husband in case of her death, 'All I now possess and all I may hereafter possess, by any ways or means, or whatever moneys or other property may be left me by any relatives or friends, or money or moneys, property, personal property, ships or ship, my husband is to have the power of the whole in his hands, so that he may do what he likes with them, and make over them in his will to anyone he wishes.'

"This will makes no mention of the settled fund over which Mrs Edwardes had the power to test which has just been mentioned. But it was not, and I think, could not be disputed that the will carried the settled funds if Mrs

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therefore the trustees were bound to hold for the eventual interest possible issue of the younger pursuer. That, however, was an erro

Edwardes had power to bequeath them.—*Hyslop* v. *Maxwell's Trustees* February 1834, 12 S. 413, 6 Scot. Jur. 255; *Grierson* v. *M'Leod or* 3d July 1852, 14 D. 939, 24 Scot. Jur. 571.

"The marriage-contract is somewhat obscurely expressed on this poi there seems to be no doubt that it contemplates a will by the wife duri subsistence of the marriage, which might be effectually made althoug should be children of the marriage then existing, but which could not, of defeat the rights of children under the marriage-contract.

"In these circumstances it has been contended for the pursuers that the the whole *jus exigendi* in the funds in question, that if the father shall cease the son, the right will vest in the son, while if the father be the su the funds will be immediately payable to him under his wife's will, and th joint discharge will therefore completely exoner the trustees. They refe *Roberton* v. *Davidson*, 24th November 1846, 9 D. 152, 19 Scot. Jur. 38; v. *Newbigging*, March 1, 1854, 16 D. 667, 26 Scot. Jur. 338; *Grant* v. *Trustees*, 4th January 1876, 3 R. 280; *Taylor* v. *Gilbert's Trustees*, 12t 1878, 5 R. (H. L.) 217; *Lowson's Trustees* v. *Dicksons*, 19th June 1886 1003.

"In reference to the alimentary character of Dr Edwardes's right, t suers referred to the proviso at the close of the second purpose of the t shewing that it was not the truster's intention that this right of liferent enjoy an absolute protection. It was maintained that the consent of the y pursuer was equivalent to his death or non-existence, so as to let in the tion of the proviso.

"The trustees maintained that they were bound to continue to hold th (1) in respect of the alimentary character of Dr Edwardes's liferent, an referred to *Balderstone* v. *Fulton*, 23d January 1857, 19 D. 293, 29 Sc 143; *Smith* v. *Campbell*, 30th May 1873, 11 Macph. 639, 45 Scot. Ju *White's Trustees* v. *Whyte*, 1st June 1877, 4 R. 786; and *Duthie's Tru Kinloch*, June 5, 1878, 5 R. 859; (2) because no right had vested; (3) they were bound to hold for the eventual interest of the possible issue younger pursuer.

"Had the circumstances in which under the marriage-contract Mrs Edw power to test on the settled funds was to arise occurred,—that is to sa there been no living issue of the marriage, I would have been inclined t that Dr Edwardes would have been entitled to demand the funds, and t trustees could not have resisted that demand on the ground that they were to hold in order to protect Dr Edwardes's alimentary liferent. I shoul come to that conclusion on account of the wide and absolute terms in Mrs Edwardes's will is conceived, and on account of the terms of the which has been referred to, and, if the provision as to that alimentary had been the trustees' sole ground of defence, I rather think I should hav that it could be overcome.

"But I have come to the conclusion that the other defences of the t ought to prevail. I think that in all the cases quoted for the pursuers trustees have been directed or authorised to denude on the joint applica a liferenter and of the person to whom the fee stood destined, the right fee was held to have vested, and that that has always been held to be esse such cases. In the case of *Latta* v. *Muirhead*, 23d December 1887, 15 anticipation of the term of payment of the fee was authorised, only becau fee was held to have vested. But that judgment has been overruled House of Lords, on the ground, I understand, that it was held that the f not vested. Here the fee has certainly not vested in the son, and althou view seems maintainable that a defeasible fee may have vested in the hu that appears to be very doubtful indeed, and would not in any view bri present case within the scope of the authorities quoted. The dilemma p the pursuers from which they concluded that the funds must certainly b

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view. There were only two cases[1] in which the *conditio* had been held applicable to marriage-contracts, and it was doubtful if the decisions in these cases could be now sustained. But apart from that, in clause 2, which was applicable to the event which had happened, viz., the wife's predecease, the only parties expressly entitled to the fee as institutes were "children." On the other hand, in the third clause, which dealt with the husband's predecease, there was an express reference to the "issue" of "children." The natural inference to be drawn from a contrast of the two clauses was that the absence of any mention of remoter issue in the former clause shewed an intention to exclude them in favour of any person whom the wife might nominate under her settlement.[2] In these circumstances, the pursuers were the only persons who could ever have right to the fund in question, and one or other of them must eventually take it. If the father predeceased the son, the son became absolute fiar as institute under the marriage-contract. If the son predeceased the father, the father took it as absolute fiar under his wife's will. Their joint discharge was then sufficient exoneration to the trustees. The case was in obvious contrast to the case of *Latta* v. *Muirhead*,[3] in which the ground of judgment in the House of Lords was that the pursuers in the case might eventually have turned out not to be the persons entitled to take the fee in terms of the deed. Perhaps the correct view was that the fee was in the father subject to defeasance in favour of the son. The fact that the father had an alimentary liferent was no bar to the trustees denuding. He might renounce or discharge it if he pleased. Moreover, the deed itself shewed that there was no intention to maintain the trust merely to secure this liferent, for there was a clause providing for the discharge of the liferent in the event of failure of children. The consent of the only surviving child might surely be taken as equivalent to his death or non-existence. Payment of the larger right of fee would discharge the lesser right of liferent.[4]

Argued for the defenders;—Under the deed the father had no right

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able to one or other of them, seems to overlook the consideration that the son may predecease the father, leaving issue, which issue would, I apprehend, take the fund and exclude the husband.—Fraser on Husband and Wife, vol. ii. 1379. Suppose that in this case the fee had not been destined to children but to grandchildren, it appears to me that the trustees would be bound to hold so long as the possibility of grandchildren existed. I do not see that a provision to a child with the special declaration that it shall not vest in the circumstances which have happened can make a difference if I am right in thinking that a conditional institution in favour of grandchildren is implied. No means were suggested by which, if the funds were paid to the pursuers, the eventual rights of the possible issue of the younger pursuer would be preserved, and they might be totally destroyed, contrary to what I hold to be the implied provision of the marriage-contract.

"On the whole, I am compelled to conclude that the pursuers have not established their right to payment, and that the trustees are in the right in their contention that they are entitled and bound to continue the trust."

[1] Robertson v. Houston, May 28, 1858, 20 D. 989, 30 Scot. Jur. 590; Arthur and Seymour v. Lamb, &c., June 30, 1870, 8 Macph. 928, 42 Scot. Jur. 542.

[2] Rhind's Trustees v. Leith and Others, Dec. 5, 1866, 5 Macph. 104, per Lord Cowan, p. 109; Young's Trustees v. M'Nab, July 13, 1883, 10 R. 1165, per Lord Shand, 1172.

[3] Muirhead v. Muirhead, Dec. 23, 1887, 15 R. 254, reversed May 12, 1890, 17 R. (H. L.) 45, per Lord Watson, p. 48.

[4] Jamieson v. Lesslie's Trustees, June 19, 1889, 16 R. 807; Pretty v. Newbigging, March 1, 1854, 16 D. 667, 26 Scot. Jur. 338.

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except to an alimentary liferent. As regarded the fee, he only came in as a disponee under a deed dated five years later, the provisions of which were not to receive effect except in a set of circumstances which as a matter of fact had not arisen. It was quite intelligible that on the final termination of the marriage relations, and on the husband alone surviving without children of the marriage, there would no longer be the same interest or necessity to keep up the trust, but until that occurred the husband had right only to the alimentary liferent, and this he could not discharge.[1] As regarded the son, he could neither assign nor renounce his right, as it was declared not to be transmissible during his father's life time. Neither of the pursuers then had a vested interest in the fund nor could demand payment.[2] Further, neither of the pursuers might ever take a vested right in the fund, as there was an implied gift to the "issue" of children. The *conditio si sine liberis* was not excluded in the case of marriage-contracts,[3] nor was it excluded by the terms of the present deed. The word "children" in the 2d clause dealing with the event which had happened fell to be read as including "grandchildren." The reference in clause 3 to the failure of "issue" of "children," shewed that in the view of the contracting parties such issue had been already called by implication in the earlier provision to "children." If "children" included "grandchildren" in the later clause, why not in the clause dealing with the wife's predecease? The very fact that the issue of children were called in the one event suggested that they were meant to be called in the other.

At advising,—

Lord President.—The question depends on the construction and legal effect of the settlement of a sum of £4000 in the marriage-contract of the leading pursuer, Dr Edwardes, and his now deceased wife. The £4000 was part of the estate of Mrs Edwardes, and she conveyed the sum to the marriage trustees for the purposes—(1) to pay the interest to the wife during the subsistence of the marriage for her alimentary use; (2) on the dissolution of the marriage by the predecease of the wife, to pay the interest to the surviving husband for his alimentary use, excluding heirs and assignees; (3) on the death of the surviving husband, to pay over the capital to the child or children on the sons attaining majority, and the daughters attaining majority or being married; (4) on the failure of children when the term of payment arrives, the husband's alimentary liferent is to continue, and the fee is to be at the disposal of the wife by will, and, failing her executing a will, is to pass to her nearest heirs and executors.

The pursuers are the surviving husband and the only child of the marriage, Mr Henry Frederick William Edwardes, and their demand against the trustees as defenders, is that they shall pay over to the pursuers, on their joint discharge, the whole sums in their hands representing the original settled fund of £4000.

The defences substantially resolve themselves into two grounds of objection to the pursuers' demand.

In the first place, the defenders maintain that they are bound to uphold the trust for the protection of the alimentary liferent of the surviving husband, the leading pursuer. But the position of Dr Edwardes is peculiar. Mrs Edwardes

[1] Duthie's Trustees v. Kinloch, June 5, 1878, 5 R. 859; White's Trustees v. Whyte, June 1, 1877, 4 R. 786.

[2] Muirhead v. Muirhead, *supra*.

[3] Robertson v. Houston, *supra*; Arthur and Seymour v. Lamb, &c., *supra*.

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who died in 1862, made a will on the 17th April 1860, leaving her whole estate to her husband absolutely. In these circumstances there can be no doubt that, if there was no surviving child of the marriage, the surviving husband would be entitled to demand an immediate conveyance of the fee, for the trustees are empowered to pay over the whole capital "at any time after the death of the predeceasing wife and the failure of issue, on obtaining the consent and discharge of the surviving husband, the liferenter, and the beneficiaries under the wife's will or settlement, or of her heirs and executors failing her executing a will." The only obstacle to the application of this clause is the existence of the other pursuer, Henry Frederick. But the clause just quoted shews that there was no intention to maintain the trust in all events merely for the security of the alimentary liferent, and if all parties interested—the surviving husband and the only child—are desirous to put an end to the trust and obtain a conveyance of the fee, it appears to me that the principle, if not the letter, of the clause is clearly applicable.

In the view of the case hitherto considered, the only parties who have any interest in the fund are the two pursuers. If the father predecease the son, the son becomes absolute fiar, as institute under the marriage-settlement. If the son predecease the father, then the father takes as absolute fiar under the wife's will, unless the son leaves issue, and that issue has right under the marriage-contract to take the fee as institute in place of his dead father.

This gives rise to the second defence pleaded by the trustees, that though the children of the marriage should all die before their shares become vested and payable, yet, if any of the deceasers leave issue, the issue will take in place of their parents; and that, as Henry Frederick may still marry and leave issue, the trustees are bound to hold in the prospect of such a contingency.

The decision of this question must depend on whether the term "children" in the clause applicable to the events which have occurred can be read as including "grandchildren." Confining my attention to the words of the clause itself, I should think the question one of some delicacy, but am disposed to construe the term strictly as not including grandchildren.

But any doubt as to this construction is, I think, removed by the light to be derived from another clause of the settlement, which provides for the event of the marriage being dissolved by the predecease of the husband. In that event the widow is to enjoy an alimentary liferent of the whole fund of £4000; after her death the interest is to be applied for behoof of the children during their minority, and on majority, or marriage in case of daughters, the capital is to be paid over to them. But this clause is followed by an important declaration "that if such child or children should all die before their mother, or, although they should survive her, should they all die before attaining majority, and without leaving issue of their own bodies," then the fund shall continue to be held by the trustees for the alimentary liferent of the widow, "but declaring, nevertheless, in the event of the said Mary Jane Naish surviving her said intended husband, and of the failure of issue of the said intended marriage," it shall be in the power of the widow to test on the capital.

The contrast between this and the clause applicable to the predecease of the wife is very remarkable. In the latter the only parties entitled to the fee as institutes are "children." In the former the grandchildren are conditionally instituted to their parents, and the widow's right to test is made dependent, not on the failure of children, but on the failure of issue of the marriage, a term of

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more elastic signification than children, and including descendants of any generation if the natural meaning is not controlled by the context.

Construing the deed as a whole, I am of opinion that the word "children" in the clause applicable to the event of the wife's predecease cannot be read to comprehend grandchildren or issue of children.

On both grounds of defence I feel myself obliged to differ from the Lord Ordinary, and to give judgment in favour of the pursuers.

I think it right to add that in disposing of this case I have not found it necessary to consider, and I have not considered, whether the *conditio si sine liberis decesserit* applies to a provision in a marriage-contract.

LORD ADAM.—This action is raised by Dr Edwardes and his only son against the trustees acting under the marriage-contract of Dr and Mrs Edwardes to have the sum of £4000, settled by Mrs Edwardes in the said contract of marriage with the interest accrued thereon, paid over to them.

The case is a peculiar one, because it is admitted that Dr Edwardes has no vested right in this fund, and it is equally admitted that his son has no vested right in it either. But the proposition is that, although neither of the pursuers has such a right separately, the two together can validly discharge it.

It is said that if the father survives the son the whole fee must vest in the father, and, on the other hand, if the son survives the father the whole fee necessarily vests in the son, and that, in any possible event, vesting must take place either in the father or in the son, and that although at present there is vested right in neither, by combining they can give an indefeasible discharge to the trustees.

The case, as I have said, is a peculiar one, and if the question only depended on the considerations to which I have referred, I could not say that the pursuers could not give a valid discharge to the trustees. But there is this further consideration,—Is it true on a construction of the marriage-contract that in every event vesting must take place in either the father or the son? The Lord Ordinary says not, because he says that the *conditio si sine liberis* applies. If that be so, the issue of children of the marriage are by the contract made conditional institutes, and in that case Dr Edwardes' son may predecease him, leaving issue who may survive Dr Edwardes and take a right to the settled fund. It therefore does not follow in that view of the contract that on his son's death Dr Edwardes could give a valid discharge to the trustees.

In the construction which your Lordship has put upon this contract, and which I understand is also adopted by Lord M'Laren and Lord Kinnear, it has not been necessary to decide whether the *conditio si sine liberis decesserit* would apply in the case of a deed of this kind. It appears to me to be a nice question and I have not made up my mind upon it, as the opinion which I am about to pronounce on the construction of the contract is not to be an operative judgment. I shall therefore only state the reasons why I differ from your Lordship on the construction of the marriage-contract, and I am not to be taken as saying that in all cases the *conditio si sine liberis* is applicable to marriage-contracts. Assuming, however, as I must assume, that in this matter marriage-contracts are in the same position as testamentary settlements, I think that in the second part of the second clause of the contract the issue of children are conditionally instituted.

The question turns principally upon the construction of this second clause

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In the first the trustees are directed to pay to the wife the interest of her estate during the subsistence of the marriage. In the second it is provided that if the wife predeceases her husband, leaving a child or children of the marriage, "the trustees shall pay the said free interest or annual produce to her said husband during his life for his liferent and alimentary use only, and with this declaration also, that the same shall not be assignable by him nor attachable for his debts or deeds; and the capital of the said sums and estate hereby conveyed shall be paid and made over to the said child or children at the first term after their father's death, and after their attaining majority in the case of sons, and in the case of daughters on their attaining majority or being married as aftermentioned; and if there are no children alive at the dissolution of the marriage by the wife's predecease, or though there should then exist a child or children of the marriage, in case of the death of all of them before the terms of payment of their provisions as aforesaid, the said interest or annual produce shall still be paid to the surviving husband during his life for his liferent and alimentary use as aforesaid; but the whole capital or fee shall be at and subject to the wife's disposal by will or other writing." Now, the wife has, in exercise of the power so given her, executed a will in favour of her husband—the pursuer, Dr Edwardes; and that, it is said, gives him the right which he claims in this action. It is quite clear, even from the terms of the clause I have read, that the son has no vested interest in the provisions to children, because payment of these provisions is made conditional on his surviving his father, but in another clause of the deed it is specially provided that the children shall have no vested right "until after the death of the longest liver of their father and mother." It is therefore quite clear on the construction of this part of the deed that the son has at present no vested right in the provisions in favour of children, and it is equally clear that although the husband may acquire the right to the settled fund under his wife's settlement he has no vested right as yet in that fund, and hence arises the question we have to decide.

Now, I think that where the clause directs that the capital of the estate shall be paid over to the child or children of the marriage the *conditio si sine liberis* applies, and that the meaning of the words used is the same as if the capital had been directed to be paid over "to children, whom failing, their issue"; and I do not understand that your Lordship would be of a different opinion except for the existence of another clause, which gives to the word "children" a more restricted meaning.

The clause to which your Lordship referred is the parallel clause to that which relates to the provisions made in the event of the wife's predecease, and deals with the event of the husband predeceasing his wife. It provides that in that event the widow shall have a liferent of the estate, and that "after her death the trustees shall pay or apply the whole future interest or annual produce thereof to or for behoof of the child or children of the marriage" during their minorities after their mother's death, and the capital of the shares of the said children in the said sum of £4000, and their mother's other means and estate foresaid, shall be payable to them after her death on their respectively reaching majority in the case of sons, or in the case of daughters on their attaining majority or being married. Had there been nothing more said it appears to me that this clause would have been framed in the same manner as the second clause, and I should have said that in this clause also the conditional institution of the issue of children was to be implied. So far as I can see, the two clauses are in entire

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harmony up to that point. But it is said that in the following lines tracting parties shew that in the second clause they are using the word "c in a limited sense, which excludes the application of the *conditio si sin* The deed in the third clause proceeds thus:—"Declaring always, that child or children should all die before their mother, or, although the survive her, should they all die before attaining majority and without issue of their own bodies," the mother may dispose of the estate by wil said that because there is a nomination of issue there, which implies the issue of the wife, therefore in construing the contract when the b "children" is used in the second clause we can only give it a restricted or, in other words, that where the parties mean to include the issue of they express themselves to that effect.

I should have felt the force of that observation if in the third clau the trustees are directed to pay over the capital to the children of the the words "whom failing, to issue" had been added—I should then the force of the observation that the word "children" standing alo second clause was meant to have only a limited meaning; but that seem to me to be the proper meaning of the words here used,—"But always, that if such child or children should all die before their m although they should survive her, should they all die before attaining and without leaving issue." It appears to me that the way in w language is used assumes a previous gift to the issue of children. I that that part of the clause necessarily proceeds on a supposition in t of the parties that in calling "children" they had called also the children. So it does not appear to me that the existence of the words leaving issue," in the place where they occur, has the effect of shew the parties, when they used the word "children" in the previous pa deed, necessarily meant to exclude the issue of children. It rath that the parties to the contract assumed that the issue of childre take under the general word "children," and then proceeded to provid event of the children dying and dying without issue.

That is my construction of the contract, and these are the reason differ from your Lordship. Though it will have no operative effec thought it right to state what my opinion on the construction of tract is.

Lord M'Laren.—I concur in the opinion of your Lordship as reg construction of the marriage-contract, in which you point out that ther a difference of phraseology in the two branches of the destination tha only conclude that, supposing the *conditio si sine liberis* were otherwi cable, it is excluded under this deed.

I quite appreciate the argument suggested by Lord Adam upon the question, that where a testator refers to the contingency of death witho it is to be taken as an implied gift to issue in the event of their surviv parents. That is a well-known rule of construction recognised in th England and Scotland in the construction of wills and settlements, and confined to cases of destinations to children, or to persons to whom the is *in loco parentis*. It does not appear to me that the existence of ought to influence the construction of the main question here, because struction founded on the words referring to death without issue must be

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to the branch of the deed in which the words occur, and is not to be referred to that branch of the destination in which children alone are mentioned without any reference to remoter issue.

In coming to this opinion I of course proceed on the assumption that the *conditio* is applicable, but it is an assumption made merely for the purpose of argument. It is a condition of the question of construction here raised. I desire to reserve my opinion as to the application of the *conditio* to a marriage-contract. I think this is a question which ought to receive further consideration when a case occurs properly raising it. There is no presumption that the parties to a marriage-contract intend to provide for any persons except those having legal claims upon them, and in such a case it can hardly be said that the conditional institution of grandchildren is within the scope of the deed.

LORD KINNEAR.—I agree with your Lordship. I cannot say that I should be able to come to the same conclusion if I thought that the right to the money settled under this contract had vested in neither of the pursuers. It appears to me, for the reasons stated by your Lordship, that the money belongs to one or other of them, though at present we cannot tell whether to the father or the son. That cannot be ascertained so long as they are both in life. But in the meantime, as both unite to demand payment, no difficulty arises from the impossibility of foreseeing in which of the two the right may ultimately be found to be vested.

The only difficulty I have felt in coming to that conclusion arises from the view which Lord Adam has explained, but I am unable, on consideration, to give to the words to which he referred the same effect as he ascribes to them. The view, as I understand it, is this—that in that part of the contract which deals with the event of the husband's predecease, the contracting parties have furnished a glossary for the construction of the word "children," by the aid of which it must be interpreted to include "grandchildren," both in that provision and in other parts of the deed.

I admit that there is a great deal of force in that argument as a criticism on the logical structure of the sentence, but I am not sure, even if I were construing that part of the contract alone without reference to any other part, that I could construe it in the same way as Lord Adam has done, because the language used is a very common form for making a conditional institution of the children of primary legatees, and it frequently occurs in the case of testamentary deeds where the provisions are in favour of strangers, or of children in such circumstances as make the *conditio si sine liberis* inapplicable. Accordingly, I am not sure that it is a sound construction of this part of the contract to say that where the framers of the instrument provide for the failure of children "without leaving issue of their own bodies," they must have had in their minds a distinct conception that the issue of children had previously been called by implication.

But if that were doubtful I think it would be quite impossible, according to the ordinary rules for the construction of written instruments, to disregard the difference between the provisions of the deed dealing with the event of the wife's predecease, and those dealing with the event of the husband's predecease; and I do not know that, even on the question of construction, it is immaterial to observe that this is not a will but a marriage-contract, in which the wife is settling funds on the children of the marriage, but is also stipulating for the right of disposing of these funds at her own pleasure in the event of there being

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no children. When the wife in making a settlement of this kind stipulates tha she shall be entitled to dispose of the funds by will, in one event if there are n children of the marriage, and in another event if there are no children or issu of children, I cannot, on the ordinary principles of construction, suppose th she does not intend to distinguish between the two cases. It is not necessa to speculate as to her reasons for making such a distinction. She has stipulat for an absolute right of disposal in the event of her predeceasing her husba and there being no children of the marriage, and it appears to me that the co trast between this clause and the later clause only goes to enforce the obligati of abiding by the literal interpretation of the words used in each.

On the question of construction, therefore, I agree with your Lordship, and also agree that it is unnecessary to determine the larger question whether t *conditio si sine liberis* can properly be applied to the construction of a marria contract in any case. But I desire to add that if the rule were applicable all, of which I am not satisfied, it appears to me to be very questionable wheth such a provision, if it should be held to include grandchildren, may not testamentary, and therefore revocable in so far as their interests are concern although it would certainly be pactional in so far as regards the immediate chil of the marriage.

THE COURT recalled the Lord Ordinary's interlocutor, decerned terms of the conclusions of the summons, and appointed t expenses of both parties to be paid out of the trust-funds in hands of the defenders.

SKENE, EDWARDS, & GARSON, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—Ag

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Allan v. Whyte.

G. & G. ALLAN AND OTHERS, Petitioners (Appellants).—*Ure.*
JOHN WHYTE AND OTHERS, Respondents.—*D.-F. Balfour—Maclar*

Burgh—Dean of Guild—Lining—Appeal—Glasgow Police Act, 1866 (29 & 30 *Vict. c. ccxxiii.*), *secs.* 273 *and* 277.—*Held* that a petition for a lining p sented to the Dean of Guild of Glasgow was a common law proceeding, and t his judgment thereon, without a record having been made up, was not exclu from review by the Glasgow Police Act, 1866.*

Burgh—Dean of Guild—Free space for air—Glasgow Police Act, 1866 (*and* 30 *Vict. c. ccxxiii.*), *secs.* 367 *and* 370.—*Held* that the Dean of Guild Glasgow was not entitled to refuse his sanction to plans lodged in a process lining because there was not exclusively on the applicant's own ground the f space required by the Glasgow Police Act, 1866, sections 367 and 370,† to in front of a room intended to be used as a sleeping apartment, seeing th

* Section 273 of the Glasgow Police Act, 1866, enacts,—"Nothing in th Act shall affect, alter, or limit the powers or jurisdiction of the Dean of Guil or the forms of procedure before the Dean of Guild, with respect to processes lining or questions of title or servitude, or otherwise at common law, or any ri of review of his sentences in the exercise of such jurisdiction."

Section 277 enacts,—"Every proceeding before the Dean of Guild in pu suance of this Act shall be subject to the following rules and regulations. . . Where a record is not made up the decision given by the Dean of Guild sha be final, and not subject to suspension, advocation, or appeal, or to any oth form of review or stay of execution."

† Section 367 of the Glasgow Police Act, 1866, enacts,—"The Dean of Guil shall not grant warrant to erect or alter any building unless or until he is satisfie that the plan and sections which are signed with reference to such warrant . .

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there was in existing circumstances sufficient free space over ground belonging to a different proprietor.

Observed, that if in the future the requisite free space ceased to exist the use of the room as a sleeping apartment might be prohibited under the Act.

1ST DIVISION.
Dean of Guild of Glasgow.

A PETITION for a lining was presented in the Dean of Guild Court of the city of Glasgow by G. & G. Allan, builders, and others, proprietors of certain subjects situated on the west side of Armadale Street, and on the south side of Garthland Drive, Dennistoun, Glasgow. The petitioners proposed to erect upon their property certain buildings, the plans of which were duly lodged with the Dean of Guild.

On 4th October 1891, the Dean of Guild (Ure) appointed the petition to be served on the neighbouring proprietors, but none of these appeared to oppose the application.

On 28th October the Sub-Dean of Guild pronounced this interlocutor:—"In respect the petitioners have not the free space behind their proposed building required by the Glasgow Police Act (sections 367 and 370) to entitle them to occupy the room or kitchen marked A on said plans as a sleeping apartment, refuses the lining craved, reserving to the petitioners to renew their application when, by such alteration of their plans, the said free space shall be secured, or on their undertaking that the said room shall not be occupied as a sleeping apartment."

The petitioners appealed to the First Division.

The respondents objected to the competency of the appeal, and argued;—Under section 277 of the Glasgow Police Act, 1866, it was provided that "every proceeding before the Dean of Guild in pursuance of this Act" shall be subject to the regulation that where a record is not made up the Dean's decision shall be final. The present application was a proceeding "in pursuance of this Act," and as no record had been made up the Dean's judgment was not subject to review.

The petitioners argued;—The phrase "proceedings in pursuance of this Act" merely referred to what were known as Guild offences, which were summarily dealt with without any record being made up, and were not appealable. A process of lining was a common law proceeding, and the Dean's jurisdiction as regarded it was expressly saved by section 273 of the Act, which also preserved the right of review of his sentences in the exercise of such jurisdiction.

LORD PRESIDENT.—This petition in the Dean of Guild Court does not bear to be brought under authority of any Act of Parliament. It is an ordinary lining, and that is a proceeding falling within the Dean of Guild's jurisdiction at

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make satisfactory provision with respect . . . that every apartment, except those distinguished on the plan as not intended to be let or used for sleeping in, is of such size, and has one or more windows, with such free space in front of every window thereof as to be in conformity with the provisions hereinafter contained."

Section 370 enacts,—"Except as aftermentioned, it shall not be lawful for any proprietor to let, or for any person to take in lease, or to use or suffer to be used for the purpose of sleeping in, any apartment, unless one-third at least of its height is above the level of the turnpike road, or public or private street or court adjoining, or near to it, and unless there be in front of at least one-third of every window in such apartment, including any turnpike road, or public or private street or Court, a free space equal to at least three-fourths of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall."

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common law. As I follow the clauses of the statute which have before us, all the remedies, including rights of review competent at law, are reserved. Proceedings under the statute will in certain circu be final, but a proceeding which a party is entitled to take at comm certainly not one of those proceedings falling within the provisions review.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court repelled the objection to the competency of the app

It was admitted at the bar that although the appellants had their own ground the free space required by sections 367 and 37 Act to entitle them to occupy the room in question as a sleepi ment, there was nevertheless free space over ground belonging to a proprietor *ex adverso* of their tenement, which, added to the amou space upon their ground, gave more than the Act required.

Argued for the appellants;—The Dean of Guild must con circumstances of each case as he found them. At the present ti was ample free space in front of the appellants' tenement if the un ground belonging to the neighbouring proprietor was taken into There was nothing in the Act to shew that the Legislature cont that the free space should be solely on the ground of the applic lining. Indeed section 370 contemplated free space being which was not exclusively upon the applicant's property, but of the area occupied by "any turnpike road or public or private court."

Argued for the respondents;—If this application was granted would be to sanction as a sleeping apartment a room which migh in a few days unfitted for such a purpose by the neighbouring p building on his own ground. It was a strain on the Act to hol regulations had reference to free space belonging to some one o the applicant. Section 370 permitted free space over turnpike to be reckoned, because in such cases the space was of necessity g as free and unoccupied in the future.

At advising,—

LORD PRESIDENT.—The Dean of Guild appears to have gone too for he has applied secs. 367 and 370 of the Glasgow Police Act to a c in its present state admits of no such application. The 367th sectio Act provides that the "Dean of Guild shall not grant warrant to ere any building unless or until he is satisfied that the plan and sections signed with reference to such warrant . . . make satisfactory with respect . . . that every apartment except those distinguish plan as not intended to be let or used for sleeping in is of such size one or more windows, with such free space in front of every window to be in conformity with the provisions hereinafter contained." This the 370th section, which provides—"Except as aftermentioned, it sh lawful for any proprietor to let, or for any person to take in lease, or suffer to be used for the purpose of sleeping in, any apartment, unless at least of its height is above the level of the turnpike road, or public street or court adjoining or near to it, and unless there be in front o one-third of every window in such apartment, including any turnpik public or private street or court, a free space equal to at least three-four height of the wall in which it is placed, measuring such space in a str

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from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall."

Now, in the plan lodged by the appellant he discloses frankly that he intends the apartment he is about to erect to be used as a sleeping apartment, and the question is whether there is anything in section 370 to prevent him in existing circumstances from using or letting it for that purpose. The provision that he is not to use the room as a sleeping apartment, "unless one-third at least of the height is above the level of the turnpike road or public or private street or court," is a most intelligible one, for every building must have an access to it from some public or private street or court, and the statute takes as the basis of measurement the level of the street or court, or whatever it is, from which access is had to the building. And again, the provision as to free space in front of at least one-third of every window is equally clear. The required free space may include any turnpike road or public or private street or court, but there is nothing about excluding any other free space.

The question therefore is, whether or not there is in the present case a free space such as is required by section 370, and I do not understand that to be in dispute as things at present stand. There is ground adjoining the apartment which is proposed to be erected which affords that requisite space, and even although it may be built upon, as has been argued, the fact remains that it is not built upon now, and there is no reason for supposing that it will be built upon in the immediate future. Therefore, in my opinion, the proprietor has a perfect right to use the proposed room as a sleeping apartment. Indeed, I cannot see how he could be prevented from doing so, unless it fell within the prohibition in the statute. The interlocutor of the Dean of Guild bears that,—"In respect the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (sections 367 and 370) to entitle him to occupy the room or kitchen marked A on said plans as a sleeping apartment, refuses the lining craved. . . ." Now, I understood these words to mean that the petitioner has not as his own property, or has not the command in permanency of, the free space required, but that is not the provision of the statute. It only requires that at the time when the room is being used as a sleeping apartment it shall have a certain free space behind or adjoining it, and at the moment that free ground comes to be built upon, if it is ever built upon, then will arise the question whether there is sufficient free space. If there is not, it will be the duty of the Dean of Guild, on the application of the Procurator-fiscal, to prohibit its use as a sleeping apartment, but until that occurs, I do not see how the statute can be enforced.

The lining, as I understand it, is otherwise unobjectionable, for the Dean of Guild reserves "to the petitioner to renew his application when, by such alteration of his plans, the said free space shall be secured, or on his undertaking that the said room shall not be occupied as a sleeping apartment." Now, I do not think he was entitled to demand any undertaking under the circumstances that this should not be used as a sleeping apartment, and I therefore think that, unless there is some other objection against the lining, the interlocutor should be recalled. The statute makes matters very secure for the future, for the moment the requisite free space ceases to exist there may be a prohibition of this room as a sleeping apartment, a prohibition fenced with very severe penalties.

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LORD ADAM.—The only reason given by the Dean of Guild for refusing this lining is "that the petitioner has not the free space behind his proposed building required by the Glasgow Police Act (secs. 367 and 370), to entitle him to occupy the room or kitchen marked A on said plans as a sleeping apartment," and these words are in the circumstances intelligible only if "free space" means free space on the petitioner's own ground. But these are not the words of the Act. The obligation contained in the Act is that there shall be in front of each window a certain free space, but not necessarily on the builder's own ground, as is clear from the words "including any turnpike road or public or private street or court." That being so, and there being at present the necessary free space in front of this property, I see no ground for refusing this application for a lining.

It appears further that the construction which the Dean of Guild puts on the Act cannot be the correct one, for if the Act makes it indispensable that the free space shall be on the builder's own ground, the Dean of Guild has no power to dispense with that provision, and yet he reserves "to the petitioner to renew his application when, by such alteration of his plans, the said free space shall be secured, or on his undertaking that the said room shall not be occupied as a sleeping apartment." Well, suppose the erection is proceeded with on the faith of this undertaking, how is it to be enforced? I see no means of doing it, and the Dean of Guild would simply be passing the lining on the faith of an undertaking which might be disregarded next day. I am therefore of opinion that there being the requisite free space at present there is no reason for refusing this lining. The statute makes clear provision for the event of that free space not being preserved.

LORD M'LAREN.—The principle on which our judgment proceeds is, I think, in agreement with the terms of the 370th section of the Police Act, which relates to applications to the Dean of Guild Court at Glasgow.

The Dean of Guild in determining the question of air-space is to take account of property *ex adverso* of the windows, although not belonging to the proprietor of the new building. Provided that this is unoccupied space,—space on which no buildings are in course of erection, or are likely to be immediately erected,—the purpose contemplated by the statute is satisfied, and with reference to this purpose it is immaterial to whom the vacant ground belongs. I only add this observation, that if there were depending at the same time an application from the proprietor of the unoccupied ground for authority to build on this ground, or if it was brought to the knowledge of the Dean of Guild that it was in immediate contemplation to build on such ground, these are circumstances which would be taken into account in disposing of the application. It would certainly not be proper to grant a warrant for the use of an apartment as a sleeping place with the knowledge that the ground shewn on the plan as air-space was about to be built upon. But except in that somewhat exceptional case, I am of opinion with your Lordship that it would be a too strict construction of the statute to reject the plans on the ground that the sleeping apartments will not have the requisite air-space in front when in point of fact there is unoccupied ground belonging to a different proprietor *ex adverso* of the proposed tenement.

LORD KINNEAR.—I am of the same opinion. The Dean of Guild has refused the lining, "in respect that the petitioners have not the free space behind their pro-

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posed building required by the Glasgow Police Act (secs. 367 and 370), but I understand it to be admitted that that statement is not strictly accurate except on a certain special construction of the Act, and that the petitioner has, as a matter of fact, at present sufficient free space to satisfy the statute. But it is said that he may be deprived of this by his neighbour building up to his march, and the Dean of Guild appears to base his refusal on this, that the free space is required by the statute to extend over the exclusive property of the builder. If that were so, the Dean of Guild would have no discretion in the matter, nor any power to dispense with this requirement such as is implied in the reservation in his interlocutor. If the Dean of Guild had reason to think that what is now free space would shortly be occupied by buildings, then a different question would arise, but one not touched by our judgment.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties on the merits of the appeal, recall the interlocutor of the Sub-Dean of Guild, dated 28th October 1890, and remit to the Dean of Guild to proceed with the lining."

DOVE & LOCKHART, S.S.C., Agents for the Petitioners.

No. 70.

Dec. 20, 1890.*
Aitchison v. Lothian.

JOHN AITCHISON, Appellant.—*Shaw.*
ALEXANDER J. LOTHIAN (Assessor for County of Selkirk), Respondent.—*Boyd.*

Election Law—County Franchise—Service Franchise—Son working on father's farm with no contract of service—Representation of the People Act, 1884 (48 *and* 49 *Vict. c.* 3), *sec.* 3.—A son worked as a farm servant upon his father's farm but without any contract of service. He took his meals in family with his father and received from him what money he required from time to time. He had the exclusive use, rent free, of a room in a cottage on the farm which was occupied by his grandmother, who paid no rent for the house to the father.

Held that he was not entitled to be entered upon the roll as an inhabitant-occupier by virtue of "service" under section 3 of the Reform Act, 1884, as there was no proof that his occupancy was connected with service.

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney. Sheriff of Roxburgh, Berwick, and Selkirk. C.

IN the Registration Court for the county of Selkirk held at Selkirk on 7th October 1890, John Aitchison, farm servant, Helmburn, claimed to have his name entered upon the register of voters for the county of Selkirk as tenant of a house at Helmburn.

The franchise claimed by him was that known as the "service" franchise conferred by the 3d section of Representation of the People Act, 1884.†

The claimant's father was tenant of the farm of Helmburn and resided in a cottage there. At a short distance from the father's house, and on the farm, there was a cottage occupied by the claimant's grandmother, who, however, paid no rent to the father for the house. The claimant had the exclusive use of a room in that house. The claimant worked on his father's farm as a member of the family, and not under any definite contract of service for wages or other remuneration. He took his meals in family with his father and received from his father what money he required from time

* Decided Dec. 1, 1890.

† "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant-occupier of such dwelling-house as a tenant."

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to time. He deponed that he had occupied the room in the cottage for the last four or five years, and that he was to have the exclusive use of it so long as he worked on the farm, but that he was entitled to leave the service and the house at any time.

The Sheriff (Jameson) rejected the claim, whereupon the claimant required a case, which was accordingly stated by the Sheriff.

The foregoing facts were set forth, and this question of law was stated —"Whether, in respect of the foresaid facts, John Aitchison is entitled to be entered in the roll, in respect of the qualification set forth in the 3d section of the Act 48 and 49 Vict. c. 3?"

The claimant argued that though there was no contract of service, there was service in point of fact and exclusive occupation of the subject. These elements satisfied the statutory provision.[1]

LORD KINNEAR.—I agree with the Sheriff, and I do not think it necessary to call for a reply. The application is founded on the 3d section of the Act of 1884 (48 and 49 Vict. c. 3), which provides that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant-occupier of such dwelling-house as a tenant.

The question is whether upon the facts brought before us by the Sheriff it can be held that the appellant occupies the house by virtue of any office, service or employment. I am very clearly of opinion that the facts shew he occupies by virtue of being his father's son and not by virtue of service. To occupy by virtue of service means, that because of his service a man has a right to occupy certain premises. But there is in this case no allegation of service or employment, and nothing to connect the fact of the appellant living in the cottage with any relation which he holds as servant of his father.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT affirmed the judgment of the Sheriff and dismissed the appeal.

THOMAS CARMICHAEL, S.S.C.—DOVE & LOCKHART, S.S.C.—Agents.

No. 71.

Dec. 20, 1890.* Neilson.

WILLIAM NEILSON, Appellant.—*Ure.*

Election Law—County Franchise—Household Franchise—Payment of rates —Failure to pay—Notice—Representation of the People Act, 1884 (48 *and* 49 *Vict. c.* 3), *sec.* 2, *and sec.* 7, *subsec.* 4—*Representation of the People* (*Scotland*) *Act*, 1868 (31 *and* 32 *Vict. c.* 48), *secs.* 3 *and* 18.—In the parish of C. it was the practice to assess the owner of premises where the rental was under £4 for the tenant's share of parochial rates, leaving it optional to the owner to recover from his tenant the latter's share of the rates. In such cases no assessment notice was sent to the tenant, although his name appeared on the Valuation-roll for the assessment leviable in respect of his tenancy.

R. was tenant of a house of the value of £3, 10s. in the parish of C., and though he had never paid rates, he had been entered upon the roll as an inhabitant-occupier, and tenant of the house. In 1890 the owner was exempted by the parochial board from payment of rates, but no notice of assessment was sent to R.

An objection was taken to R.'s name remaining on the roll in respect he had

[1] Ballingal v. Menzies, Nov. 26, 1886, 14 R. 127.

* Decided Dec. 1, 1890.

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Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney. Sheriff of Lanarkshire. C.

failed to pay poor-rates in the sense of section 3 * of the Representation of the People (Scotland) Act, 1868.

Held that R. was not disqualified, as no statutory notice of assessment had been sent to him in terms of section 18 of that Act.

AT a Registration Court for the parish of Cambusnethan and constituency of Mid-Lanark, the Sheriff-substitute (Mair) rejected the claim of William Neilson, labourer, to be entered on the roll as tenant of a house in Hill Street, Wishaw.

Neilson craved a case, in which the following facts were set forth :—

"In the Valuation-roll of Cambusnethan parish, for years 1888-9 and 1889-90, William Neilson is entered as tenant or occupier of the house, No. 50 Hill Street, Wishaw, of which John Russell, labourer, is entered as the proprietor. The rent of the house is entered at £3, 10s. It has been the invariable custom in the parish of Cambusnethan (as in many other parishes in Scotland) to assess the owner of heritable subjects for his tenant's proportion or share of the parochial rates in cases where the rental is under £4. It is optional to the owner to recover such portion or share of rates from his tenant. In such cases no assessment notice is sent to the tenant, although an entry for the assessment leviable in respect of his tenancy or occupancy appears on the column of assessment opposite his name in the collector's copy of the Valuation-roll. John Russell, the owner of the said subjects, was exempted by the parochial board from payment of parochial rates. In the collector's copy of the Valuation-roll, under the heading 'Exempted,' the assessment due both by John Russell and the claimant are entered as 'exempted.' The collector, in his schedule (D) to the Assessor, included the claimant's name as exempted from payment of parochial rates. It is admitted that the claimant was not exempted by a special resolution of the parochial board from payment of rates; further, admitted that no notice of assessment was sent him, and also that, although he has never hitherto paid rates, he has always been held entitled to vote."

The ground upon which the claim was rejected was that the claimant had been exempted from payment of poor-rates.

The questions of law for the decision of the Court of Appeal were—(First) Whether in the case of tenants and occupants with a rental less than £4, in which the assessment is levied only from the owner, exemp-

* The Representation of the People Act, 1884, by section 2 extended to counties the household franchise established in burghs, and by section 7, subsection 4, it incorporated section 3 of the Representation of the People (Scotland) Act, 1868, "and the enactments amending or affecting the same." Section 3 of the latter Act enacts,—"Every man shall, on and after the year 1868, be entitled to be registered as a voter who is qualified as follows :— . . . provided that no man shall, under this section, be entitled to be registered as a voter who at any time during the said period of twelve calendar months shall have been exempted from payment of poor-rates on the ground of inability to pay, or who shall have failed to pay on or before the 1st day of August in the present, or the 20th day of June in any subsequent year, all poor-rates (if any) that have become payable by him in respect of said dwelling-house, or as an inhabitant of any parish in said burgh, up to the preceding 15th day of May." Section 18.—"Where any poor-rate due from an occupier of premises to which a right of voting is for the first time attached by this Act remains unpaid on the 15th day of May in any year, the collector of poor-rates for the parish in which such premises are situated shall, on or before the 25th day of July in the present, or the 1st day of June in any subsequent, year, unless such rate has previously been paid, or has been duly demanded by a demand-note served in like manner as the notice in this section referred to, give or cause to be given a notice in the form set forth in schedule (C) to this Act to every such occupier."

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tion of the owner from both his own rates and those assessed on the rental of the house occupied by his tenant is sufficient to disqualify the tenant and occupant? and (second) Whether in the case as above, and where the owner, though assessed for his rates, fails to pay them by the 20th of June such failure on his part, while not disqualifying him as owner, is sufficient to disqualify the tenant and occupant?"

Argued for the appellant;—Exemption from payment of poor-rate meant exemption by resolution of the parochial board. The appellant had received no such exemption, and was, therefore, not disqualified on that ground.[1] There was no failure to pay. The appellant was entitled to believe that his landlord was paying the rates as he had formerly done. In order to disqualify him it was imperative, under the 18th section of the Act, that an assessment notice should be served upon him. This had been omitted.

There was no appearance in support of the judgment of the Sheriff substitute.

LORD KINNEAR.—The condition attached to the right of voting by the proviso in respect of which the appellant has been rejected by the Sheriff is, that a man shall be entitled to be registered who has been exempted from the payment of poor-rates on the ground of inability to pay, or who shall have failed to pay all poor-rates that have become payable by him. The Sheriff says that the appellant in this case was not exempted by a special resolution of the parochial board from the payment of rates, and therefore it is unnecessary to consider the branch of the proviso which is applicable to such exemption. The question is whether it can be said that this appellant has failed to pay his poor-rates in the sense of the enactment to which I have referred? The state of the facts is, that it has been the invariable practice in this parish to assess the owner for the tenant's share in cases where the rental is under £4, and when the owner is assessed it is optional for him to recover such share from his tenant. In such case no notice is sent to the tenant, although his name appears upon the Valuation-roll. It is stated in the case that the owner of the premises rented by the appellant was exempted by the parochial board, but it is admitted that no notice of assessment was ever sent to the appellant, and that although he himself had never hitherto paid his rates, he had always been held entitled to vote. If there had been no other provisions in the Act of Parliament except those in the 18th section, it seems to me the question might have been of some difficulty, but I think the difficulty altogether removed by the provision of the 18th section. That provision is as follows,—(quoted *supra*, p. 339, note.) In this case the appellant, according to the statement, had no reason to suppose that any assessment had become exigible from him. He had had no notice of assessment. He knew that the rates had previously been paid by his landlord and not himself, and that he had been held entitled to vote. It appears to me that in order to disqualify the appellant on account of failure to pay rates it was indispensable that he should have the statutory notice. I am therefore of opinion that the appellant is not disqualified.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT sustained the appeal, and reversed the judgment of the Sheriff.

SIMPSON & MARWICK, W.S., Agents.

[1] Nicolson on Elections, p. 25; Ross v. Gilchrist, Dec. 19, 1868, 7 Macph. 323; *cf.* Mackenzie v. King, Nov. 1, 1875, 3 R. 8.

JOSEPH TRAIN GRAY, Appellant.—*J. A. Reid.*
JOHN DEUCHAR, Respondent.—*W. C. Smith.*

No. 72.

Dec. 20, 1890.*

Gray v. Deuchar.

Election Law—Burgh Franchise—Lodger—Occupancy "separately and as sole tenant"—Representation of the People (Scotland) Act, 1868 (31 *and* 32 *Vict.* c. 48), *sec.* 4.—A son, as a lodger, paid his mother rent for the exclusive use of a bedroom, and for the joint use with her of other rooms. The clear annual value of his rights of use or occupation was sufficient, but the value of the bedroom taken alone was insufficient.

Held that he did not occupy lodgings of the statutory value "separately and as sole tenant," and was therefore not entitled to the franchise under the 4th section of the Representation of the People (Scotland) Act, 1868.†

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney. Sheriff of the Lothians. C.

AT a Registration Court for the burgh of Edinburgh held on 2d October 1890 John Deuchar claimed to be enrolled on the register of voters for the burgh of Edinburgh (South Division) as a lodger. Joseph Train Gray objected.

The Sheriff (Crichton) admitted his claim, and the objector asked a case, in which the following facts were set forth as admitted:—"That the claimant has had, under agreement with his mother, who is the tenant, and the only other occupant of the house, to whom he pays rent, and with whom he resides in family, the sole use or occupancy, for the qualifying period, of a back bedroom in a half-flat house, 42 Morningside Road, and the joint use or occupancy of the dining-room, drawing-room, and bath-room. That the clear annual value of the claimant's rights of use or occupation aforesaid is sufficient, but that the value of the bedroom taken alone is insufficient."

The question of law for the decision of the Court of Appeal was,—"Whether the joint use of the dining-room, drawing-room, and bath-room by the claimant as aforesaid can be reckoned as part of a lodger qualification?"

Argued for the appellant;—The respondent could not be said to occupy premises of the requisite value "separately and as sole tenant." He was "sole tenant" only of the bedroom, and that was of insufficient value. The case of *Brown* v. *Martin*[1] was distinguishable from the present case, because in it the claimant had exclusive right by contract both the bedroom and the parlour on which he claimed to be enrolled, though other persons used the parlour.

Argued for the respondent;—The word "separately" in the statute did not mean "exclusively." The words of the statute excluded joint tenants and joint lodgers, but did not infer that the occupation might not be shared in by the landlord. *Brown* v. *Martin* was directly in point.

LORD KINNEAR.—I am unable to agree with the learned Sheriff in the view he has taken of this case. On a proper construction of the statute the question seems to me to be a clear one. The statute provides that "every man shall . . . be entitled to be registered as a voter . . . who is qualified as follows (that is to say) . . . as a lodger, has occupied in the same burgh,

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* Decided Dec. 1, 1890.

† 31 and 32 Vict. c. 48, sec. 4, provides that "Every man shall . . . be entitled to be registered as a voter . . . who is qualified as follows: . . . as a lodger, has occupied in the same burgh, separately and as sole tenant, the twelve months preceding the last day of July in any year, lodgings of the clear yearly value, if let unfurnished, of £10 or upwards."

[1] Brown v. Martin, Nov. 6, 1885, 13 R. 159.

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separately and as sole tenant, for the twelve months preceding the last day July in any year lodgings of a clear yearly value, if let unfurnished, of £10 upwards." Now, the statement of fact on which the Sheriff was asked sustain this claim was this—[His Lordship here quoted the statement admitted facts]. Now, it is of the bedroom alone that the applicant is said have the sole use or occupancy, and therefore it appears to me clear that cannot hold that he has, separately and as sole tenant, occupied lodgings of t qualifying value. The right of a sole tenant to the exclusive occupancy of l lodgings excludes a landlord just as much as anyone else claiming to be joi tenant with him. With regard to the case of *Brown* v. *Martin*, it appears me that the decision in that case proceeded upon the view that the applica had an exclusive right by contract to both the parts of the subject on which claimed, although other persons were accustomed to use one portion of it. T decision does not therefore appear to me to create any difficulty.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT sustained the appeal, recalled the judgment of th Sheriff appealed against, and remitted to the Sheriff, with inst tions to expunge the name of the claimant.

DAVID D. BUCHAN, S.S.C.— —Agents.

No. 73.

Dec. 20, 1890.* Falconer v. Dunlop.

JAMES FALCONER, Appellant.—*Asher*—*A. J. Young.*
GEORGE DUNLOP, Respondent.—*Murray*—*C. N. Johnston.*

Election Law—Burgh Franchise—Lodger—Residence—Absence from lodg during part of the year—Representation of the People (Scotland) Act, 1868 *and* 32 *Vict. c.* 48), *sec.* 4.—A son occupied, as a lodger, rooms of the statut value in his father's house, for which he paid rent to his father, residing them during nine months of the year. During the remaining three month was absent in the country, and the house was shut up, but he had access t any time he desired.

Held that he had been resident during the statutory period required b 4th section of the Representation of the People (Scotland) Act, 1868.†

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney. Sheriff of Edinburgh. C.

AT a Registration Court for the burgh of Edinburgh, held on 6th ber 1890, George Dunlop claimed to be enrolled on the register of v for the West Division of Edinburgh, in respect of his occupancy of lod at 12 Randolph Crescent. James Falconer, W.S., objected.

The Sheriff (Crichton) admitted the claim, whereupon Mr Fal asked a case, in which the following facts were set forth as admitted:

The house 12 Randolph Crescent was occupied by the claimant's f as tenant. The claimant occupied three rooms in it of the nece value. He resided in the rooms during the year from 31st July to 31st July 1890, with the exception of about three months, when

* Decided Dec. 1, 1890.

† The Act 31 and 32 Vict. c. 48, sec. 4, provides that "Every man . . . be entitled to be registered as a voter . . . who is qualifi follows, . . . (2) as a lodger, has occupied in the same burgh, sepa and as sole tenant, for the twelve months preceding the last day of July i year, lodgings of a clear yearly value, if let unfurnished, of £10 or upw and (3) has resided in such lodgings during the twelve months immediately ceding the last day of July . . ."

house was shut up, and he was absent from Edinburgh in the country. He could have had access to the house at any time he desired. No. 73.

Dec. 20, 1890 Falconer v. Dunlop.

The question of law for the determination of the Court of Appeal was, —"Whether the respondent is entitled to be put upon the roll as a lodger in respect of the said rooms?"

Argued for the appellant;—The claimant had not resided in the lodgings for the full statutory period. During three months of the year the house was shut up, and though he might have obtained access he could not have resided in the house.

Counsel for the respondent were not called upon.

LORD KINNEAR.—I think this is a perfectly clear case. The claimant was *de facto* resident in the lodgings, for which he was paying rent, during nine months of the year, and he had access to them during the remaining three months. In point of fact he did not make use of them because he happened to be out of town. The fact that the other inhabitants of the house were also away does not, in my opinion, affect the question. I am accordingly of opinion that the respondent was resident in these lodgings during the statutory period.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT dismissed the appeal, and affirmed the judgment.

JAMES FALCONER, W.S.—GEORGE INGLIS, S.S.C.—Agents.

JOHN CAMPBELL SMITH, Appellant.—*Crole.* No. 74.
JAMES FALCONER, Respondent.—*Asher*—*A. J. Young.*

Dec. 20, 1890. Smith v. Falconer.

Election Law—Burgh Occupation Franchise—Residence within burgh—Sheriff-substitute necessarily resident out of burgh—Sheriff Courts (Scotland) Act, 1838 (1 *and* 2 *Vict. cap.* 119), *sec.* 5—*Reform (Scotland) Act*, 1832 (2 *and* 3 *Will. IV.* cap. 65), *sec.* 11.—The Act 1 and 2 Vict. cap. 119, sec. 5, provides that "every person holding the office of Sheriff-substitute, and receiving salary on that account, shall reside personally within his jurisdiction, and shall not be absent therefrom more than six weeks in any year, nor for more than two weeks at any one time . . . without the special consent in writing of the Sheriff of such county for the time being."

The Act 2 and 3 Will. IV. c. 65, which conferred the franchise on owners within burgh of houses worth £10 a-year, provides (sec. 11),—"No such person shall be entitled to be registered, or to vote in the present or any future year, unless he shall have resided for six calendar months next previous to the last day of July within such . . . burgh . . . or within seven statute miles of some part thereof."

The Sheriff-substitute of Forfarshire, at Dundee, claimed to be entered on the roll of voters for the burgh of Edinburgh under section 11 of the Reform (Scotland) Act, 1832, as owner of a house in Nelson Street, Edinburgh. Except in the month of April (when he resided almost continuously in Edinburgh) he occupied lodgings in Dundee during eleven days and nights out of each fortnight, and during the remaining three days and nights of each fortnight he resided in Northumberland Street, Edinburgh, in which his wife and family resided.

Held (dub. Lord Kincairney) that he must be assumed to be resident in Dundee in compliance with the provisions of the Sheriff Courts (Scotland) Act, 1838, and that therefore his residence in Edinburgh was only incidental, and did not entitle him to be enrolled as a voter.

* Decided Dec. 1, 1890.

No. 74.

Dec. 20, 1890.
Smith v. Falconer.

Registration Appeal Court.
Lord Kinnear.
Lord Trayner.
Lord Kincairney.
Sheriff of Edinburgh.
C.

AT a Registration Court for the burgh of Edinburgh, held at Ed on 2d October 1890, James Falconer, W.S., objected to the f entry by the Assessor in his list:—

"NELSON STREET.

No. in Street.	Name of each Person objected to.	Place of Abode.	Occupation.	N su Qua
16	John Campbell Smith	9 Northumberland Street	Advocate	Pr

The Sheriff (Crichton) sustained the objection, whereupon Mr Smith took a case, in which the following facts were set forth as —"It was admitted that the said John Campbell Smith had five years Sheriff-substitute of Forfarshire at Dundee. That during the month of April (when he resides almost continu Edinburgh) he occupies lodgings in Dundee during eleven nights out of each fortnight, and that during the remaining th and nights of each fortnight he resides at No. 9 Northumberlan Edinburgh, of which he has for twelve years been owner and It was also admitted that the appellant's wife, children, and reside at the said house, No. 9 Northumberland Street, Edinbu that the appellant pays the usual taxes effeiring to the said ho fixed rental of £80, and also the taxes as the owner of the house Nelson Street. The appellant has never bought or leased a Dundee where his wife and family could reside, and he has all al sidered Northumberland Street his home."

The question of law for the decision of the Court of Appea "Whether John Campbell Smith is entitled to be enrolled as the house No. 16 Nelson Street?"

Argued for the appellant;—Upon the facts stated the ap residence in Edinburgh was sufficient to comply with the provi the statute. His home was really in Edinburgh, and the fact tha temporarily absent in Dundee in performance of his official duties deprive him of the franchise. His absence from his home reside just the temporary one which occurred in the cases of a Member o ment attending the House of Commons during session, and of a mason working at places in the country.[1] In the case of *Bond* held that a man can be resident in one place where his wife li at the same time in another place where he has lodgings. The *Kennard* v. *Allan*[3] was distinguishable from the present, becau the claimant's family did not reside in Falkirk, where he claime enrolled. Reference to the provisions of the Sheriff Courts (S Act, 1838, was irrelevant. This was an appeal upon a case stated, facts must be taken as set forth in the case.

Argued for the respondent;—There was no such residence statute required. The respondent must be assumed to be complyi

[1] Nicolson on Elections, pp. 111 and 112; Cay on Scottish Reform 453; Watt v. M'Guire, Dec. 12, 1888, 16 R. 263.

[2] Bond v. Overseers of St George's, Hanover Square, 1870, Hopw Coltman's Reports, 427.

[3] Kennard v. Allan, Nov. 4, 1879, 7 R. 1.

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the provisions of the Sheriff Courts (Scotland) Act, 1838, and if that were so, his residence in Edinburgh was merely incidental.

LORD KINNEAR.—The question of law put to us in this case is whether Mr John Campbell Smith is entitled to be enrolled as owner of the house No. 16 Nelson Street. Mr Smith does not occupy the house in Nelson Street. This is not a claim therefore to be enrolled as "inhabitant-occupier," but as "owner" of a house in which the appellant does not reside, and it appears to me that a claim in these circumstances can only be maintained under the Act of 1832 as modified by the Act of 1884.

Now, the Act of 1832 conferred the franchise upon "owners" of subjects of a certain yearly value within burghs. The Act of 1868 conferred the franchise on "inhabitant-occupiers" of a dwelling-house whether as owner or tenant, but the appellant is not an "inhabitant-occupier" of the house in question, and it is only in the character of "owner" that he can be placed upon the roll.

Now, the provision of the Act of 1832 is continued by the subsequent statute, and is still applicable to the qualification of ownership, and it enacts that an owner shall be qualified provided he resides within the burgh, or within seven miles of it, for six months prior to the period when the roll is made up.

The question is whether Mr Campbell Smith has resided for six months in the burgh of Edinburgh.

Now, it is stated in the case that he is Sheriff-substitute of Forfarshire at Dundee, and we are bound to take notice of the provisions of a public statute regulating the conditions under which such office can be held. The statute requires that the Sheriff "shall" reside within his jurisdiction, and shall not be elsewhere for more than six weeks in any year, nor for more than two weeks at any one time, except upon compliance with certain conditions. We must assume, I think, that the Sheriff-substitute is complying with the provisions of the statute, and therefore we have to consider the question whether a Sheriff who, as we must assume, has been residing within his jurisdiction according to the statutory enactment can possibly have been resident in Edinburgh contrary to the enactment.

I am of opinion that it is impossible to hold that he had such residence in Edinburgh as to comply with the provisions of the statute under which he claims to be enrolled. It is perfectly well settled by a decision, both here and in England, that in order to make out a constructive residence it is necessary that the party who may have been in fact absent from his alleged residence for a part of the necessary period should have power to return to it at any time, without breach of a legal obligation. Now, Mr Smith had no power to reside in Edinburgh for more than six weeks in any one year without a breach of the obligation imposed upon him by statute. I do not find in the case that the whole period of his stay in Edinburgh, taken together, amounted in fact to six months, and I do not think he can take any benefit from the doctrine of constructive residence, for the reason I have mentioned. I think we must hold his occupation of the Edinburgh house to be merely incidental, and that his true residence was in Dundee.

LORD TRAYNER.—I agree that this question must be decided under the Act of 1832 as modified by the Act of 1884. The test of the appellant's right is residence within the burgh for a certain period. Upon the facts stated I am clearly of opinion that he has not resided in Edinburgh in any proper sense whatever.

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But further, I think the appellant is precluded from saying that he has resided in Edinburgh, as that is equivalent to saying that he has disobeyed the statutory provisions under which he holds his office.

LORD KINCAIRNEY.—I have grave doubts as to the decision which your Lordships have given in this case.

In my view this is a pure question of fact, and I have difficulty in assuming anything contrary to the facts set forth in the case.

I doubt the propriety of taking into consideration the statutory duty of Sheriff-substitute as to residence.

THE COURT dismissed the appeal, and affirmed the judgment of the Sheriff appealed against.

DANIEL TURNER, S.L.—JAMES FALCONER, W.S.—Agents.

No. 75.

Dec. 20, 1890.* Mackenzie v. Fraser.

ALEXANDER MACKENZIE, Appellant.—*Orr.*
JOHN S. FRASER, Respondent.—*A. Davidson.*

Election Law—Household Franchise—Tenant and Occupant—Lease—Valuation-roll not conclusive on question of occupancy—Representation of the People Act, 1884 (48 *and* 49 *Vict. c.* 3), *sec.* 5.—M., a newspaper proprietor, became tenant, in 1885, under a lease for seven years, of certain premises used for the printing and publication of his newspaper. In 1887 the business was converted into a limited company, M. becoming managing director and editor, and occupying, by arrangement with the other directors, a room on the premises of the annual value of more than £10, for his editorial work, as well as for his own private business. From 1885 he was entered on the Valuation-roll as tenant and occupier of the premises. The rent and taxes of the premises were paid by the company to the landlord, who was also secretary of the limited company, but there was no assignation of the lease to the company.

Held that M. was entitled to remain on the roll as tenant and occupier of the premises.

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney. Sheriff of Inverness. C.

AT a Registration Court for the burgh of Inverness, held at Inverness on 30th September 1890, John S. Fraser, solicitor, objected to the name of Alexander Mackenzie, publisher, being retained on the roll as tenant and occupant of an office in High Street.

The Sheriff (Ivory) sustained the objection, and Mackenzie asked a case, in which the following facts were set forth as proved:—

"By lease, dated 22d April 1886, Kenneth Macdonald, town-clerk, Inverness (proprietor of the subjects), let to the claimant, who was sole partner of the firm of Mackenzie, Thomson, & Co., printers and publishers, the premises for which the claimant was entered in the roll of voters, for seven years from Whitsunday 1885, at a rent of £52, 10s. for the first two years, and £60 for the remaining five years of the lease. The lease expressly excluded heirs and assignees. From 1885 to 1887 the claimant was proprietor and editor of the *Scottish Highlander* weekly newspaper printed and published in the premises in question. In 1887 the newspaper was converted into a limited liability company, of which the claimant became, and continued to be, the managing director, and the newspaper continued to be printed and published in the premises under the claimant's editorship.

"Besides being editor of the paper Mr Mackenzie conducted, and con

* Decided Dec. 9, 1890.

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Dec. 20, 1890. Mackenzie v. Fraser.

tinues to conduct, a separate business of his own in said premises as publisher of books, magazines, &c., of which business he was, and continues to be, sole proprietor. By arrangement with the directors of the *Scottish Highlander* Mr Mackenzie, as editor, has the use of one room in the said premises known as the 'Editor's Room,' for the conduct of the editorial work of the paper, and also for the conduct of his own separate business. But Mr Mackenzie failed to prove that he could not be dismissed from his office as editor at any time. The annual value of the room is more than £10. The rent of £60 and taxes of the whole premises, including the 'Editor's Room,' were paid by the Scottish Highlander Company, Limited, to Mr Kenneth Macdonald, the proprietor of the premises, and the salaried secretary of the said company, and Mr Mackenzie paid no part thereof. . . . In the Valuation-roll for the year 1887, and subsequent years, Mr Mackenzie is entered as tenant and occupant of the whole premises. But it was proved that the Scottish Highlander Company occupied the whole premises as tenants subsequent to 1887, with the consent and concurrence of Mr Kenneth Macdonald, their secretary. No written assignation or sublease of the premises however was granted by Mr K. Macdonald in favour of the said company."

The questions of law raised were,—"(1) Whether Mr Mackenzie is the occupant of the 'Editor's Room' in the said premises or the whole premises in the sense of the Registration Acts? (2) Whether Mr Alexander Mackenzie is the tenant of the said room or of the whole premises in the sense of the Registration Acts? (3) Whether, considering the terms of the lease and the entries in the valuation returns and Valuation-roll, it was competent to prove by the parole evidence of Mr Mackenzie and Mr K. Macdonald, the two parties to the lease (the latter being also the proprietor of the premises, who made the valuation returns), and the assessor, who prepared the Valuation-roll, that Mr Mackenzie was not the true tenant of the said premises, and also that he was not the true occupant thereof?"

Argued for the appellant;—(1) It was incompetent for the Sheriff to allow a proof to contradict the terms of the Valuation-roll.[1] (2) Upon the evidence, the company had no written lease connecting them with the premises. The appellant, on the other hand, was tenant under the lease, and had stood as tenant and occupant on the roll ever since the date of the lease. In any event, he was in occupation of one room of sufficient value.

Argued for the respondent;—It was competent to go behind the Valuation-roll and prove the actual state of occupancy.[2] The Sheriff had found as matter of fact that the entire premises were occupied by the company, who paid the rent. That was conclusive upon the question of occupancy. In regard to the editor's room, the facts proved shewed that the claimant was not in exclusive use of it.

LORD TRAYNER.—I have no difficulty in arriving at a conclusion upon the question raised in this case. I am clearly of opinion that the Sheriff has gone wrong. The person who was enrolled, and who has been struck off the roll, is the tenant under a regular lease from the proprietor, by which lease he is bound till 1892 to occupy the premises at a certain increasing rent. It is matter of fact that since he took the lease he has been in the possession of these subjects

[1] Rea v. Thomas, Oct. 24, 1870, 9 Macph. 8, 43 Scot. Jur. 4.

[2] Brown v. Holmes, Dec. 19, 1868, 7 Macph. 325, 41 Scot. Jur. 191; Loudon v. Brown, Nov. 1869, 17 S. L. R., 163.

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under the title which that lease conferred, and has been entered all these years, as he is now entered in the Valuation-roll, as the tenant and occupier. The Sheriff finds in point of fact that there has been no written assignation or sub-lease of the premises in favour of anybody else, and therefore the unrestricted and unlimited right of tenancy belongs to the claimant. In point of fact, the claimant is in the premises because, although there is an arrangement between him and the company, he has remained there as their servant, having use of a particular room. The Sheriff has come to the conclusion that the company occupies the premises, but I fail to see how he reaches that legal conclusion upon the facts as stated by him. In point of fact, Mackenzie is tenant; in point of fact, Mackenzie is in the premises. The Sheriff says he has failed to prove that he could not be dismissed. The question whether he could be dismissed or not has no relevancy to the question before us, and in any event, the burden of proof could not be upon him. I think it was entirely irrelevant to inquire into what was the private arrangement between Mackenzie and the company. I am accordingly clearly of opinion that the appellant's name should be put upon the roll.

With reference to the point raised by the third question put to us, I should be slow to affirm that parole evidence is not competent to get behind what is in the Valuation-roll. At the same time, such evidence should be allowed with great caution.

LORD KINCAIRNEY.—I cannot say that I have no difficulty in this case. I would prefer to rest my judgment on more limited grounds. The Sheriff says that Mackenzie, as editor, has use of one room "for the conduct of the editorial work of the said paper, and also for the conduct of his own separate business." I understand the Sheriff to say that Mackenzie has had the use of that room for the qualifying period. I do not see any indication that any other person has a right to use that room except Mackenzie. That satisfies the 5th section of the Act of 1884, and Mackenzie is therefore entitled to have his name placed upon the roll.

LORD KINNEAR.—I agree with Lord Trayner. I think that if the Scottish Highlander Company is in the occupation of the premises it occupies them through Mr Mackenzie, and in no other way, according to the statement which the Sheriff brings before us. I am therefore of opinion that Mr Mackenzie is occupant of the premises, and I have no doubt he is sole tenant.

The only additional observation I desire to make is, that I do not understand that either of your Lordships entertains any doubt as to the doctrine, which is quite well settled, that although the Valuation-roll is conclusive upon the question of value, it is not conclusive upon the question of occupancy; and if any relevant ground is stated for inquiry, there is no reason why proof should not be allowed as to the question of occupancy. The only difficulty which appeared in the argument upon that subject arose from Mr Orr's citation of the case of *Rea*, but that case does not really conflict in any way with what has always been understood to be the law on the subject. All that was decided there was that the particular proof asked in that case was inadmissible. The reason was clear. The tenant and occupant of a farm had been enrolled as a voter for the county of Perth. Then another person came forward, alleging occupation for the requisite period, and produced an assignation, dated 22d

February 1870, in support of his lease to the farm, which was dated in 1868. The Sheriff refused to allow the proof of occupancy, because he held that the claimant's right to be registered in virtue of the assignation must be regulated by the date of the assignation itself.

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THE COURT sustained the appeal, recalled the judgment of the Sheriff-substitute appealed against, and remitted to the Sheriff, with instructions to retain the name of the appellant on the roll of voters.

WILLIAM OFFICER, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

JAMES STEWART, Appellant.—*Maconochie.*
GEORGE M'FADZEAN, Respondent.—*A. J. Young.*

No. 76.

Dec. 20, 1890.*
Stewart v. M'Fadzean.

Election Law—Household Qualification—"Inhabitant-occupier"—Residence—Representation of the People Act, 1884 (48 *and* 49 *Vict. c.* 3), *secs.* 2 *and* 7, *subsec.* 4—*Representation of the People (Scotland) Act*, 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 3.—A person, whose principal residence was in Glasgow, resided for three or four months in summer in a cottage, at a rent of £3 a-year, in Arran. He did not sublet the cottage, and kept it locked up when he was not living in it.

Held that he was not entitled to be entered upon the Valuation-roll as an inhabitant-occupier of the cottage in the sense of the Representation of the People Acts, 1868 and 1884.†

At a Registration Court for the county of Bute, held at Rothesay on 11th October 1890, George M'Fadzean, grocer, Rothesay, objected to James Stewart, post-office pensioner, being retained on the list as a voter for the county.

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney. Sheriff of Bute. C.

Stewart was described in the Assessor's list as "occupant of dwelling-house, Glenrosa, Brodick," and the objection was that he had not been an inhabitant-occupier of the house for the period of twelve calendar months next preceding 31st July 1890.

The Sheriff (Cheyne) sustained the objection, whereupon Stewart craved a case, in which the following facts were stated as proved:—"James Stewart has for many years past resided with his family in Glasgow during eight or nine months of each year, and Glasgow is his home in the sense of being the ordinary and principal place of residence of himself and his family. He has also for several years been, and still is, the tenant of a cottage at Glenrosa, Brodick, in the county of Bute, for which he pays a rent of £3 per annum, and he has been in the habit of residing there for two or three months continuously each summer, and occasionally

* Decided Dec. 13, 1890.

† The Representation of the People Act, 1884, by section 2, made the household franchise applicable to counties, and by section 7, subsection 4, enacted,—"The expression 'a household qualification' means, as respects Scotland, the qualification enacted by the 3d section of the Representation of the People (Scotland) Act, 1868, and the enactments amending or affecting the same, and the said section and enactments shall, so far as they are consistent with this Act, extend to counties in Scotland."

The Representation of the People (Scotland) Act, 1868, section 3, enacted,—"Every man shall, on and after the year 1868, . . . be entitled to be registered as a voter . . . who is qualified as follows:— . . . (2) is and has been for a period of not less than twelve calendar months next preceding the last day of July an inhabitant-occupier as owner or tenant of any dwelling-house within the burgh."

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for a few days at a time at other periods of the year. His resid
the said cottage during the year preceding 31st July 1890 co
period of between three and four months in all. He has never su
said cottage, and when he is not living in it it is locked up."

The question of law for the decision of the Court of Appea
"Whether a man who has been tenant, and had the full cont
dwelling-house in A for the whole of the qualifying period,
resided therein for three or four months of the said period, but
during the remainder of the said period resided in B (which is n
home), is entitled to be enrolled as a voter under the household f
in A?"

Argued for the appellant;—Continuous residence was not nec
order to entitle a man to be registered as a voter.[1] No precise r
be laid down as to the requisite length of residence. A man mi
two residences at one time.[2] In the present case the appellant
control of the cottage. He never sublet it, and kept it locked
he was not living in it.

Argued for the respondent;—The appellant's true residence
Glasgow, and that was his home. His residence in Arran wa
incidental. In short, there was really no sufficient residence in t
of the statute.

At advising,—

Lord Trayner.—In this case the claimant claims to be registered
in Bute on the ground that he is the tenant and occupant of a dwell
at Glenrosa, Brodick. The objection stated is that he has not been
tant-occupier of that house for the period of twelve calendar months
the 31st July. The Sheriff has stated the facts. They may be resu
—The claimant has his principal residence in Glasgow, where he resid
eight or nine months of the year, but for several years he has been, a
tenant of a cottage in Brodick, to which he resorts in summer for tw
months. In the year 1890 he resided there three or four months in a
to entitle the claimant to get upon the roll he must satisfy the Court
an inhabitant-occupier of that house. I am not prepared to offer an
exhaustive definition of that term, but I think it may be fairly said tha
an occupier who inhabits. The question is, has the claimant inhabite
of opinion that he has not. He resides in Glasgow, and his visits to
to me not to be in any proper sense a residence or inhabiting, but visits
to the residence which he has in Glasgow. It was said that he was
occupier of this house; that, if he was not there all the year, he had
to go when he pleased; that when he left it he locked it up, and th
never been sublet. Now, if use of that kind for the period of three
would make him an inhabitant, the same principle would make him a
tant if he only went for three days. To put the case in that way shew
admit this claim would be to avoid the object of the statute, which is
every man who lives or resides in a locality an interest in the represen
that locality. The claimant in this case has not, it seems to me, comp
the statutory requirement, and therefore I agree with the Sheriff.

I desire to add that my opinion in this case is not to be held as at al

[1] Watt v. M'Guire, Dec. 21, 1888, 15 R. 263.

[2] Johnston v. Buchanan, Nov. 6, 1879, 7 R. 7; Bond v. Overse
George's, Hanover Square, L. R., 6 C. P. 312.

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ing any view upon the more general question sometimes raised, whether a man may not inhabit two places at one time. Upon that question I reserve my opinion.

LORD KINCAIRNEY.—I concur. I wish only to observe that, in my view, this case raises no question of constructive residence or constructive inhabitancy. There was no inhabitancy at all.

LORD KINNEAR concurred.

THE COURT dismissed the appeal, and affirmed the judgment of the Sheriff.

COOPER & BRODIE, W.S.—LACHLAN M'INTOSH, S.S.C.—Agents.

No. 77.

Dec. 20, 1890.*
Falconer v. Lessels.

JAMES FALCONER, Appellant.—*Asher*—*A. J. Young.*
JOHN LESSELS, Respondent.—*Murray*—*C. N. Johnston.*

Election Law—Burgh Occupation Franchise—Combination of period of occupancy as lodger with period of occupancy as tenant—Representation of the People (Scotland) Act, 1868 (31 *and* 32 *Vict. cap.* 48).—A period of occupancy as lodger cannot be combined with a period of occupancy as tenant and occupant of a dwelling-house within burgh so as to entitle the occupant to the burgh occupation franchise under the Representation of the People (Scotland) Act, 1868.

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney. Sheriff of the Lothians. C.

At a Registration Court for the burgh of Edinburgh, held at Edinburgh on 2d October 1890, James Falconer, W.S., 42 Heriot Row, Edinburgh, objected to the entry upon the voters' list of the name of John Lessels as "tenant and occupant" of 4 Dundonald Street. The ground of objection was that Lessels had not occupied the premises for the period of twelve months prior to 31st July 1890.

The Sheriff (Crichton) repelled the objection, and Falconer craved a case, in which the following facts were set forth:—"It was admitted that Mr Lessels did not become tenant or occupant of No. 4 Dundonald Street until the month of March 1890. It was, however, admitted that, for the period from 31st July 1889 to March 1890, he had occupied lodgings at No. 30 Royal Circus, of the annual value of £10, unfurnished. No claim had been made at this registration period by Mr Lessels as a lodger, but he was on the roll for 1889-90 as a tenant and occupant in respect of his lodgings at 30 Royal Circus aforesaid. I repelled the objection, and was required by the appellant to state a special case."

The question of law for the determination of the Court of Appeal was, "Whether John Lessels is entitled to be enrolled as tenant and occupant of No. 4 Dundonald Street, by virtue of his occupancy of the said lodgings at 30 Royal Circus from 21st July 1889 to March 1890, and of his occupancy of 4 Dundonald Street as tenant from March 1890 to 31st July 1890?"

Argued for the appellant;—The Representation of the People (Scotland) Act, 1868, recognised two modes of occupancy, distinct in character, and requiring different proceedings to entitle the person qualified in respect of them to be placed upon the roll. Occupation *qua* lodger was not by a sufficient qualification. The person claiming on such an occupancy must put in his claim accompanied by a formal declaration attested by a witness.[1] The respondent had not done this, and had therefore never

* Decided December 13, 1890.

[1] Adair v. M'Bride, and Donald v. Adair, Nov. 13, 1879, 7 R. 38.

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Dec. 20, 1890.
Falconer v. Leasels.

become properly qualified to vote as a lodger. But (2) assuming that h had complied with this formality, he was clearly not entitled to combi his lodger occupancy with his subsequent occupancy of a dwelling-hou as tenant and occupant.[1] It was true that section 13 of the Act auth rised the combination of two periods of successive occupancy of "differe premises." That, however, only applied where the different premi were occupied in the same character. Moreover, the interpretati clause of the Act which defined "premises" did not include a "dwellin house." The 11th section of the Reform Act, 1832,* which was found on as enfranchising lodgers as occupiers if they had occupied for t requisite period lodgings in cities, burghs, and towns of the yearly val of £10, had been repealed† by the Representation of the People A 1884, and therefore it was vain to appeal to the former Act.

Argued for the respondent;—By the 11th section of the Reform Act 1832 lodgers were admitted to the roll as occupiers of premises of t annual value of £10. The only change made by the Representation the People (Scotland) Act, 1868, with regard to lodgers was as to t manner in which they were to be registered. It was true that the 1 section of the Act of 1884 had repealed the first named enactment, b it really re-enacted it, for by section 5 it provided a franchise with t same qualification, making it apply to counties as well as to burghs. I was quite competent to combine the periods of occupancy here. T essential character of the respondent's occupancy was in both peri that of tenant and occupant. If he had changed his residence to ot lodgings of similar value, the two periods could have been combin under section 13 of the Act of 1868, and it would be anomalous if t obtaining of a higher qualification were to deprive him of his right vote.

At advising,—

Lord Kinnear.—In this case the respondent has been entered upon the r as tenant and occupant of the house No. 4 Dundonald Street. It is set forth the case that the respondent did not become tenant and occupant of these p mises until the month of March 1890, and therefore he has not been tenant occupant of these premises for a year prior to the last day of July. Du the previous part of the year, however, he occupied lodgings at No. 30 D Circus of the annual value of £10, unfurnished, and the question before us whether by virtue of these two terms of occupancy, first as a lodger, and af wards as tenant and occupant, he can be held to have satisfied the condi imposed by the statute, which requires that in order to be entitled to the house franchise a man must occupy, as owner or tenant, for twelve calendar mon before the 31st of July in the year in which he claims to be registered, a dwelli house in the burgh? It has been contended that as the respondent, if he changed his residence to other lodgings of similar value, could have combi the two terms of occupancy, it would be an anomaly if the obtaining of a hig qualification should deprive him of a right to vote, and that the Legislat could not have contemplated such a result. It was said that the principle on which the Legislature proceeded in providing that terms of occupancy as l might be combined, and that terms of occupancy as tenant and occupant mi be combined, applied with equal force to the case before us. But we are

[1] Moncrieff v. Dalgleish, Dec. 19, 1868, 7 Macph. 315, 41 Scot. Jur. 186.

* 2 and 3 Will. IV. cap. 65, sec. 11.

† 48 and 49 Vict. cap. 3, sec. 12.

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entitled to reject or sustain claims for registration upon any view we may take of the principle on which the Legislature proceeded in making these enactments.

We must proceed upon an interpretation of the words of the statutes. Now upon a construction of the statute, it appears to me that two things are clear—1st, That it distinguishes between two classes of voters enfranchised by its provisions—occupants of dwelling-houses and lodgers; and 2d, that the 13th section authorises the combination of two periods of occupation in the same character, but not the combination of a period of occupancy in one character with a period of occupancy in another character. It does not, in my opinion, authorise the combination of occupancy as owner with occupancy as tenant, or occupancy as tenant or owner with occupancy as lodger. The case of *Moncrieff* v. *Dalgleish*, December 19, 1868, 7 Macph. 315, I think, expressly so decides, and if the question were open I should be of the same opinion.

But it was maintained that the decision appealed against may be supported upon a ground upon which the learned Sheriff did not proceed. It is said that the respondent is entitled to be enrolled as tenant and occupant under the Reform Act of 1832 as modified by the Act of 1884. I am unable to give effect to that argument. The statute of 1868 enfranchises lodgers if they have occupied for the requisite period lodgings of the yearly value of £10 only if certain other conditions expressly laid down in the section have been satisfied. But the argument is that all lodgers whose lodgings are of the annual value of £10 are entitled to be registered although not one of these conditions has been satisfied. If that were so, the Act of 1868 would be futile as regards the lodger franchise. It appears to me that the intention and effect of the Act of 1868 is to enfranchise lodgers upon the conditions laid down, and upon these only. I am therefore of opinion, differing from the Sheriff, that Mr Lessels is not entitled to be enrolled.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT sustained the appeal, and reversed the finding of the Sheriff, and remitted to him to expunge the respondent's name from the roll of voters.

JAMES FALCONER, W.S.—GEORGE INGLIS, S.S.C.—Agents.

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FREDERICK WALTER CARTER, Pursuer (Respondent).—*Jameson*—*G. W. Burnet.*

JOHN GUTHRIE LORNIE, Defender (Reclaimer).—*Johnston*—*W. Campbell.*

Sale—Sale of heritage—Agreement to accept title subject to all exceptions.—In agreement for the sale of heritage contained a stipulation that the purchaser should accept the title to the subjects "as it at present stands, and subject to all exceptions of any nature." *Held* that the purchaser was not bound by that stipulation to accept a title which was not marketable and which could not be made marketable by any expenditure on his part.

Sale of heritage—Title—Montgomery Act (10 *Geo. III. c.* 51), *sec.* 5—*Stipulation to build dwelling-houses.*—The Montgomery Act, which gave power to heirs of entail to grant building leases for ninety-nine years, provided by sec. 5, "That every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void, if one dwelling-house at least not under the value of £10 sterling shall not be built within the space of ten years from the date of the lease" for each half acre of ground let.

The tenant in a ninety-nine years' lease under the Act, which contained a

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stipulation that the tenant should build a dwelling-house of the value of £ within three years, and that failing his doing so the lease should be void, erect a factory, but no dwelling-house, within the three years, and thereafter enter into an agreement for the sale of the subjects, the purchaser becoming bound accept the title "as it at present stands, and subject to all exceptions of a nature." *Held* that, whether the building of the factory was or was not su cient implement of the obligation to build in a question with the heir of ent the lease was not a title which the purchaser was bound to accept.

Sale of heritage—Title—Rutherfurd Act (11 *and* 12 *Vict. cap.* 36), *sec.* 24 *Consideration other than rent.*—Section 24 of the Rutherfurd Act provides t it shall not be lawful for any heir of entail in granting a feu or long lease take any grassum, or fine, or valuable consideration other than the rent for gra ing such feu or lease, otherwise such feu or lease shall be void.

In a lease for eighty-one and a-half years, granted by an heir of entail, t consideration was an annual payment of £36, 16s. payable, to the extent £26, 16s., by the tenant and, to the extent of £10, by an insurance compa under a bond of annuity in favour of the heir of entail and his successors in t entail. The tenant entered into an agreement for the sale of the subjects, t purchaser becoming bound to accept the title "as it at present stands, and s ject to all exceptions of any nature." *Held* that the obligation by the insura company to pay an annuity was not equivalent to rent, and that the lease w not a title which the purchaser was bound to accept.

Sale of heritage—Title—Tender of valid title pending action for implement—Right to resile—Process.—An action was brought by the seller of heritage a the purchaser to have him ordained to implement his part of the contract accepting a disposition of the subjects and paying the price. After the opi of the Court had been delivered, to the effect that the title offered by the sel was not such as the purchaser was bound to accept, the seller tendered a min in which he offered the purchaser a title to which no exception could be tak The purchaser had obtained possession of the subjects at the date mentioned the agreement of sale, and had removed the machinery in a factory which form part of the subjects. The defender pleaded that tender of a good title was m too late, and that he was not bound to accept it. *Held* that the purchaser w bound to accept the title offered.

1st Division. Lord Trayner. O.

On 22d and 23d March 1888 Frederick Walter Carter, C.A., Edinburg judicial factor on the sequestrated estates of Robert Speedie & Sons, li manufacturers, Sinclairtown, Kirkcaldy, entered into a minute of ag ment of sale of two linen power-loom factories belonging to the est under his charge with John Guthrie Lornie, manufacturer, Kirkcal One of the factories, known as the new factory, was built on grou held under a ninety-nine years' lease, and this lease had been shewn Lornie before he signed the agreement. The agreement was in the fo lowing terms:—"The first party agrees to sell to the second party, a the second party agrees to purchase from the first party, the two la linen power-loom factories situated in Sinclairtown, and belonging to t first party, as judicial factor foresaid, with the whole steam-engines a machinery, as per inventory thereof, on the terms underwritten. (Fir The price of the said subjects shall be £2000 for the old factory a machinery therein, and £2000 for the new factory and machinery there (Second) The price of the new factory shall be payable within six wee from the date hereof, the second party, however, to get possession earli on payment of the price; and the price of the old factory shall be paya at Martinmas 1888. (Third) The second party shall accept the title the said subjects as it at present stands, and subject to all exceptions any nature; and the first party shall not be bound to grant warrandi except from his own proper facts and deeds only. (Fourth) This agre ment shall be subject to the sanction of the Court of Session being obtain thereto."

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The sanction of the Court having been obtained to the sale, Lornie, on 5th May 1888, paid the price of the new factory, and thereupon entered into possession of it. He removed certain machinery which was in it to one of his own mills.

On 24th October 1888 Messrs Gibson & Spears, writers, Kirkcaldy, Carter's law-agents, sent to Messrs Thomas Dow & Sons, writers, Kirkcaldy, Lornie's agents, the titles to the old factory (as to which no question was raised) in order that they might prepare a conveyance prior to the term of Martinmas. A copy of the lease which was the title to the new factory had previously been sent to Mr Lornie. Messrs Dow & Son had not hitherto acted in the matter, Lornie having dealt personally with Messrs Gibson & Spears. Upon examining the titles Messrs Dow & Sons took objection to the validity of the title to the new factory, and Lornie refused to take a disposition of the subjects. Some negotiations took place between the parties with a view to compromise, but these were unsuccessful. During these negotiations Lornie removed about 130 looms from the old factory to his own mill.

On 16th January 1889 Carter brought an action against Lornie, concluding for decree ordaining him to implement his part of the minute of agreement of sale of 22d and 23d March 1888 by accepting from him a valid disposition of the old factory, and by making payment to him of the sum of £2000, the agreed-on price and value of said subjects, with interest from Martinmas 1888, or, alternatively, for £2000 in name of damages.

The lease, which was the title to the new factory, was granted, in January 1874, by the Earl of Rosslyn, as heir of entail in possession of the entailed estate of Ravenscraig and others, and bore to be for the period of ninety-nine years from Martinmas 1871. It was granted under the powers conferred upon heirs of entail by the Act 10 Geo. III. cap. 51 (the Montgomery Act).* The lease contained the following conditions: "Declaring that the said James Speedie, Thomas Speedie, and John Speedie, as trustees foresaid, and the said firm of Robert Speedie & Sons, shall be bound, within three years from the said term of entry (Martinmas 1871), to build a dwelling-house or houses of stone, and slated, of the value of at least £50, and to keep and uphold said houses, and all other buildings which may be erected on said piece of ground, in good tenantable and sufficient repair during the currency of the lease . . . and in case the said tenants shall fail to build the said houses within the said space of three years, or in case they shall fail to keep the same in good tenantable and sufficient repair, then this tack shall *ipso facto* be void and null without any declarator or process of law for that effect. . . . And they hereby bind and oblige themselves and their foresaids to plant forest trees on the said vacant space, and attend to the cultivation thereof. . . ." Declaring that, in case they "shall fail to implement the foresaid obligations incumbent on them, or shall contravene any of the conditions and restrictions before specified, the said Earl or his foresaids shall

* The Act 10 Geo. III. cap. 51 (Montgomery Act), provides, sec. 5,—"Provided always that not more than five acres shall be granted to any one person either in his own name or to any other person in trust for him, and that every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void, if one dwelling-house at least not under the value of £10 sterling shall not be built within the space of ten years from the date of the lease, and that the said houses shall be kept in good tenantable and sufficient repair, and that the lease shall be void whenever there shall be a less number of dwelling-houses than one of the value aforesaid to each one-half acre of ground kept in such repair as aforesaid standing upon the ground so leased."

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be entitled to enter to the possession of said piece of ground, and t houses and other buildings erected or to be erected thereupon, in t same manner as if the whole years of this lease had expired, and th shall be entitled to remove the said James Speedie, Thomas Speedie, a John Speedie, as trustees foresaid, and the said firm of Robert Speedie Sons, and their foresaids, summarily from the possession of the said su jects." No dwelling-house or houses or boundary walls had been erect by the lessees, and no trees planted by them. The only building erect by them upon the ground was the linen weaving steam factory alrea mentioned.

The pursuer pleaded, *inter alia;*—(3) The defender having, in kno ledge of the objections now raised by him to the title to the new facto entered into possession of the old factory, he is bound to accept the co veyance thereof tendered to him by the pursuer, and to pay the price the said old factory, the price of the new factory having already be settled. (4) The pursuer having tendered to the defender a valid conve ance of the old factory, the defender is bound to accept the same and pay the price of the said old factory. (5) The defender having tak possession of both factories, and the machinery therein, and dealt wi the same as his own, and still continuing to do so, he is not entitled t refuse to pay the price of the said subjects, or any part thereof. (6) Th defender is barred from taking the objections he now seeks to do to t title to the new factory, by the terms of his agreement with the purs and is bound to accept an assignation of the lease thereof as the same present stands. (7) *Separatim,* The defender's objections to the title the new factory are unfounded, in respect (1) that, on a sound constru tion of the Montgomery Act, it is competent for an heir of entail grant a lease of land under the said Act for the purpose of building manufactory thereon; (2) that the special provisions in the lease question, founded on by the defender, having been inserted for the bene of the landlord, and having been waived or departed from by him, the no fulfilment thereof does not invalidate the said lease.

The defender pleaded, *inter alia;*—(2) The pursuer not being able give the defender a valid conveyance of the subjects contained in the minute of sale, he is not entitled to sue for implement of the said minu

On 26th November 1889, after a variety of procedure, the purs lodged a minute, in which he stated that Lord Rosslyn, having obtain the necessary authority, had granted a new lease to the pursuer, and th "while not admitting the nullity of the former lease, and under reservation as aforesaid, the pursuer tendered, and hereby tenders, t said new lease to the defender as a valid title to the new factory, and implement of the obligations incumbent upon him under and in terms the minute of agreement of sale libelled so far as regards the title of t said new factory."

The new lease tendered by the pursuer was for 81½ years from the te of Whitsunday 1889. The consideration on the part of the tenant was tack-duty of £26, 16s., and an annuity of £10 purchased from the Nor British and Mercantile Insurance Company, payable to the heir of entail in possession and his successors in the entail. The lease contained th clause,—"Declaring, as it is hereby expressly provided and declared, th if at any time the tenants shall allow two years' payment of the before mentioned yearly rent or tack-duty of £26, 16s. to run on into the thir unpaid, they shall *ipso facto* lose and forfeit this tack, which shall then upon fall and return to the said Earl of Rosslyn and his foresaids witho any declarator to be raised to that effect, and without any payment f the houses which may be erected on the said piece of ground, and witho

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prejudice to the right of the said Earl and his foresaids, to draw and receive payment of the before-mentioned annuity during the whole period of the said bond, notwithstanding that the said tack may have been forfeited or have come to an end."

The defender, on 18th December 1889, was allowed to amend his record by adding the two pleas following:—(4) The defender should be assoilzied, on the ground that, even if the title which the pursuer has obtained from Lord Rosslyn is good, the same was not obtained till November 1889, and was not timeously offered to the defender; and that the delay in procuring and offering a title has been so great as entirely to defeat the purpose for which the defender originally made the purchase. (5) The pursuer not having been able timeously to implement his contract, the defender should be assoilzied.

On 23d May 1890, the Lord Ordinary (Trayner) pronounced the following interlocutor:—"Finds that the defender, John Guthrie Lornie, is bound to implement and fulfil his part of the minute of agreement mentioned on record, and that by accepting from the pursuer, Frederick Walter Carter, a valid disposition containing all usual and necessary clauses of the subjects described in the conclusions of the summons at the instance of the said pursuer against the said defender, the said disposition to be adjusted (if necessary) at the sight of Mr H. B. Dewar, S.S.C., and by making payment to the pursuer of the sum of £2000 sterling, with interest thereon from 11th November 1888 till this date, at the bank rates current during that period on deposit-accounts, and at the rate of 5 per cent from this date till paid, and decerns: Finds the said pursuer liable to the said defender in the expenses of process down to the 26th November 1889, and the said defender liable in expenses from and after that date," &c.*

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* "OPINION.—The leading question is, whether the defender, Mr Lornie, is bound to implement a contract or agreement entered into between him and the pursuer, Mr Carter, on 22d March 1888, the terms of which are quoted on record. By that contract or agreement the defender agreed to purchase from the pursuer two factories situated in Sinclairtown, with the engines and machinery therein, at a certain price payable at certain specified dates. It was, *inter alia*, a condition of the agreement that the defender should accept 'the title to the said subjects as it at present stands, and subject to all exceptions of any nature.' The defender refuses to implement the contract on various grounds. He maintains (1) that while the title to the 'old factory' is unobjectionable, the title to the 'new factory' offered to him originally (that is, the title to the new factory as it stood at the date of the contract) is null; that the title now offered to him is also null, or at all events defective; that even if the title now offered is held to be a good title he is not bound to accept it, as it has not been timeously offered, and that if he is not bound to implement the contract as regards the 'new factory,' he is not bound to implement any part of it, as the contract was one and inseparable for the purchase of the two factories.

"This latter proposition I am prepared to adopt, and I think it was not seriously contested by the pursuer. The main question therefore regards the title to the new factory offered to the defender.

"The title to that factory at the date of the contract in question consisted of a long lease granted under the provisions of the Montgomery Act by the Earl of Rosslyn to Speedie & Sons, dated 12th and 20th January 1874. The lease itself is conform to the statutory provisions, and no objection is stated against its validity. It provides that the tenant shall be bound, within three years of their term of entry (declared to be the term of Martinmas 1871), 'to build a dwelling-house or houses of stone, and slated, of the value of at least £50,' &c. In fact no dwelling-house was ever erected on the ground, although a spinning factory of very much greater value than £50 was, and the defender maintains that the fact that no 'dwelling-house' was erected on the ground nullifies the

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Lornie reclaimed.

Argued for the reclaimer;—The title now offered by the respondent was not a title which the reclaimer was bound to accept. The lease contained a valuable consideration other than the rent, contrary to the provisions of sec. 24 of 11 and 12 Vict. c. 36 (The Rutherfurd Act),* and

lease under the express provision of the 5th section of the Montgomery Act. The pursuer's answer to this contention is that the Montgomery Act was an enabling Act, and is to be liberally construed, and that looking to the purpose for which the Act was passed (as expressed in section 4), the erection of a factory may be regarded as compliance with the requirements of the statute as one of the things which might conduce to the formation of a 'village.' In support of this view I was referred to the opinion of Lord Kinloch in *Miller v. Carrick* (5 Macph. 718). With the greatest deference to that opinion, I am unable to hold that the building of a factory is a compliance with the statutory requirement, which in definite and precise terms exacts the erection of a dwelling-house. No doubt the existence of a factory might lead to the construction of dwelling-houses, and the consequent formation of a village, and the erection of factories is not forbidden. But what the statute requires as a condition of the validity of a lease granted under its provisions is the erection of a dwelling-house, and that has not been complied with. The statutory nullity has therefore, in my opinion, been incurred; by no liberality of construction can I read 'factory' or 'spinning mill' for 'dwelling-house.' It follows from what I have said that the defender was not bound to accept such a title to the 'new factory.' The clause in his contract binding him to accept the pursuer's title as it stood, subject to all exceptions, does not affect the defender's right to reject the title offered to him. That clause merely binds the defender to accept a title, defective it may be, and as it stands not marketable, but a title which can be made good. It does not bind him to accept what is not a title at all. The pursuer, however, does not now insist on the defender accepting the title as it originally stood. He has procured at his own expense a title to the subject sold from the Earl of Rosslyn, which appears to me to be open to no objection, and this he offers to the defender. That title, as a valid title to the new factory, I think the defender is now bound to accept. I repel the defender's plea that he is not bound to accept that title because not timeously offered. That plea was only put upon record after the new title had been tendered to the defender. But he had been in actual possession of the factory and of machinery from the date of entry stipulated in his contract, and had treated the machinery therein as his own after he knew of the objection to the original title. No one has ever interfered with his possession or challenged his title.

"This case I regard as one not only distinguished from, but in contrast to the case of *Kelman* (5 R. 816), to which I was referred by the defender. The views expressed by Lord Gifford in that case regarding the right in the general case to rescind a bargain where the title has not been timeously offered are, I think, applicable to this case.

"(2) The defender farther maintained that he was not bound to implement the contract in question, because he had entered into it under essential error induced by the misrepresentations and concealment of the pursuer's agents. The averments on which this plea is based are, in my opinion, not only not proved, but are not true. It is unfortunate for the defender that his evidence (the only evidence supporting this part of the case) is not only contradicted by other witnesses, but is itself contradictory of the statements made by him on record. I do not go into the details of the evidence, but I may say that I have had no hesitation in rejecting the defender's evidence wherever it has been contradicted. . . .

"As regards expenses, I find Mr Lornie entitled to expenses down to the 26th November 1889, when the new title was tendered to him, and liable in expenses from that date."

* The Act 11 and 12 Vict. cap. 36 (The Rutherfurd Act), sec. 24, provides,—"And be it enacted, that notwithstanding any prohibitory, irritant, and resolutive

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was therefore null and void. The annuity of £10 was such a consideration. No doubt it was made payable to the heirs of entail in succession, but that had not the effect of entailing it. It was quite within the power of the present heir of entail to sell it. The third article in the agreement did not bind the reclaimer to accept a totally bad title. It could only apply where the title could be cured by some conveyancing process, in fact, where the rectification of the title was a question of expense only.[1]

Argued for the respondent;—(1) The reclaimer was bound to accept the original title offered. That title was no doubt liable to question, but it was not settled that it was bad.[2] Lord Kinloch's opinion (*Miller*, 5 Macph. 715) was in favour of its validity. Lord Colonsay (6 Macph. (H. L.) p. 105) reserved his opinion. The exception being one which might or might not be taken and sustained fell within the third clause of the agreement.[3] (2) The reclaimer was barred from objecting to the title. He had taken possession of the old mill after he knew of the defect in the title and had raised the question regarding it. (3) In any event, the reclaimer was bound to accept the title now offered. The annuity was not a consideration struck at by the Rutherfurd Act. It was payable to the successive heirs of entail.[4]

At advising,—

LORD ADAM.—This action is brought by Mr Carter, the judicial factor on the sequestrated estates of Robert Speedie & Sons, to have Mr Lornie, the defender, decerned and ordained to implement and fulfil his part of a certain minute of agreement of sale of two power-loom factories belonging to the first party, as judicial factor foresaid, with the whole machinery therein, entered into between the defender and pursuer of date 22d and 23d March 1888. The answer to the pursuer's claim made by the defender is that he is not bound to implement his

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clauses, or any limitation by way of maximum or minimum of the extent of ground to be feued or to be granted in each separate feu, contained in any tailzie dated prior to the 1st day of August 1848, it shall be lawful for an heir of entail in possession of an entailed estate in Scotland, upon notice to the heir of entail next entitled to succeed to such estate immediately after such heir of entail in possession, with the approbation of the Court, to be obtained in the form and manner hereinafter provided, to grant feus or long leases of any part of the said entailed estate for the highest feu-duty or rent that can be got for the same, such feus or long leases so granted by him not exceeding in all one eighth part in value for the time of such estate; provided always, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the tack duty or rent for granting any such feu or lease, nor to grant any such feu or lease of the mansion-house, offices, or policies of the estate; and such heir shall be entitled to make, at the sight of the Court, all such feu-charters, or other feu-rights, or tacks or leases, as shall be necessary; and in case any such grassum, fine, or consideration shall be taken, and in case any feu or lease hereby prohibited shall be granted, such feu or lease shall be null and void; but nothing herein contained shall prevent, or be construed to prevent, any heir of entail in possession from exercising any power of granting feus or leases which may be contained in the tailzie under which he possesses, more extensive than the power of granting feus or leases hereby conferred."

[1] Carruthers v. Stott, May 26, 1825, 4 S. 34.

[2] Miller v. Carrick, March 29, 1867, 5 Macph. 715, 39 Scot. Jur. 368, 6 Macph. (H. L.) 101, 40 Scot. Jur. 530.

[3] Waddell v. Pollok, June 19, 1828, 6 S. 999.

[4] Stewart v. Murdoch, Jan. 27, 1882, 9 R. 458.

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part of the agreement, because the pursuer cannot give him full implement of his part.

By the agreement in question Mr Carter, the pursuer, agreed to sell, and Mr Lornie, the defender, to purchase, two large power-loom factories in Sinclairtown, with the steam-engines and machinery therein, on the following terms:—The price was to be £2000 for each factory and the machinery therein; the price of the new factory being payable within six weeks from the date of the agreement and the price of the old factory at Martinmas 1888. The third clause of the agreement contains a condition of which we have heard a good deal. It is in these terms:—"(Third) The second party shall accept the title to the said subjects as it at present stands, and subject to all exceptions of any nature, and the first party shall not be bound to grant warrandice, except from his own proper facts and deeds only."

Now, it is to be observed that it is not disputed, and could not be, I suppose that the purchase of the two factories is all one contract, the price being £4000. Not long after the date of the agreement the defender paid £2000 as the price of the new factory, and got possession of both factories; and what is now sought as the fulfilment of the agreement between the parties, is that the defender should pay £2000 for the old factory, and accept a disposition of the old factory. The defender, however, although he has no objection to the title to the old factory, answers, and rightly in my opinion, that the contract is one contract for the sale of both the factories, and that the pursuer cannot give him a good title—that is, a title he is bound to accept—to the new factory. The question whether the pursuer is entitled to insist on the agreement being implemented turns on whether the pursuer is or is not in a position to give the defender a title which he is bound to accept.

The pursuer puts his case in two ways. He says, in the first place,—"I offered you, and still offer you, an existing lease, which is a good lease, and constitutes a good title to the new factory"; and, as an alternative, the pursuer offers the defender a second lease, which he says is a good title to the subjects at least in this sense, that it is a title which the defender is bound to accept. The question whether the leases tendered are or are not titles of that kind depends on the construction of the third head of the agreement. The pursuer contends, having regard to that clause, that they are, and the defender that they are not.

The clause is not of an unfamiliar kind, and I have always understood that such clauses applied to and covered defects in the progress of titles or other defects of that kind which could be remedied, but that it did not apply where it could be shewn that no good title could be given. I think the meaning of such a clause is, as Lord Kinnear put it in the course of the discussion, that the purchaser is bound to take a marketable title, and nothing else.

The question then comes to be whether the leases in this case are such titles as the purchaser is bound to accept. The first lease, which was originally tendered to the defender bears to be entered into between the Earl of Rosslyn and the trustees of John Speedie, and is dated in January 1874. It is granted by the Earl of Rosslyn as an heir of entail, and, though on the face of the lease there is no reference to the Montgomery Act, it is admitted that only under that Act could such a lease have been granted. It contains consequently, in terms of that Act, this stipulation:—"Declaring that the said James Speedie, Thomas Speedie, and John Speedie, as trustees foresaid, and the said firm of Robert

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& Sons, shall be bound, within three years from the said term of entry, to build a dwelling-house or houses of stone, and slated, of the value t £50." Now, it is admitted that the building erected is, and always , a factory, and that no dwelling-house has been erected, and therefore tion to the lease is that, in terms of the Act, it is null and void. I do that we are bound in this case to decide whether it is an absolutely as regards a question with an heir of entail. It is enough to say that, n its face so patent an objection, it is not a marketable title, or such a purchaser is bound to take.

uestion under the second lease is different. It is rather a curious docu- As the reporter says in his report to the Lord Ordinary, it is a novel lease. The Earl of Rosslyn agrees to accept an annual payment of . in respect of the lease, but that consideration is made up in a curious addition to the rent of £26, 16s. stipulated for from the tenant, the rates that the pursuer has purchased from the North British and Mer- nsurance Company an annuity of £10, payable to the Earl of Rosslyn successors in the entail for the period of the lease, and that he has ver to the Earl the bond under which the annuity is payable in pur- f the arrangement under which the lease is granted. These two sums 16s. and £10, it is said, "together make up the yearly sum of £36, 16s., e whole amount of the annual rent or tack-duty for the said subjects, as d and arranged between the parties hereto, and set forth in the petition entioned." Then follows a clause declaring "that if at any time the shall allow two years' payment of the before-mentioned yearly rent or of £26, 16s. to run on into the third unpaid, they shall *ipso facto* forfeit this tack."

aid that that is so clearly a valid lease that the defender is bound to It is certainly novel to make part of the rent payable in the form of ty by an insurance company. Suppose,—improbable as it may appear,— North British and Mercantile Insurance Company failed, what would osition of an heir of entail under the lease? He could recover £26, 16s. only from the tenant. How could anyone maintain that in that case e was not to the prejudice of the heir of entail and reducible. It is in ion impossible to make an obligation by an insurance company or other on of that kind part of the consideration for a lease. If such an obliga- to be accepted, why not a guarantee by a private individual? In my e rent of land is payable out of the fruits of the land, and on that ground rs to me that this lease is not such a title as the purchaser is bound to because it discloses on its face that it is not marketable.

pursuer thus being in my opinion not able to implement his part of the nt by tendering to the defender a marketable title, that would be an the case, were it not that the pursuer maintains alternatively, that the r is barred by his conduct and actings from insisting in any such plea the title tendered him is not marketable. As I understand it, the ground contention is that the defender knew that the first lease was bad, and that nstanding this knowledge he entered into possession of the subjects. I able to follow that argument. So far as I can see, the defender took up ition that the contract entitled him to have a valid title, and that he into possession under the agreement for such a title, and was quite d to act as owner of the property purchased by him. I do not think it

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is proved that he knew the lease to be a bad lease, and indeed the pursuer does not yet admit that to be the case. I cannot see anything in the defender's acting which disentitles him to stand on his right to have a good marketable title given him, and I am therefore of opinion that the interlocutor of the Lord Ordinary must be recalled.

LORD M'LAREN.—I concur.

LORD KINNEAR.—I agree entirely with the opinion of Lord Adam, and should only like to add, what I presume his Lordship will have no difficulty in accepting, that, although the title tendered to the defender were not marketable, he would be bound to accept it if it could be made marketable by some expenditure which he could incur, and that by his acceptance of the stipulation in the 3d clause of the agreement. But the objection he states is not one that could be amended by anything he could do, or apparently by anything the pursuer could do either.

LORD ADAM.—I quite agree with the observation made by Lord Kinnear, that the defender would have been bound to accept the title if it could have been made marketable by some expenditure on his part. I thought that I had indicated that in what I said as to defects in the progress of titles, and other defects of a similar kind which can be remedied.

LORD PRESIDENT.—I am of the same opinion as Lord Adam, and I also concur with the observations made by Lord Kinnear. If the objection to the title were that it is bad as it stands, and if it were capable of being made a good title, the dispute would then resolve itself into the question, who was to bear the expense of making the title good, and that would depend on the terms of the agreement. I agree that if the title were in the position that it could be made good, there would be strong ground for the contention that the defender should bear the expense of making it good. But the case is not of that kind.

I would add in conclusion that the only difference of opinion between the Lord Ordinary and ourselves is as regards the second lease tendered to the defender, because the Lord Ordinary is clearly of opinion that the first lease granted under the Montgomery Act, is not a good title. The part of his opinion to which we take exception is the following:—"The pursuer, however, does not now insist on the defender accepting the title as it originally stood. He has procured at his own expense a new lease from the Earl of Rosslyn, which appears to me to be open to no objection, and this he offers to the defender. That title as a valid title to the new factory, I think the defender is now bound to accept." That is really the only point of difference between the Lord Ordinary and ourselves, and as regards that point I entirely agree with Lord Adam.

After the Court had advised the case, counsel for the pursuer stated that Lord Rosslyn who had granted the two leases which had been considered by the Court had died, and that the pursuer had reason to believe that his successor who had been born since 1st August 1848, and who could accordingly disentail the entailed lands without consents, would disentail the lands and grant him a lease of the new factory for the unexpired portion of the former lease, which he would then be in a position to tender to the defender as a valid title.

The Court, on 13th November 1890, recalled the interlocutor of the Lord Ordinary, and appointed parties to be further heard.

On 11th December counsel for the pursuer tendered a minute in which

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it was stated that a letter had been received from Lord Rosslyn, offering to apply to the Court for disentail of the lands, and on that being obtained to execute a new lease of the new factory for the unexpired portion of the former lease; and that the pursuer undertook to obtain such a lease to be adjusted at the sight of the Court and to tender it to the defender in fulfilment of his agreement. Counsel for the defender objected to the minute being received, on the ground that the defender was not now bound to accept the title offered in fulfilment of the pursuer's obligation.

It was agreed that the discussion should proceed on the footing that there was now tendered to the defender a title which was open to no objection.

Argued for the defender;—The tender was not timeous (1) as a matter of process, (2) as a matter of contract. (1) The pursuer closed the record upon a definite view of the law. He was allowed afterwards to tender a new lease and amend his record. Upon the record so amended he had gone to final judgment. He was not now entitled to ask that the process be so altered that he would be enabled to present to the Court a new ground of action. That would be equivalent to a new action.[1] (2) As matter of contract the tender was too late. The pursuer had broken his contract. The possession which the defender had had did not amount to more than the keeping of a caretaker in the factories. It was not such complete possession as he was entitled to under the agreement. His position was therefore the same as if he had not obtained possession at all. That being so he was entitled to refuse the present tender.[2]

Argued for the pursuer;—Beyond the question of expenses no question of process was involved in the present tender. When a title was held to be unmarketable the course followed by the Court was either to sist process till a valid one could be obtained, or to dismiss the action.[3] As matter of contract the tender was timeous, as the defender had had full and complete possession from the dates contracted for.

LORD PRESIDENT.—According to the view which I take of this case, it can be disposed of on a very simple ground. Referring back to what was decided in November last, it appears to me that the important fact upon which everything hinges here is the fact that the purchaser of the new factory, which was a lease-hold subject, took possession upon his title as purchaser, and upon no other title. The possession taken embraced not only a heritable subject, but a great deal of machinery. That machinery the defender has proceeded to dispose of and use for his own purposes as the proprietor thereof. That being so, it appears to me that the defender's mouth is entirely shut against maintaining the plea that this bargain of sale has come to an end through lapse of time, or through failure on either side to fulfil the contract, because the contract has been to a certain extent fulfilled and taken advantage of by himself. The parties cannot be restored against what has been done, because the possession taken by the defender has innovated the whole matter, and converted the machinery in the

[1] Whitworth Brothers v. Shepherd, Dec. 2, 1884, 12 R. 204; Stewart v. Field, July 19, 1871, 9 Macph. 1057, 43 Scot. Jur. 583; Mackenzie v. Munro, March 17, 1869, 7 Macph. 676, 41 Scot. Jur. 374.

[2] Hunter v. Carswell, Jan. 17, 1822, 1 S. 271; Tilley v. Thomas, Nov. 11, 1867, L. R. 3 Chan. App. 61; Kelman v. Barr's Trustee, May 21, 1878, 5 R. 816.

[3] Dick v. Cuthbertson, Nov. 30, 1830, 9 S. 93, 3 Scot. Jur. 50, aff. 5 W. & S. 712; Carruthers v. Stott, May 26, 1825, 4 S. 35; Fleming v. Hazley's Trustees, June 6, 1823, 2 S. 374; Raeburn v. Baird, July 5, 1832, 10 S. 761, 4 Scot. Jur. 562.

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factory into machinery for his own factory at Pathhead. I can therefore pa no attention to the plea that this contract may now be regarded as having com to an end. Now, that being the state of matters it seems to follow almost necessity that the bargain being still an undissolved bargain if it be capable being carried out must be carried out, and the defender cannot refuse to do s He is now offered what appears and what we assume at present to be a goo title to the new factory premises, and he is bound to take that title.

LORD ADAM.—The pursuer now tenders, in order to get implement of his co tract with the defender, a lease which we must assume for the purposes of th argument to be a good lease. The answer made by the defender is that this lea is tendered too late, for two reasons, in the first place in respect of the period the process at which the tender is made, and in the second place in respect certain facts and circumstances apart from the matter of process.

With regard to the first of these objections, I think Mr Johnston advanc a proposition for which there is no authority at all, because his contenti practically came to this, that, wherever a party selling a property produces doubtful title, he is not entitled to have the opinion of the Court on the qu tion whether it is a marketable title or not, except on the penalty, if the opini of the Court is against him on that matter, of losing all right to insist on impl ment of his contract. I think there is no foundation for such a propositi either in authority or practice. So far as I know the practice of the Court is the other way, for the necessity of tendering a new title only arises when t Court has pronounced an opinion adverse to the quality of the title first offer The objection to a title may be on various grounds. It may be objected th there are objectionable clauses in the title, or that the progress is defective, that the title is not a good title at all. But as soon as the pursuer can cure defect in the progress of titles, if that is the defect complained of, or can pr duce a good title in place of a defective title, he is entitled to offer that title the defender, and insist on implement of the contract of sale.

Now, what is the difference between such a case and the present? The o difference is that the pursuer in this case could not, till recently, cure the de in the title he offered to the defender, but to my mind that makes no differen because he now makes a tender of a good title, and it does not matter m whether six months ago it was not in his power to make such a tender. Th disposes of the defender's objection on the matter of process.

The next objection is that the new lease is tendered too late, because two ye and a-half have elapsed since the date of the agreement between the parties. think there might be a great deal in that objection if matters had remain entire, and the defender had not entered into possession of the subjects, wh he was entitled to under the agreement, as was stated to be the case in some the authorities quoted to us, or had even declined to enter into possession the ground that the title tendered to him was defective. He might or mig not in these circumstances have had a good plea for repudiating the contra but there is no place for such a plea here, because the pursuer put the defend in possession of the subjects even before the date at which he was entitled possession under the agreement, and the defender has since continued in poss sion of them, and has intromitted with and carried away a great part of th moveable subjects, which are of equal value to the heritable subjects, to anothe place. That being the state of the case, the defender now comes forward an

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'I admit that the pursuer now offers me a good title, and that I have ssession, but the offer is made too late." That is a contention to which not listen for a moment, and I think, therefore, that the pursuer's tender of lease is not too late on either of the grounds maintained by the defender.

D M'LAREN.—The argument for the defender was maintained under two es, a question of process and a question of contract. I confess I have en able to see any clear distinction between these two grounds. It seems that the whole argument resolves into this, that the purchaser claims to titled to be freed from his contract, because he says that the fulfilment of ontract on the part of the seller has come too late. There are cases no where one party to a contract of sale may resile. The strongest case pro- is that of disconformity between the subject offered and the subject pro- d to be sold. Even there the rule is not absolute; because, while in the of sales of goods we generally hold that any disconformity entitles the pur- er to reject the goods, that is not so in contracts relating to buildings or hinery. It is then a question of degree, and for slight disconformity we do hold that the purchaser may put an end to the contract. Then there is the ction that possession has not been given in due time, and looking to the s cited, I think that wherever it can be shewn that immediate possession of the essence of the contract, we should apply the same rule to sales of tage as we do in the case of sales of moveables deliverable at noted times. the other hand, if the purchase is merely for investment, and there is nothing uggest that in the intention of either of the parties time was of any great nent, I should not hold that delay in giving possession necessarily infers a charge or rescission of the contract. But certainly the weakest of all cases rescission is the case here offered, where the seller is in a position to give mediate possession, where possession has in fact been given; where the only ault which has arisen is in the title originally offered, and the seller has been ng his best to cure the infirmity in the title to the property. Mr Johnston not shew that the purchaser had suffered any damage except the cost of in- tigating the title in the Courts of law, and for this he is no doubt entitled e indemnified. I therefore agree with your Lordship that there is no sub- nce in the defence now stated, and that if a good title is now offered by the er, the purchaser may be compelled to take it, and to pay the price.

LORD KINNEAR concurred.

THE COURT repelled the fifth plea in law for the defender; allowed the minute for the pursuer to be received; continued the cause; found the pursuer entitled to the expenses of this discussion, and reserved all other questions of expenses.

MITCHELL & BAXTER, W.S.—WATT & ANDERSON, S.S.C.—Agents.

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Kerrs v. Lindsay.

MRS JANE WHITE OR KERR AND ANOTHER, Pursuers (Respondents).—*G. W. Burnet.*
WILLIAM LINDSAY, Defender (Appellant).—*Sym.*

Parent and Child—Paternity—Presumption.—Circumstances in which it was ld that a husband and wife had failed to displace the presumption of fact that e husband was the father of a child with which his wife was to his knowledge egnant when he married her.

* Decided Dec. 19, 1890.

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An action was raised by a married woman, with concurrence of her husban against an unmarried man for payment of aliment for a child of which t woman had been delivered on 5th January 1890. The marriage had tak place on 30th August 1889, the woman being thirty years old, her husba forty. The act of connection with the defender was said to have tak place on 7th April 1889, and on 12th April the proposal for the marri which afterwards took place had been made and was shortly afterwar accepted. Both husband and wife deponed that no antenuptial connection h taken place between them, but evidence was led to shew that they had be seen walking together at night about the end of March or beginning of Apr the man having his arm about the woman's waist. They stated that the wi had told her future husband some weeks after their engagement that she w with child to the defender. The husband held no communication with t defender till the child was born, when he wrote to him calling upon him take the child away. The defender admitted having had connection wi the pursuer once in February 1889, but denied any subsequent intercours There had, however, been subsequent opportunity, and a witness deponed th he had admitted the paternity to him before the action was threatened. *He* (*diss.* Lord Trayner) that the presumption that the husband was the father the child arising from his marrying the mother when he knew that she w pregnant had not been displaced, and defender *assoilzied.*

2D DIVISION.
Sheriff of Dumfries.
l.

THIS action was raised in the Sheriff Court at Dumfries in March 189 by Mrs Jane White or Kerr, wife of Samuel Kerr, shoemaker, Sanquhar, wi his concurrence, against William Lindsay, shovel-finisher, Sanquhar, co cluding for inlying expenses and aliment of a child borne by the pursu on 5th January 1890, of which the defender was alleged to be the fathe

The pursuer and her husband were married on 30th August 1889.

The pursuer averred that for two or three years previous to the co ception of the child, the defender had paid attention to her, called fr quently to see her at her mother's house, took long walks with her in th neighbourhood of Sanquhar, and had repeated connection with her, an in particular had connection with her on or about the 7th April 188 when she alleged the child was conceived.

The pursuer denied having had connection with her husband prior t their marriage.

The defender admitted having had connection with the pursuer pri to the month of March 1889, but denied that there had been connectio between them subsequent thereto. He also averred that the pursuer husband was himself the father of the child.

On a proof the pursuer deponed to the truth of the facts averred b her. With regard to her communication to her husband of the fact o her pregnancy, she deponed,—"On or about the 12th April of that yea 1889, Samuel Kerr offered me marriage, and I accepted it. I told him would have to see defender before I could give him an answer. I di not tell Kerr at that time that I had had connection with Lindsay, but told him a few weeks afterwards. I agreed to marry him, but it wa resolved to postpone the marriage. I went and saw defender and tol him what was wrong with me. He owned the child, and said he would do what was in his power for it. He seemed very sorry. It would b fully a month after the child was begotten. . . . Samuel Kerr neve came to the house to see me until the 10th April, but he had often bee in the house for other reasons. His family and mine were very intimate The first time I walked with Kerr was on the 10th April. I had one o two other walks with him before I told him that I had had connection with defender. We stopped having walks then, but he came as usual to my mother's house. Once or twice before our marriage, which took place on 30th August, we had a short walk in company with Jessie M'Kendrick

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er had connection with me before my marriage." In cross-exami-
she stated that she was at a ball on 29th March, when she had
dances with Kerr; that they were in the same party driving home,
t Kerr left her at her mother's door.

el Kerr, forty years of age, husband of pursuer, deponed,—"I was
ver when I married pursuer, and had four children alive. I am
in the United Presbyterian Church. I have known my wife's
or a long time. I proposed marriage to her on 10th April 1889.
quite willing, and made no objection. She said something about
efender. I knew that she had been in the habit of walking with
Ve walked together occasionally altogether for three weeks or a
fter that, every night. She then told me that she was pregnant,
t we had better not walk together in the meantime. It was
he marriage should be postponed. I said I was willing to wait
wo years. I told her she ought to let defender know the condi-
was in. We did not continue walking together as we used to,
ent to her mother's house as formerly. I never had connection
r before marriage. The day after the child was born I wrote to
r. I produce a copy of the letter made by myself. I received an
the next day, which I produce." These letters were in the follow-
ns:—"Sanquhar, 6 Jany. 1890.—Sir,—I have to inform you that
, Jane White, gave birth to a male child yesterday morning, of
he declares you are the father. I may say that I am not disposed
the child to be brought up in my house, and therefore I have to
that you will without delay make arrangements to have it nursed
re. Your immediate attention to this will oblige.—Yours," &c.
ck Bridge, Jan. 7.—Sir,—You can do as you please with your child,
ll never do for it. WM. LINDSAY." "Cross-examined.—. . . When
said she would require to see defender I did not ask her the
. . . I have been called before my kirk-session in connection
e birth of this child. That was to explain why the child was born
vife so soon after my marriage. No discipline was exercised upon
never spoke to defender on this subject. I knew him quite well."
pursuer's mother and another woman swore that they had been
her in the end of April or beginning of May 1889 that she was
ild by the defender. And evidence was also led as to an alleged
on of the paternity by the defender in conversation with a witness
John Hiddleston.

defender deponed,—" . . . It is not true that I had connec-
th pursuer on 7th April. I was not with her that day. In the
of May 1889 a man named Nicol told me pursuer wanted to see
I wrote agreeing to see her. I met her, and she told me she
egnant, and said that I was the father of the child, and I denied it.
for her once after that, and she replied that she could not meet
Between the time that pursuer accused me as I have mentioned,
e time that I got a letter from her present husband I was never
to by any of them about the child. The evidence of John
ston about a conversation with me is not true. Cross-examined.—
once had connection with pursuer, and that was in the end of
ry 1889. Sometimes I walked with her on other occasions in
y and February. I only walked with her once in March, and not
n May. . . . By the Court.—I offered to marry pursuer on
ion that the child was mine, that is, if it came to my time, and
clined."

defender also led evidence to the effect that the pursuer and her
nd had been seen walking together late at night in the end of

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March and beginning of April, and that on one occasion about Kerr had been seen with his arm round pursuer's waist. certain, however, whether this occasion was or was not sub their engagement.

The Sheriff-substitute (Hope) issued this interlocutor:— fact that the pursuer was delivered of an illegitimate mal 5th January last, of which she has deponed that the defe father; (2) that the defender admits having had connectio pursuer in the end of February 1889; (3) that he had oppo connection with the pursuer after that, including the date whe says that the child was begotten, viz., 7th April 1889; (4) that i that before the child was born the defender admitted to a t that the pursuer was with child to him; and (5) that it is that the pursuer's husband had connection with her before thei Finds in law (1) that these facts are sufficient to establish the of the pursuer's child as libelled; therefore repels the defences

The defender appealed to the Court of Session, and argue pursuer and her husband had not married, there might have b

* "NOTE.— . . . . . The pursuer's child was born on 5 last, and her marriage did not take place till 30th August 1889, presumption arises out of the fact of the marriage. The defe is rather that there is a presumption that the child is Samuel K that he married her although he knew that she was pregnant. that is a fair argument to use, but a presumption—especially is not the subject of a rule of law—is not proof, and this p is not an irresistible one. I have known a good many cases have acted in the way in which Samuel Kerr says he has done. a matter of taste. Some men would not marry an unchaste wom would, and many do. Very few would marry a woman who was another man, but experience shews that some men do. Again, ma hope most men if they did so,—would rather seek to hide their w than expose it in a Court. But this again is a matter of taste. To s it may be a matter of compulsion with Mr Kerr, because he appears risk of having to stand discipline unless he can shew that the begotten by another man. I do not think there is any evidence to he was ever unduly intimate with the pursuer before marriage. . .

"It was argued for him that the fact that he was an elder in a ch a presumption in his favour. Left to myself I would not have so held case of *Martin* v. *Smith* (17th May 1834, 12 S. 604, 6 Scot. Jur. 329 was entertained by the Court, and it has been acted on since. As defender, the points which tell against him to a certain extent are h connection with the pursuer at a date prior to the conception, and her o been held that the combination of such facts as these with continued are sufficient to prove a pursuer's case. What is to be considered opp a question of circumstances. I have generally held that there was either when the parties lived in the same house or at the same far or (where they lived at different places) when they had been seen suspicious circumstances. Here the opportunity is very meagrely unless the fact that the parties lived in the same place as they did nection admittedly took place is sufficient. . . .

"On the whole, I am of opinion, though I have arrived at it with that opportunity has been proved.

"I also think that the alleged admission of the paternity is prov the manner of the witnesses, I believe Hiddleston and Sharp rathe defender, and M'Millan's evidence did not shake my opinion. I do reason to believe that Hiddleston concocted the story. He told it this case was or could be thought of, and he gave his evidence appa reluctance."

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against the defender. But the presumption of fact that the husband is himself the father was almost insuperable. There was very considerable intimacy between them prior to their marriage, and even apart from the marriage there would have been a strong case against Kerr. And when it was admitted that he knew of her condition for months before the marriage it was impossible not to believe that he was the father, or thought so. The Sheriff's ground of judgment, viz., that the defender admitted having had connection with pursuer in February, and that opportunity for its renewal existed in April, was unsound. This case was practically ruled by the cases of *Gardner* and *Reid* v. *Mill*.[1]

The pursuer argued;—The evidence of Hiddleston was quite distinct as to the defender having admitted paternity, and there was no reason why he should not be believed. This was the Sheriff's view, and there was no need to traverse *Gardner* or *Reid* v. *Mill*. In these cases, moreover, the spouses were clearly convicted of falsehood, in saying that there had been no intimacy between them before marriage.

Lord Justice-Clerk.—This is a very curious case, and presents some very serious features. It is certain that the pursuer, Mrs Kerr, and her present husband became engaged to be married almost immediately after she had become pregnant, and that the marriage which followed a few months after was entered into by him in full knowledge of her condition. It is also certain that in the spring of 1889 she had had connection with the defender, and it is quite possible that the child might have been his.

It was a most extraordinary position for a man to take up to marry his wife knowing that she was pregnant, and then when the child is born immediately to proceed to bastardise it. That is a most unlikely thing for any man to do, and Kerr gives no explanation of his conduct. It appears that he is an elder of the U. P. Church, and it seems to me that if he had been an innocent man this would have made him averse to run the risk of having his wife give birth to a child a few months after marriage. He is also, it must be kept in view, a man of mature years, a widower with a family, and not an inexperienced youth led on by a designing woman. It accordingly seems to me that his conduct must be taken as an attempt to do his best to repair a wrong he had done to the woman. Apart from the husband's actings, it might be quite as likely that the defender was the father of the pursuer's child as that he was not, but the evidence of the pursuer's witnesses is extremely indefinite, and there is nothing in the proof to displace the presumption of fact arising from Kerr marrying the pursuer when he knew she was pregnant that the pursuer and her husband had had antenuptial connection, and that it was in consequence of it that they got married.

Lord Young.—The question in this case is whether the pursuer has proved as a matter of fact that the defender is the father of the child. I think she has not, and I am even prepared to find in fact that he is not. The pursuer's husband, a man of forty, a widower, and an elder of a dissenting church, begins courting a mill-worker of twenty-nine. Their sweethearting commenced about March; he proposed on 12th April and was accepted. He has been seen out with her pretty late at night, and with his arm round her waist. On his own

[1] Gardner v. Gardner, May 30, 1876, 3 R. 695; Reid v. Mill, Feb. 8, 1879, 6 R. 659.

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crop 1890 on his farm, including the portion assigned to the crofters. The crops so sown by him on that portion amounted to 14 acres of bere, 3 acres of potatoes, and 16 acres of turnips.

On 4th September 1890, in order to preserve his right to reap the crops, he brought a suspension of the decree of ejection. He stated that he did not dispute that the respondents were entitled to get possession of the assigned land, but contended that the decree of ejection ought to be qualified by a reservation of his right to reap the crops sown by him in good faith. It was further stated that the first cutting of hay had been already removed by the respondents.

The respondents stated, *inter alia*:—"It is believed and averred that no part of the seeds for crop 1890 were sown until six weeks or thereby after 3d March 1890, when decree conform was pronounced by the Sheriff as above narrated. During the period since said terms of entry the complainer has had no title to occupy or enter upon said lands, or to interfere with the crops thereon, and his occupation thereof and interference therewith are and have been vitious and illegal." They further stated:—"It is believed and averred that the complainer, so far from sowing the crops referred to in good faith, refused to sow said crops on the land which had been assigned to the respondents, in respect that he had no longer any right to continue in possession of said land, and that he at last consented to do so only after peremptory orders had been given him to that effect by the proprietors, who at the same time undertook to relieve him of all loss he might suffer thereby."

The complainer pleaded, *inter alia*;—(2) The complainer having sown the crops in said land *in bona fide*, is entitled to reap the same, and the decrees of ejection complained of being in prejudice of his said right, he is entitled to suspension thereof as craved.

The respondents pleaded, *inter alia*;—(1) No title to sue. (2) No relevant or sufficient ground of suspension has been stated by the complainer. (3) The respondents having the sole right and title to the possession of the said lands and the crops growing thereon, the complainer is bound to remove therefrom. (4) The complainer having sown said crops *in mala fide*, and at his own risk, is not entitled to suspension of the decrees of ejection complained of, and the note should be refused, with expenses.

The Lord Ordinary (Trayner), on 14th November 1890, pronounced this interlocutor:—"Repels the first and second pleas in law for the respondents: Finds that the crops mentioned on record having been sown by the complainer belong exclusively to him, and that the respondents have no right to the same, and to this effect sustains the second plea in law for the complainer, and repels the second plea in law for the respondents: *Quoad ultra* continues the cause: Grants leave to reclaim."*

* "OPINION.—In 1889 the members of the Crofters Commission, by virtue of their statutory power, assigned to the respondents, in enlargement of their holdings, certain lands then occupied by the complainer. The complainer thinking himself aggrieved by the action of the Commissioners, raised a suspension of their proceedings, and averred that the order or interlocutor of the Commissioners was *ultra vires*. On 4th June 1890 I refused the complainer's note of suspension, and that judgment was affirmed by the First Division of the Court on 11th July 1890. During the dependence of that suspension the complainer sowed the land assigned to the respondents with the necessary seeds for crop 1890, consisting of bere, turnips, potatoes, and hay.

"It is unnecessary to detail the subsequent litigation which took place between the parties. The question now is, To whom do the crops belong? The respondents claim the crops on the ground (1) that they have the sole right and title

THE COURT found that the pursuer had not proved that the defender was the father of her child libelled, sustained the appeal, and assoilzied the defender. No. 79. Dec. 20, 1890. Kerrs v. Lindsay.

EMSLIE & GUTHRIE, S.S.C.—ALEX. WYLIE, Solicitor—Agents.

JAMES SWANSON, Complainer (Respondent).—*Murray—Macfarlane.*
JOHN GRIEVE AND OTHERS, Respondents (Reclaimers).—*Jameson—R. L. Orr.*

No. 80. Jan. 7, 1891. Swanson v. Grieve.

Crofters Holdings (Scotland) Act, 1886 (*Act* 49 *and* 50 *Vict. cap.* 29)—*Enlargement of holdings—Entry to assigned lands.*—In April 1889, by order of the Crofter Commissioners, certain lands—part of a farm held under a lease dated subsequently to the passing of the Crofters Act, 1886—were assigned to certain crofters for the enlargement of their holdings. The landlord and tenant of the farm thereafter brought a suspension and interdict to have the crofters interdicted from entering upon the assigned lands, on the ground that they had no title, not having obtained decree conform to the order from the Sheriff in terms of the Act, and obtained interim interdict. After certain procedure decree conform was pronounced on 3d March 1890, and the interim interdict was recalled. A second note of suspension and interdict against entering the lands was thereafter brought by the landlord and tenant on the ground that the order and all that had followed upon it was *ultra vires* of the Commissioners, the farm being held under the above lease. In July 1890 the reasons of suspension were repelled. Meantime the tenant had sowed the assigned lands with the necessary seeds for crop 1890. In August 1890 the crofters obtained a decree of ejection against the tenant, and claimed right to the crop sown.

In a suspension by the tenant the Court *held* that in the circumstances the tenant had a right to sow the crop, and that the crop so sown by him belonged exclusively to him.

Question, whether the crofters might have a right to the profits of the crop.

THIS was a sequel to the case of *Traill's Trustees* v. *Grieve*, reported *ante*, July 11, 1890, 17 R. 1115. 1ST DIVISION. Lord Trayner. C.

By order, dated 24th April 1889, the Crofter Commissioners assigned certain subjects, amounting to 65 acres arable land, and 22 acres pasture, forming portion of the farm of Elsness, Orkney, then occupied by Mr James Swanson, as agricultural tenant, under the trustees of Mr J. C. Traill of Rattar, the proprietor, to John Grieve and others, crofters, in enlargement of their holdings, with possession at 11th November following.

The proprietor and tenant in November following brought a suspension and interdict in the Sheriff Court to have the crofters prevented from taking possession on the ground that decree conform had not been obtained from the Sheriff under the 28th section of the Crofters Holdings Act, 1886. Interim interdict was granted, and after certain procedure both in the Court of Session and in the Sheriff Court, decree conform was pronounced by the Sheriff-substitute on 3d March 1890, and the interim interdict was recalled.

On 13th March 1890 the proprietor and tenant presented a second note of suspension and interdict, praying the Court to suspend the order of the Commissioners and the decree following on it, on the ground that they were *ultra vires* of the Commissioners. The note was refused by the Lord Ordinary (Trayner) on 4th June 1890, and a reclaiming note against his Lordship's interlocutor was refused by the First Division, as reported *ante*, July 11, 1890, 17 R. 1115. In August 1890 the crofters obtained decree of ejection against the tenant in the Sheriff Court.

Meantime Mr Swanson, the tenant, had sown the necessary seeds for

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the Sheriff for decree conform, which alone could give them a legal title to enter. In consequence, a suspension and interdict was brought to prevent their doing so—the ground of suspension being that the respondents had failed to obtain the decree conform, and the objection—being the only objection which was insisted on—was removed when, *pendente processu*, the necessary decree was obtained. The plea of *mala fides*, which was the prominent question argued in this discussion, was largely founded upon the contention that the landlord and tenant might have raised in the first suspension the other objections to the order of the Crofter Commissioners which were subsequently raised in the second suspension. I shall consider that question afterwards, but meantime I may say that when a party litigant has one good objection to a proceeding of this kind he is well entitled to make it, and to have effect given to it. That is all that was done. But the objection founded upon the want of the decree conform having been removed, another suspension was brought, in which the proceedings of the Crofter Commissioners were complained of as being *ultra vires*, and beyond their statutory powers. That question gave rise to a lengthened discussion and was decided by this Division of the Court in July last. The question was one certainly not unattended with difficulty; indeed, it appeared to me to be one of considerable nicety and importance, and although ultimately, upon a examination of the matter, I came to think that the Crofter Commissioners had not exceeded their powers, it still appeared to me that the proceedings had placed both the landlord and tenant in a position of great embarrassment. I came to be of that opinion because the Crofters Act seemed to take no interest in, and to be absolutely silent in regard to any provisions for adjusting or regulating the relations of the original proprietor and tenant of the lands, a slice of which was to be given to the crofter. I cannot accordingly say that the case was a very clear one; it was rather one which any person who was interested was entitled to have seriously considered and decided; and, therefore, so far as this point is concerned, I am not disposed to think that either landlord or tenant was in *mala fide* in litigating it, the effect of the litigation being to suspend the order of the Commissioners. It therefore follows that the crofters who were prevented from getting possession of the subjects are not now entitled to say that they have been treated in any spirit of vindictiveness, or ill-will, or *mala fides*.

I have made these observations as negativing the existence of *mala fides* on the part of Mr Swanson, but I must guard myself by saying that I am not satisfied that the present question turns upon the existence or non-existence of *mala fides*. It rather appears to me that until the decision of July 1890 the landlord and tenant had no alternative but to continue the state of possession as it previously existed. If the portion of the farm which had been assigned to the crofters had been left uncultivated by the tenant, the landlord could not in the circumstances have been disabled from claiming rent, or, at least, the tenant might have rendered himself subject to an action for failing to cultivate it. *Mala fides* is nothing but a state of feeling, and I think the position of the landlord and tenant was such that, pending the litigation, they had no course to follow except that which they took.

That being so, what is the ground of the Lord Ordinary's judgment? Pending the litigation, there were three positions in which the farm might have been placed. In the first place, it might have been left uncultivated, an alternative which is not to be entertained after what has been said. In the second place, it might have been handed over to the crofters, an alternative which

quite inconsistent with the pleas of the complainers in the second suspension, and would virtually have amounted to a surrender of the position which the proprietor had taken up. The third alternative was the one which was adopted, that the tenant should continue to cultivate his holding under the lease until the question at issue was finally decided. In adopting this alternative, I think the parties acted rightly, the landlord and tenant were bound to one another—mutually bound to one another—to continue the state of possession so long as the litigation lasted. The Lord Ordinary has accordingly held, and I think rightly, that the crop raised during the interval caused by the litigation—the crop of 1889-90—cannot belong to the crofters. They did not sow it, nor did they labour the ground, and they had no concern with any part of the work necessary to produce the crop.

There may be a further question, how far the crofters who have been found in the end to be right, and who ought to have been in possession of the farm, may not be entitled to the profits of the crop which was sown by Mr Swanson. There is nothing upon this record to raise such a question, which is one of difficulty, and involving some little embarrassment on a ground which has been suggested by Mr Jameson, that, in his view, it will be necessary to deduct the value of the labour, because if his clients had been in possession they would probably have themselves in person laboured the ground, and would not have hired others to do so as the tenant did. But there is no averment upon this matter on record, and in regard to the only question there raised, I agree with the result at which the Lord Ordinary has arrived.

LORD ADAM.—The sole question which we have to decide is whether the respondents have a right to the crops grown during the season 1889-90 on certain parts of the farm of Elsness, which by an order of the Crofter Commissioners, dated 24th April 1889, were assigned for the enlargement of the respondents' holdings. The ground upon which the complainer claims the crop is that it was he who sowed it. The respondents, on the other hand, say that the land upon which it was sown was theirs. Both parties have argued the case as if it turned upon the question whether there was or was not *mala fides* on the part of the complainer. It was not disputed on the one hand by the respondents that if the crop was sown *in bona fide*, then the general rule *superficies cedit sementem sequitur* applies. It was not, on the other hand, disputed by the complainer that, if the crop was sown *in mala fide*, then the brocard in question would not apply.

I have a doubt along with your Lordship whether that is the ground upon which the complainer is entitled to defend his rights. But I take the case upon that footing. The order of the Crofter Commissioners was pronounced on the 24th April 1889. A suspension and interdict was brought in November 1889 by Mr Swanson to have the respondents prevented from entering into possession of the subjects assigned to them until they should obtain decree conform giving them an active title to do so. Mr Swanson's position in that suspension was ultimately admitted by the respondents to be sound, and upon 31 March 1890 decree conform was, on their application, pronounced by the Sheriff-substitute. Accordingly, down to that date, there was no *mala fides*, and no reason why Mr Swanson should not have sown the land as usual. That objection to the respondents' title was, however, cured by the order being registered, as I have said.

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Then arose another question under a second suspension which was brought on the ground that the order of the Crofter Commissioners was *ultra vires*. It was presented on 13th March last, and the Lord Ordinary's interlocutor refusing it was affirmed by this Division of the Court on 11th July following. It is needless to say that the crops were sown during the progress of the litigation, and the question comes to be, was the complainer *in mala fide* when he so sowed the crops? *Mala fides* necessarily implies an improper state of mind on the part of the person with regard to whom the allegation is made. But the respondents' averment in the suspension does not set forth any *mala fides* on the part of Mr Swanson. The averment is,—"It is believed and averred that the complainer, so far from sowing the crops referred to in good faith, refused to sow said crops on the land which had been assigned to the respondents, in respect he had no longer any right to continue in possession of said land, and that he at last consented to do so only after peremptory orders had been given him to that effect by the proprietors, who at the same time undertook to relieve him of all loss he might suffer thereby." If it had been averred that Mr Swanson and his landlord had acted in concert, and had sown the crops in pursuance of a scheme to defeat the legal rights of the respondents, it might have been different; but where the tenant was perfectly willing to renounce possession and the landlord insisted on his sowing a crop in order to retain it, I do not think that such a course can be said to amount to *mala fides* on his part. I think the crop was sown in perfect *bona fides*.

There may be questions behind which are not raised in this record, and which are not now decided, as to whether in an action of damages, or in any other action that may be brought by the respondents, they would be entitled to the profits of the crop. Upon that matter I say nothing.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT adhered.

JOHN C. BRODIE & SONS, W.S.—J. D. MACAULAY, S.S.C.—Agents.

No. 81.
Jan. 10, 1891.
Whyte's Factor v. Whyte.

J. A. MOLLESON, C.A. (Whyte's Factor), Petitioner (Respondent).—*Sym*
GEORGE WHYTE, Respondent (Reclaimer).—*Party.*
PHILLIS WHYTE AND OTHERS, Compearers.—*Younger.*
WELSH & FORBES, Compearers.—*Macfarlane.*

Trust—Sale of trust-estate—Powers of trustees.—*Held* that a power given by testator to his trustees to sell his heritable estate, with the exception of certain lands, implied a prohibition against selling the excepted lands.

1ST DIVISION.
Lord Kincairney.
C.

GEORGE WHYTE of Meethill and Burnhaven died in 1869 survived by his wife, one son, George Whyte, and three daughters. By his trust-disposition and settlement he directed his trustees, *inter alia*, to pay his debts, and to hold the residue of his estates for his wife in liferent, and upon her death to pay certain legacies to each of his daughters. He directed his trustees, upon the death of his widow (which was declared to be the period of vesting), to hold the residue for behoof of his son and the heirs of his body. The settlement conferred upon the trustees power to intromit with the whole estate, heritable and moveable, "and to sell and dispose of the same (with the exception of the said lands of Meethill and Burnhaven) by public roup or private bargain, in any manner and subject

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ADAM.—The sole question which we have to decide is whether the ents have a right to the crops grown during the season 1889-90 on parts of the farm of Elsness, which by an order of the Crofter Commis- dated 24th April 1889, were assigned for the enlargement of the ents' holdings. The ground upon which the complainer claims the crop it was he who sowed it. The respondents, on the other hand, say that d upon which it was sown was theirs. Both parties have argued the if it turned upon the question whether there was or was not *mala fides* part of the complainer. It was not disputed on the one hand by the dents that if the crop was sown *in bona fide*, then the general rule *sementem sequitur* applies. It was not, on the other hand, disputed by nplainer that, if the crop was sown *in mala fide*, then the brocard in on would not apply.

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Trust—Sale of trust-estate—Powers of trustees.—*Held* that a power
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Jan. 13, 1891.
Cleland v. Allan.

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At advising,—

LORD JUSTICE-CLERK.—The deceased Gavin Allan in 1859 had a settlement prepared by Mr Torrance, writer, which proceeded on the narrative that it was a duty incumbent on him to settle his affairs in case of his death. He accordingly settled his affairs in one bequest, and "for the love, favour, and affection I have and bear to Elizabeth Cleland or Allan, my spouse, assigned and disponed to her, her heirs, executors, and assignees whomsoever, heritably and irredeemably," certain heritable property, and generally his whole estate and effects, heritable and moveable, real and personal, and appointed her his executrix. He was predeceased by his wife, Elizabeth Allan, and married afterwards a second wife, Margaret Smith or Allan. In 1889 he died survived by his second wife. His will remained unaltered at his death.

The question which we have to decide is whether this deed of settlement was a provision in favour of his first wife and fell when she predeceased her husband, or a bequest to her and her heirs which remained effectual after her death.

The question seems easy enough in itself. We must look to the terms of the deed of settlement. When I look at the deed, I am of opinion that it is not of the nature of a provision but a settlement by the deceased of his affairs with the intention definitely expressed that all is to go to his wife and her heirs. There is nothing in the deed to shew that that was not what he intended. The preliminary narrative points to a general settlement of his affairs, and there is nothing in the deed to militate against his having made such a settlement. He left this deed behind him at his death. He never cancelled it. It never seems to have entered into his mind after making the deed that he still had a duty incumbent on him to settle his affairs.

Taking that view of the case, I think it falls under *Halliburton*, 11 R. 979. In that case a truster in his trust-settlement directed his trustees to convey the residue of his estate to Barbara Halliburton, his youngest daughter, and her heirs and assignees, and the grantee having predeceased the truster it was held on the death of the truster that the heirs of the daughter, who had predeceased, were entitled to succeed. In the case of *Findlay* v. *Mackenzie*, 2 R. 909, the intention to make a provision for his widow was expressed by the testator in the deed, and the Lord President in his opinion in the case of *Halliburton* specially distinguished it from *Findlay* v. *Mackenzie*.

Here there being no children of the marriage, it was quite natural that the husband should leave all his property to his wife and her heirs. It is not for us to inquire into the reason why he preferred his first wife's heirs to his own. That matter was entirely in his own hands. According to the terms of this deed, it was a settlement of his affairs. The presumption is, that having made such a settlement, and having left it uncancelled, he intended to adhere to it. I think therefore that we should decide this case by answering the first question in the affirmative and the second in the negative.

LORD YOUNG.—I concur, but not without some misgiving whether, if the testator were alive, he would answer the questions as proposed.

The case deals only with heritage, consisting of a house. There seems to have

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and I hereby nominate and appoint the said Elizabeth Cleland or Allan to be my executrix and universal legatrix, ... declaring always that the said Elizabeth Cleland or Allan shall be bound and obliged, by acceptance hereof she binds and obliges herself, out of my said estate and effects above conveyed, to make payment of all my just and lawful debts, deathbed and funeral expenses."

Mrs Allan died without issue on 20th March 1884, and on 21st August 1884 Gavin Allan married again, his second wife being Margaret Smith or Allan. He died at Motherwell on 16th December 1889, without issue by either marriage, but survived by his second wife, who was appointed his executrix-dative *qua* relict.

Gavin Allan's whole heritable estate consisted at his death of heritable property, which was valued at about £1200. The free moveable estate left by him amounted to £200.

The widow claimed her legal rights in the estate.

Questions having arisen as to the person entitled to succeed to the heritable property, this special case was presented for the opinion and judgment of the Court. The heir-at-law of Elizabeth Cleland or Allan was the first party, and the heir-at-law of Gavin Allan was the second party thereto.

The first party, as heir of Elizabeth Cleland or Allan, claimed the heritable property, subject to the widow's terce, as conditional institute under the said disposition and settlement. The second party claimed the heritable property, subject to the said burden of terce, as the heir-at-law of Gavin Allan, maintaining that the said disposition and settlement was evacuated by the predecease of Elizabeth Cleland or Allan, and that Gavin Allan died intestate.

The following questions at law were submitted to the Court:—"(1) Is the first party, as heir of Elizabeth Cleland or Allan, entitled to the said heritable property left by the deceased Gavin Allan, subject to the widow's terce, as conditional institute under the said disposition and settlement? (2) Is the second party entitled to it, as heir-at-law of the deceased Gavin Allan, in consequence of the said disposition and settlement having been evacuated by the predecease of the said Elizabeth Cleland or Allan, it having been conditional on her surviving her husband, and that he thus died intestate?"

Argued for the first party;—This deed was preserved by Mr Allan and was never revoked by him. This shewed that he intended it should take effect. The testator passed over his own heirs and gave everything to his first wife and her heirs. The disposition constituted Mrs Elizabeth Allan's heirs conditional institutes in the event of her decease. The case of *Findlay* v. *Mackenzie*[1] did not apply, as the disposition in that case expressly bore to be granted as a provision to a wife in the event of her survivance.[2]

Argued for the second party;—This deed was a provision in favour of the granter's wife. This case exactly resembled that of *Findlay*, and in his opinion in *Halliburton* the Lord President excepted cases resembling that of *Findlay*. The general rule to be gathered from these decisions was that where a deed was of the nature of a postnuptial marriage-contract in which a husband granted a provision to his wife in implement of no legal obligation, the presumption was that the disposition was effectual only in the event of the wife's survivance. If the deed was looked at

[1] Findlay v. Mackenzie, July 9, 1875, 2 R. 909.

[2] *Authorities cited.*—Erskine, iii. 9, 9; Boston v. Horsburgh, Feb. 13, 1788 M. 8099; Halliburton v. Halliburton, June 26, 1884, 11 R. 979.

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The question seems easy enough in itself. We must look to the terms of the deed of settlement. When I look at the deed, I am of opinion that it is not of the nature of a provision but a settlement by the deceased of his affairs with the intention definitely expressed that all is to go to his wife and her heirs. There is nothing in the deed to shew that that was not what he intended. The preliminary narrative points to a general settlement of his affairs, and there is nothing in the deed to militate against his having made such a settlement. He left this deed behind him at his death. He never cancelled it. It never seems to have entered into his mind after making the deed that he still had a duty incumbent on him to settle his affairs.

Taking that view of the case, I think it falls under *Halliburton*, 11 R. 979. In that case a truster in his trust-settlement directed his trustees to convey the residue of his estate to Barbara Halliburton, his youngest daughter, and her heirs and assignees, and the grantee having predeceased the truster it was held on the death of the truster that the heirs of the daughter, who had predeceased, were entitled to succeed. In the case of *Findlay* v. *Mackenzie*, 2 R. 909, the intention to make a provision for his widow was expressed by the testator in the deed, and the Lord President in his opinion in the case of *Halliburton* specially distinguished it from *Findlay* v. *Mackenzie*.

Here there being no children of the marriage, it was quite natural that the husband should leave all his property to his wife and her heirs. It is not for us to inquire into the reason why he preferred his first wife's heirs to his own. That matter was entirely in his own hands. According to the terms of this deed, it was a settlement of his affairs. The presumption is, that having made such a settlement, and having left it uncancelled, he intended to adhere to it. I think therefore that we should decide this case by answering the first question in the affirmative and the second in the negative.

LORD YOUNG.—I concur, but not without some misgiving whether, if the testator were alive, he would answer the questions as proposed.

The case deals only with heritage, consisting of a house. There seems to have

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Jan. 13, 1891.
Cleland v. Allan.

been some moveable estate, but no question is raised about that. The decease left a disposition of this heritage executed nearly thirty years before his deat It was an ordinary disposition conveying the estate to Elizabeth Allan a her heirs. Elizabeth Allan died in 1884. Her husband survived her for fi years, and at his death that disposition of the house was found in his repositori and no other.

The question therefore is shortly this,—Is that disposition to have effect? cannot find any sufficient ground in law for denying that it should. The hou remained the property of the husband till his death. When Elizabeth All died, he continued at liberty to deal with the house as he pleased. He did n deal with it except by this disposition to her and her heirs. Her heirs na claim it. In the circumstances, I see no reason for refusing their claim.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—Both during the discussion and since I have had doubt to whether this deed could be regarded except as a provision in favour of t wife. This doubt has induced considerable hesitancy in my mind at arriving a conclusion. But a careful consideration of the facts of the present case, an the two cases referred to by your Lordship in the chair, has convinced me tha the view of the law taken by your Lordships is the one established by the de cisions.

THE COURT answered the first question put in the case in the affirma tive, and found and declared accordingly.

A. P. PURVES & AITKEN, W.S.—J. MURRAY LAWSON, S.S.C.—Agents.

No. 83.
Jan. 13, 1891.
Cunningham's Trustees v. Cunningham.

JOHN CUNNINGHAM AND ANOTHER (Cunningham's Trustees), Pursuers an Nominal Raisers.—*Craigie.*

JOHN CUNNINGHAM AND OTHERS, Defenders and Claimants (Reclaimers) *Asher—Fleming.*

JOHN CUNNINGHAM, Real Raiser and Claimant (Respondent).—*R. V. Campbell—W. Campbell—Gloag.*

Succession—"Relatives"—Stirpes or capita.—A truster directed that t residue of his estate should be "equally divided amongst all my relatives, n sister Maria to get a half more than the others." Of his four sisters and tw brothers only one—Maria—survived him, but several nephews and nieces di *Held* that the testator's sister and all his nephews and nieces were entitled t share in the residue *per stirpes*, the sister receiving half as much again as any the other *stirpes*.

2D DIVISION.
Ld. Kyllachy.
M.

ARTHUR CUNNINGHAM died on 12th October 1889 leaving a trust-dis position, dated 18th February 1884, and a codicil, dated 18th Februar 1887, both holograph.

By his trust-disposition, after leaving certain legacies, he provided,— "To my sister Maria Cuningham or M'Lean residing in Bernard S Bridgeton Glasgow the sum of £100 one hundred pounds; to my brother William's son John who is dumb £50 fifty pounds; also £50 fifty pounds to be divided equally among my sister Ann's family, and also £50 fifty pounds to be divided equally amongst my sister Sarah's family, the residue of my estate I leave to my brother Richard's family the daughters to get one fourth more than the sons & Richards share I put in the hands of his brother Dr John Cunningham to be given him as he may think it may be used proper or improperly."

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In his codicil he provided,—" . . . . . I wish the residue or mainder of my estate to be sold & the proceeds to be equally divided nongst all my relatives, my sister Maria to get a half more than the hers."

The truster had had four sisters and two brothers. All these predeased him save Maria. They all, however, left children. The eldest other left an only child, John; the second brother left six children, of om Dr John Cunningham was one.

A multiplepoinding having been raised in name of the trustees for tribution of the residue, claims were lodged, *inter alia*, (1) for John unningham, who claimed on the footing that the division of the estate ould be among the sister and the nephews and nieces *per stirpes*, and) for Dr John Cunningham, who claimed on the footing of a division ong these persons *per capita*.

The Lord Ordinary (Kyllachy), on 15th July 1890, found that the whole idue fell "to be divided *per stirpes* among the testator's brothers and ters and their descendants, in the same manner as if he had died testate, but subject always to his sister Maria receiving one-half share re than the share falling to each of the other *stirpes*," &c.

Dr John Cunningham reclaimed, and argued;—The trust-settlement ust be read as if the testator had said, "First find out who my relatives e." Now, the clue to that was supplied by the case of *Williamson*,[1] here a bequest in similar terms was held to point to heirs *in mobilibus*, according to the Intestate Moveable Succession Act of 1855. Then, recurring to the truster's directions, the trustees found themselves instructed to divide "equally" among these persons. To divide *per stirpes* would let in an infinite diversity among the favoured individuals. In a similar destination of a husband's and wife's property to their "nearest of in" the sister of the wife and the nieces of the husband had all been mitted to share equally.[2] Again, the *præcipuum* given to Maria was telligible if she was thereby to be placed on a higher level than her phews and nieces. It was not so intelligible, however, that one sister ould be preferred before other sisters and brothers.

John Cunningham argued;—In the will itself the testator took the families" as the objects of his bounty, *i.e.*, the *stirpes*. By the codicil e desired to recall the inequality of distribution among these *stirpes*, but here was no indication of any intention to disturb the method of division. he reclaimer appealed to the case of *Williamson* as giving the rule. *Esto.* What was the result? The adoption of the rules of the Intestate Moveble Succession Act, by which the representatives came in place of those hom they represented, each family taking what its head would have aken. The reclaimer, again, emphasised the word "equal," but there was o intention to disturb the equality. The problem always was amongst hom the equality was to have place, the kin in the first degree or those n the second. There were many cases where kindred in two different legrees were called, and the distribution was to be equal, but yet the present question had to be settled.[3]

At advising,—

Lord Justice-Clerk.—The late Arthur Cunningham, who was a merchant in Girvan, left a testament and relative codicil, both holograph, and the question

[1] Williamson v. Gardiner, Nov. 17, 1865, 4 Macph. 66, 38 Scot. Jur. 40.
[2] Hogg v. Bruce, July 8, 1887, 14 R. 887.
[3] *E.g.*, Home's Trustees v. Ramsays, &c., Dec. 11, 1884, 12 R. 314; Allen v. Flint, June 15, 1886, 13 R. 975.

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raised in this case relates to the disposal of the residue of his estate by th codicil, by which that residue is directed "to be equally divided amongst all m relatives, my sister Maria to get a half more than the others."

It is contended, on the one hand, that by this direction the testator favour equally all those who were legally his heirs *in mobilibus;* that the estate mu be divided into twice as many shares as there are heirs *in mobilibus* and o share more; and that his sister Maria must receive three shares and each of t other persons two shares. On the other hand, it is contended that the true co struction is that the testator intended by the expression "my relatives" h brothers and sisters, or the direct descendants of those who should predece him, the latter taking their parents' share.

There is considerable difficulty in finding grounds in the words of the codi for either construction, but I have come to the conclusion that the construct adopted by the Lord Ordinary is the right one. I think that that is the co clusion I should have arrived at had there been no other words than the "amongst all my relatives." The deceased was making a family settlement which he was acting as *in loco parentis* to the rest of his family, and it wo be, I think, an unnatural construction to put upon the words he used to g them a meaning which would cause the shares of his brothers and sisters w might survive him to have a proportion carved out of them whenever a brot or sister should die, leaving a number of children. Such a reading would think, be strained and unnatural. But the special favour shewn to "my si Maria," that she was to get "a half more than the others," seems to me to in cate very plainly that, in speaking of his relations, he was speaking of a di sion among them in equal shares to each family, and not in equal shares to e individual, whether brother, sister, nephew, or niece, who might survive hi move your Lordships, therefore, to adhere to the Lord Ordinary's interlocut

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER not having heard the case gave no opinion.

THE COURT adhered.

THOMAS HART, L.A.—WM. B. RAINNIE, S.S.C.—Agents.

No. 84.
Jan. 13, 1891.
Wood v. Cranston & Elliot.

GEORGE DICK WOOD, Pursuer, Nominal Raiser (Appellant).—*Salvesen* CRANSTON & ELLIOT, Defenders, Real Raisers (Respondents).—*Gould*—*John Wilson.*
SAMUEL CALCRAFT, Defender.

Bankruptcy—Notour Bankruptcy—Diligence—Poinding—Bankruptcy A 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 7, 9, 12—*Debtors Act*, 1880 (43 *and* *Vict. c.* 34), *sec.* 6.—Section 12 of the Bankruptcy Act, 1856, which equal arrestments and poindings used within sixty days prior to, or four months s sequent to, "the constitution of notour bankruptcy," contemplates the origi constitution of notour bankruptcy only; and subsequent proceedings, wh would of themselves have constituted notour bankruptcy, do not form a r constitution of notour bankruptcy to the effect of equalising diligence, notwi standing the proviso of section 9 of the Act.*

* Bankruptcy Act, 1856, sec. 9.—"Notour bankruptcy shall be held to co mence from the time when its several requisites concur, and when it has co been constituted shall continue, in case of a sequestration, till the debtor ob obtain his discharge, and in all other cases until insolvency cease, without p judice to notour bankruptcy being anew constituted within such period."

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A debtor was on 7th February made notour bankrupt by the expiration without payment of the days of charge upon a decree for payment. On 21st May the creditor poinded his goods, and on 27th May carried through a sale thereof. On 20th June, being more than four months after the first constitution of notour bankruptcy, another creditor, founding on liquid grounds of debt, claimed to be ranked *pari passu* with the poinding creditor on the proceeds of the sale, on the ground that a second notour bankruptcy had been created by the execution of the poinding on 21st May.

Held that notour bankruptcy having been once constituted on 7th February, the subsequent poinding could not be founded on as a constitution of bankruptcy.

2D DIVISION. Sheriff of the Lothians and Peebles.

On 27th January 1890 George Wood, butcher, Edinburgh, obtained a decree for payment of a sum of money in the Debts Recovery Court, Edinburgh, against Samuel Calcraft. A charge was given upon this decree which expired upon 7th February 1890 without payment. Calcraft being insolvent at the time was thus rendered notour bankrupt in virtue of the Debtors Act, 1880.*

On 21st May 1890 Wood executed a poinding under the decree, and on 27th May Calcraft's effects were sold thereunder. The sum realised was £37, 1s. 10d.

Cranston & Elliot, Edinburgh, were also creditors of Calcraft. They desired to rank *pari passu* with Wood on the sum of £37, 1s. 10d., and in June 1890 they raised, in the name of Wood, an action of multiplepoinding in which Calcraft and his other creditors were called.

They stated that at the date of the poinding Calcraft, the common debtor, was notour bankrupt, that they were creditors "holding liquid grounds of debt against the said common debtor, and on 20th June 1890 have produced the same in this process within sixty days of the date of said poinding; and, at all events, within four months thereafter, and within four months after the constitution of the notour bankruptcy of the common debtor."

They pleaded;—The common debtor being notour bankrupt, and the claimants having produced liquid grounds of debt, they are entitled to a share of the free proceeds of the sale of the common debtor's effects in terms of section 12 of the Bankruptcy Act, 1856.†

Wood, the nominal raiser, objected to the real raisers obtaining a *pari passu* ranking. He averred that the common debtor was rendered notour bankrupt on 7th February by the expiration of the charge on his decree without payment, the common debtor being then insolvent, and he explained that the proceeds of the sale had been paid to him in virtue of that diligence as regularly carried through, and that he was not debtor to

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* The Debtors (Scotland) Act, 1880 (43 and 44 Vict. c. 34), sec. 6, enacts,—"That in any case in which under the provisions of this Act imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment. . ."

† The Bankruptcy Act, 1856 (19 and 20 Vict. c. 79), sec. 12, enacts,—"That arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date," . . . provided further "that any creditor judicially producing in a process relative to the subject of such arrestment or poinding liquid grounds of debt or decree of payment within such period shall be entitled to rank as if he had executed an arrestment or a poinding, and in case a poinding creditor shall carry through a sale, he shall be accountable for the sum recovered to those who by virtue of this Act may be eventually found to have a right of ranking *pari passu* thereon. . . ."

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the common debtor, or possessed of any estate which could competentl be held as forming a fund *in medio* in the action.

Wood pleaded;—(1) The real raisers' whole material averments a irrelevant. (2) The nominal raiser having no funds belonging to t common debtor in his hands, the present action is incompetent. (3) T real raisers and claimants not having, within four months after the co stitution of the common debtor's notour bankruptcy, judicially produc liquid grounds of debt or decree of payment in any process relative to t subject of the poinding, and not having been, within said period, in a po tion to arrest or poind the estate of the common debtor, they are n entitled to a *pari passu* ranking with the nominal raiser on the proce of the sale carried through by him.

On 21st July 1890 the Sheriff-substitute (Hamilton) pronounced th interlocutor:—"Repels the defences for George Dick Wood, the nomin raiser; sustains the competency of the multiplepoinding," and appoint Wood to consign the fund. *

Wood appealed to the Sheriff (Crichton), who on 23d October adhered

Wood appealed to the Court of Session, and argued;—The noto bankruptcy was constituted on 7th February by the charge given h him expiring without payment,‡ and Cranston & Elliot did not prod liquid grounds of debt within four months from that date. The She had held that the mere carrying out of the poinding rendered the comm debtor notour bankrupt a second time on 27th May. If this view we correct, then each successive step of diligence would render a man noto bankrupt over again *ad infinitum*. What the Debtors Act, 1880, sec. did, was to introduce a new mode of constituting notour bankruptcy, whi had to be read into the Bankruptcy Act of 1856. When notour ban ruptcy was once constituted, its effects were always the same.[1]

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* "NOTE.—It appears that the common debtor was rendered notour bankr on 7th February last, on which day the charge given on the nominal rais decree expired without payment (Debtors (Scotland) Act, 1880, section 6). was again rendered notour bankrupt on 27th May, when a sale was carr through, under the poinding executed by the nominal raiser (Bankruptcy (Sc land) Act, 1856, section 7 (b), see also section 9). As the real raisers and cl claimants have produced liquid grounds of debt in this action, within four mo of the latter date—(Bankruptcy Act, 1856, section 12)—it is thought that th are entitled to be ranked on the fund *in medio pari passu* with the nomi raiser—in other words, that the competency and relevancy of the action must sustained."

† "NOTE.—(After quoting section 12 of the Bankruptcy Act, 1856, als given)—In the present case the real raisers and other claimants have p duced grounds of debt within four months of the date of the poinding. it is contended on the part of the poinding creditor and nominal raiser th by the Debtors (Scotland) Act, 1880, section 6, the common debtor w rendered notour bankrupt on 7th February by the expiry of the charge gi him, and that the four months must count from that date. The Sheriff is opinion that that Act was not intended to affect the rights of creditors in and accordingly that the four months must run from the date of the poindin

‡ Section 7 of the Bankruptcy Act, 1856, enacts,—"Notour bankrup shall be constituted by the following" (among other circumstances) "by in vency concurring either with a duly executed charge for payment, followed, wh imprisonment is competent, by imprisonment . . . or, where imprisonm is incompetent or impossible, by . . . execution of poinding of any of t debtor's moveables."

[1] Scott v. Rutherfurd, Dec. 7, 1839, 2 D. 206, 12 Scot. Jur. 234; Black Watson, Nov. 29, 1881, 9 R. 167; Clark, &c. v. Hinde, Milne, & Co., Dec. 1884, 12 R. 347.

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Argued for Cranston & Elliot;—The effect of the poinding was to make Wood notour bankrupt afresh on 27th May. Section 9 of the Bankruptcy Act, 1856, specially contemplated a second notour bankruptcy being constituted before the termination of the first—(quoted in footnote, *supra*, p. 382). Section 6 of the Debtors Act, 1880, was not intended to interfere in any way with the provisions of the Bankruptcy Act of 1856. The only notour bankruptcy here to which section 12 of the Act of 1856 could apply was that constituted by the poinding and sale on 27th May, and as the claimants had produced liquid grounds of debt within four months thereafter, they were entitled to a *pari passu* ranking.[1]

At advising,—

LORD TRAYNER.—The appellant in this case obtained a decree against his debtor Calcraft in January 1890 upon which a charge of payment was given. That charge expired on 7th February following without payment having been made. The appellant's decree being one on which, but for the provisions of the Debtors Act, 1880, he could have operated personal diligence, the lapsing of the charge without payment constituted notour bankruptcy against the debtor. Following up his charge, the appellant poinded the goods of his debtor and carried through a sale thereof in the month of May. The respondents, who are also creditors of Calcraft, claim to rank *pari passu* with the appellant on the proceeds of the sale on the ground that they have within four months from the constitution of the debtor's notour bankruptcy judicially produced a liquid ground of debt against the debtor, as provided by section 12 of the Bankruptcy Act, 1856. The judicial production by the respondents of their liquid ground of debt on which their claim is based is said, by them, to have been made on 20th June. From this statement of the facts it appears to be clear enough that the respondents' claim cannot be sustained if the notour bankruptcy of the debtor Calcraft constituted on 7th February is taken as the terminus from which the four months are to be computed. Accordingly the respondents maintain that notour bankruptcy was again constituted against Calcraft in the month of May by the poinding which was then executed of his goods by the appellant, and that they are entitled to the *pari passu* ranking which they claim, as having produced this liquid ground of debt within four months of that date. This is the view which the Sheriff and Sheriff-substitute have taken, but I think it is not a sound view of the law.

The 12th section of the Act of 1856 appears to me to contemplate and to deal with one constitution of notour bankruptcy, and one only. From the date of that constitution the sixty days before and the four months thereafter are to be reckoned. If it was not so, then creditors who did diligence within four months after the second or third or fourth constitution of notour bankruptcy would all be entitled to rank *pari passu* with those who had done diligence within four months of the first constitution, which would result in this, that creditors would rank *pari passu* who had done diligence within sixteen months after the constitution of notour bankruptcy, a result not provided for by the statute. In the present case notour bankruptcy was constituted, in my opinion, on 7th February, when the charge of payment given by the appellant expired. The subsequent poinding was not a constitution of notour bankruptcy, but merely an ordinary step in the course of following up the diligence already commenced.

[1] Macrae v. Sutherland, Feb. 9, 1889, 16 R. 476.

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No doubt a poinding following upon an expired charge is in itself a mode of constituting notour bankruptcy, but it was not in this case the constitution of notour bankruptcy against his debtor by the appellant, for that had already been done. As regards his notour bankruptcy, the poinding executed by the appellant did not affect the debtor's position; he was neither more nor less notour bankrupt after the poinding than before it. I do not think the respondents can take any benefit from the provisions of section 9 of the Act of 1856. It is there provided that notour bankruptcy being once constituted shall continue in the case of a sequestration until the debtor is discharged, and in other cases until insolvency ceases "without prejudice to notour bankruptcy being anew constituted within such period." If I read that clause alone, and apart from the other sections of the statute, I should have some difficulty in understanding the purpose of its concluding proviso. If notour bankruptcy once constituted is to continue in a sequestration till the debtor's discharge, and in other cases till insolvency ceases, there would appear to be no room—and indeed no reason—for providing that during that period notour bankruptcy might be constituted anew. But the difficulty disappears, and the importance and value of this provision becomes clear, when the terms of the 15th section are taken into account. I think the renewed constitution of notour bankruptcy provided for by section 9 has reference to an application for sequestration, and has no bearing or effect upon the question of the equalisation of diligence.

I am of opinion that the interlocutor appealed against should be recalled.

LORD JUSTICE-CLERK.—I have had great difficulty in this case. The result at which the Sheriff has arrived is indeed a most anomalous one, but the question was put whether this was not the inevitable consequence of the language of the statute. Lord Trayner's explanation is however a possible one, and, though with considerable difficulty, I concur.

LORD RUTHERFURD CLARK.—I concur.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Finds in fact that Samuel Calcraft, the common debtor, was rendered notour bankrupt on 7th February 1890 by the expiry, without payment of the charge given him upon the appellant's decree; that a poinding of the common debtor's effects was executed at the instance of the appellant on 21st May 1890; that a sale of the poinded effects was carried through on 27th May 1890; and that the respondents and claimants produced in the process decree of payment, or other liquid grounds of debt, on 20th June 1890: Find in law that the respondents are not entitled to a *pari passu* ranking with the appellant on the proceeds of the sale carried through by him: Therefore sustain the appeal, recall the interlocutor of the Sheriff appealed against, and assoilzie the nominal raiser and appellant from the conclusions of the petition, and decern," &c.

JOHN W. DEAS, S.S.C.—P. MORISON, S.S.C.—Agents.

No. 85.

Jan. 15, 1891.
Gilligan v. Gilligan.

WILHELMINA GILLIGAN AND HER CURATOR AD LITEM, First Parties.—*M'Kechnie—J. Wilson.*
MARION E. FRASER OR GILLIGAN, Second Party.—*M'Lennan.*

Succession—Heritable and Moveable—Jus relictæ—Heritable security—Titles to Lands Consolidation Act, 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 117.—A testatrix directed her trustees "to hold, apply, pay, and convey the whole residue" of her estate for behoof of her three children. The trustees had a power to sell heritage, and to call up investments. One of the sons, who survived his mother, died after the residue had been divided with the exception of a heritable bond for £1500 which belonged to the deceased testatrix. In a question between the son's widow and daughter, *held* that the son's right in the bond was a moveable *jus crediti*, and was subject to *jus relictæ*.

2D DIVISION. M.

ELLEN M'GRATH OR GILLIGAN died in 1884, leaving three children, William Robert Gilligan, Archibald Gilligan, and Susan Gilligan. By her trust-disposition and settlement she directed her trustees to "hold, apply, pay, and convey" the whole residue of her means and estate among these three children. The deed bore further, "I hereby authorise my trustees" to sell the trust-estate, heritable and moveable, and to invest the funds in the purchase or on the security of heritable property.

Part of Mrs Gilligan's estate was a heritable bond for £2000 over property in Calton, Glasgow. The trustees received £500 to account, and reduced the bond to £1500.

William Robert Gilligan died intestate in 1888. He was survived by his wife and by one child, Wilhelmina Gilligan, who was in pupillarity.

Thomas M'Lelland, writer, was appointed judicial factor on the intestate estate of William Robert Gilligan. At the time of his death W. R. Gilligan had not obtained from Mrs Gilligan's trustees the one-third of the £1500 in the bond which fell to him. After his death, however, the trustees assigned the £1500 in favour of M'Lelland, as judicial factor on *his* intestate estate, and Archibald and Susan Gilligan in equal proportions.

A question arose in the course of M'Lelland's administration of the intestate estate as to the manner in which this sum of £500 fell to be apportioned between Mrs W. R. Gilligan and Wilhelmina Gilligan. A special case was stated for the opinion of the Court upon the following question of law:—"Whether the widow of the said William Robert Gilligan is entitled to *jus relictæ* or terce, or either and which of them, out of the said sum of £500?"

The first party was Mr Henry Taylor, who was appointed curator *ad litem* to Wilhelmina Gilligan. The second party was Mrs W. R. Gilligan.

The first party maintained that in the persons of the trustees of Mrs Gilligan senior the bond was heritable; that they in the exercise of their trust, though they had power to convert it, retained it; that the sum of £500 must be dealt with as if directly secured to W. R. Gilligan under a bond and disposition in security; and that in that view no right in it, unless perhaps terce, pertained to Mrs W. R. Gilligan, his widow. Section 117 of the Act of 1868 * made heritable securities moveable only in

* The Titles to Lands Consolidation Act, 1868 (31 and 32 Vict. cap. 101), enacts, sec. 117, that from and after the date of that Act heritable securities shall, except as therein provided, "be moveable as regards the succession of the creditor, . . . provided that all heritable securities shall continue, and shall be heritable . . . as regards all rights of courtesy and terce competent to the husband or wife of any such creditor."

No. 85.

Jan. 15, 1891.
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cases of intestate succession.[1] Alternatively, on the footing th Gilligan was not to be regarded as creditor therein at the time of l the first party maintained that it was still heritable in any quest his succession, and that Mrs W. R. Gilligan had no claim to any it *jure relictæ*.

The second party maintained that W. R. Gilligan, her husband creditor in the heritable bond, but had merely a claim to the sum as part of the residue of his mother's trust-estate, which claim w able, and subject to the second party's *jus relictæ*.[2]

At advising,—

LORD YOUNG.—This case is between a mother and her only child, a and it regards one-third of a sum of £500. The question is whether third part of £500 is to go to the mother or to go to the daughter. T claims it as part of her *jus relictæ* out of her deceased husband's estat is an alternative claim by her to terce out of the £500. The £50 of so much of the deceased husband's deceased mother's estate s entitled to at the time of his death. He survived his mother, and p estate consisted of a bond for £2000 heritably secured. She left a tru tion and settlement directing her trustees to pay, divide, and make estate equally among her children, of whom there were three, the husband of one of the parties before us and the father of the other of them. The trustees had complete power to sell any part of the and authority to uplift any investment which stood at the death of th This particular investment of £2000 they did uplift, but only to the one-fourth, leaving £1500 of the trust money standing upon it; and third of that remainder which they left standing upon this heritable the £500 to which I have alluded.

The widow is entitled to *jus relictæ* out of the £500 or not accord husband's right and interest in so much of his deceased mother's estate will was heritable or moveable. I cannot say that the question is u with difficulty. There is a great deal to be said in support of the vie was heritable, and that the trustees left the estate as they got it from th in this heritable form to the extent of £1500. But upon the whole ma the best consideration I have been able to give to the matter, I think was moveable. I think the trustees uplifted the £500 as they m uplifted the whole, and that the £1500 which they left was just an in of the trust-estate, and that the right of the deceased husband and t a personal right to the one-third of that £1500, just as part of the e was only part of it,—that is to say, £500. The result of that is that th is entitled to one-third of it, and that the residue of two-thirds go daughter.

I think we should answer the question by saying that the mother i to *jus relictæ* out of the £500. I do not take any account—I have tioned it because I think it is of no account—that in the end by arr the trustees transferred to the beneficiaries this heritable security, as it standing, to the extent of the £1500. That was by arrangement and prejudice to any legal rights.

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[1] Hare, Nov. 25, 1889, 17 R. 105.
[2] Guthrie v. Guthrie, Oct. 23, 1880, 8 R. 34.

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Gilligan v. Gilligan.

LORD RUTHERFURD CLARK.—I am of the same opinion. I think that the estate of the truster was by the operation of the recent statute wholly moveable, and that the son as a beneficiary under the trust had merely a moveable *jus crediti*. He was not entitled to any share of the heritable bond. His right was to a certain share of a moveable estate. His claim being a moveable *jus crediti*, his widow is entitled to one-third as her *jus relictæ*.

LORD JUSTICE-CLERK.—I concur.

THE COURT found that the second party, as widow of William Robert Gilligan, was entitled to one-third of the £500 as *jus relictæ*.

SOMERVILLE GREIG, W.S.—AULD & MACDONALD, W.S.—Agents.

No. 86.

Jan. 15, 1891.*
General Property Investment Co., Limited, and Liquidator v. Craig.

GENERAL PROPERTY INVESTMENT COMPANY, LIMITED, AND LIQUIDATOR, Pursuers (Reclaimers).—*Murray—Salvesen.*
ROBERT CRAIG, Defender (Respondent).—*Asher—Dundas.*

Company—Surrender of shares—Purchase of shares—Companies Acts, 1862 *and* 1867 (25 *and* 26 *Vict. c.* 89, *and* 30 *and* 31 *Vict. c.* 131).—Circumstances in which *held* that a limited company was entitled to accept a surrender of shares by an insolvent shareholder without reserving its right to recover unpaid calls, as a fair compromise of the company's claims against the shareholder, and that when the company afterwards went into liquidation the liquidator was not entitled to reduce the transaction on the ground that it was *ultra vires* of the company.

1ST DIVISION. Lord Kinnear. C.

MR ROBERT CRAIG, papermaker, Craigesk, was a shareholder in the City of Glasgow Bank, and on the bank going into liquidation in October 1878 he was placed on the list of contributories as a holder of £20,467 of stock, involving a liability of £562,842, or thereby. He was wholly unable to meet the calls, and accordingly made over his whole estate to the liquidators. His estate embraced, *inter alia*, 250 original shares of £10 each of the General Property Investment Company, on which £2 per share was paid up, and on which a further call of £2 per share had been intimated and was due in December 1878. It was arranged between him and the liquidators of the bank that he should realise such portion of his means as could be disposed of, and account for the proceeds, and that the liquidators should get an assignation to the remainder. Accordingly, in answer to an inquiry made in March 1879, as to how the shares in question could be best disposed of, the secretaries of the company suggested that Mr Craig should give up his shares, which, with the assent of the liquidators of the bank, Mr Craig agreed to do.

The following transfer was accordingly executed on 14th April 1879, and accepted by the company on 5th June following:—"I, Robert Craig, . . . in consideration of my being hereby relieved of liability for the uncalled portion of the share capital of the General Property Investment Company, Limited, in respect of the shares after mentioned, and without any price or consideration having been paid to me by the General Property Investment Company, Limited, hereinafter called the said transferees, do hereby assign and transfer to the said transferees 250 shares of £10 each, . . . of and in the undertaking called the General Property Investment Company, Limited, to hold unto the said transferees and assigns, subject to the several conditions on which I held the same

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immediately before the execution hereof; and we, the said transferees do hereby agree to accept and take the said shares subject to the conditions aforesaid."

In 1886 the Investment Company became insolvent, and an order for its winding-up was pronounced by the Court, Mr David Myles being appointed liquidator.

In 1889 the Investment Company and its liquidator brought an action against Mr Craig, which concluded for reduction of the transfer and of all entries in the share register and other books of the company giving effect to the transfer, and, further, for payment of a sum of £1533, being the amount of calls on the shares so transferred, less the amount paid on 108 of the shares which were reissued by the company.

The pursuers averred that the company had no power under its memorandum of association to purchase its own shares; that the transfer and entries following upon it were illegal and void under the Companies Acts, 1862 and 1867; and that it was *ultra vires* of the directors of the company to accept or register them.

The defender in answer averred that the transfer was made by him and accepted by the company in consequence of his inability to meet the call due on 24th December 1878, and that it was truly a surrender or forfeiture of his shares to the company with a view to the benefit of the company. "No price or consideration was paid to the defender by the company in respect of the said transfer or surrender, and it was such a transfer or surrender as is contemplated by the Companies Acts and the articles of association of the company. The capital in possession of the company was not thereby diminished to any extent. Its purpose and effect was to enable the company to reissue the shares so surrendered and to substitute a solvent for an insolvent shareholder. Moreover, the said surrender was made by the defender with the approval and in the interests of the liquidators of the bank, and if the company had not accepted the said transfer the liquidators" of the bank "would have relieved the defender, as they were bound to do, of all liability in connection with the said shares. The bank, however, has now been dissolved, and the liquidators discharged, and the defender may therefore be precluded from claiming relief from them."

He further stated;—(Stat. 2) "The company, and the directors and all the shareholders, have, since June 1879, refused to recognise the defender as a shareholder, and have adopted, homologated, and acquiesced in the said transfer, or surrender, or forfeiture, in the full knowledge of the whole circumstances. They have treated the shares as the property of the company and in their hands for re-issue. Accordingly, the company, accepting the shares on this footing, and treating them as forfeited or surrendered, have re-issued 108 thereof to existing shareholders, and have made and recovered calls from them in respect thereof. Since June 1879 the defender has not been entered in the register of shareholders, or in any of the books of the company, or in the statutory returns made to the registrar, as owner of the said shares. On the contrary, the company and their transferees have been so entered. This was all along well known to all the shareholders and creditors of the company. It was also all along, from at least June 1879, known, or otherwise ought to have been known, to all the shareholders and creditors of the company that the company had accepted the foresaid surrender, and had re-issued a portion of the shares so surrendered, and they acquiesced in and adopted the same." The defender had never had any intimation of calls or of any of the meetings of the company subsequent to the date of the transfer, and no claim had ever been made upon him in connection with the shares until February 1888. It was also, he

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stated, impossible for the pursuer to make restitution *in integrum* in the event of the transfer being reduced.

The pursuers pleaded, *inter alia*;—1. The pretended transfer of shares by the defender to the company condescended on, and relative entries in the books of the company, being illegal and void, and inconsistent with, and in violation of, the Companies Acts, 1862 and 1867—(*a*) the said transfer and entries should be reduced as concluded for; and (*b*) decree should be pronounced in terms of the petitory conclusions of the summons.

The defender pleaded, *inter alia*;—2. The transfer sought to be impugned having been truly a surrender or forfeiture by the defender of his shares to the company solely for the company's benefit, and having been dealt with as such by the company, and not being in violation either of the Companies Acts or the constitution of the company, the defender should be assoilzied. 5. *Restitutio in integrum* being impossible, the defender should be assoilzied. 7. The company, and the shareholders and creditors thereof, having acquiesced in, adopted, and homologated the said transfer, and the company having re-issued a portion of the shares in question, the pursuers are barred from maintaining their present claims.

A proof was led, in which the defender's averments were established, and from which it further appeared that the suggestion for the transfer of the shares in question was made by the company to Mr Turnbull, the defender's agent,* the articles of association of the company stipulating that "no shareholder shall transfer his shares until he has first made offer of them to the company at the then market price."† The agreement be-

* Mr Turnbull deponed,—"I had communications with the liquidators—I think entirely by letter—in regard to the mode of dealing with those 250 shares. I also communicated with the company as to finding a purchaser for them. They did not succeed in getting a purchaser. They stated that in a similar case the directors had relieved the shareholder on the footing of no price being paid, the shareholder being relieved of all further liability, and they suggested that a similar course should be adopted in Mr Craig's case. I communicated that suggestion to the liquidators, and they approved of it. As the result of that negotiation a transfer of the shares was prepared in favour of the company. I obtained Mr Craig's signature to it, and delivered it to the company. Mr Craig received no consideration of any kind from the company for that transfer. I transmitted it to the secretaries of the company in the usual way. On 19th April they replied that they would lay it before the directors, and I heard no more about it. Mr Craig had no means of paying the £2 per share at the time. It was supposed there was no market for the shares. If the company had proposed to forfeit the shares as against Mr Craig he had no means of preventing them doing so. Mr Craig personally had no interest in the matter at that time. If this transfer had not been made the shares, under the arrangement between me and the liquidators, would have gone over to them. The transfer was in point of fact carried through by me as part of the realisation of Mr Craig's estate under the instructions of the liquidators."

† Mr Alexander Stewart, who had taken charge of the affairs of the Investment Company, deponed,—"Under article 4 of the articles of association a shareholder was bound to make offer of his shares to the company before transferring them, but the company had a right to forfeit these shares, and, having that right, they suggested that Mr Craig should grant a transfer. I believe the directors considered it would be to their advantage that the transfer should be made, because they could re-issue the shares at a profit. I believe their idea was to allot the shares among solvent shareholders. It was arranged at a general meeting of the shareholders to allot those shares among existing shareholders who desired to have them."

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tween Mr Craig and the liquidators of the bank, under which the forme obtained his discharge, bore date 27th September and 16th October 187 and Mr Haldane, one of these liquidators, deponed that it was part the arrangement that they should relieve Mr Craig of any liability o the shares transferred to the Investment Company.* The liquidatio had, however, come to an end some years prior to the bringing of th action.

The Lord Ordinary (Kinnear), on 14th June 1890, assoilzied the d fender.†

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* "It was part of the bargain that Mr Craig was to be relieved of the shares [certain shares in other companies]; and claims having been made up Mr Craig in respect of them, the liquidators relieved him of them as part of t arrangement under which his estate was transferred. If the General Proper Investment Company had not accepted the transfer of the 250 shares they wou have been in the same position as regards liability as the others."

† "OPINION.— . . . The ground of action is that the transaction up which the transfers were made and accepted was *ultra vires* of the company, a that the transfers were therefore void *ab initio*; and this is said to be estab lished by the cases of *Trevor* v. *Whitworth*, L. R., 12 App. Ca., and the Pro *perty Investment Company* v. *Matheson*, 16 R. 282.

"The distinction between these cases and the present is manifest, and indee is very clearly brought out in the conclusions of the summons. In each of t former cases the company had bought its own shares from one of its membe for a price, and the ground of judgment was that it had no power under t Companies Acts to purchase its own shares, or, in other words, to pay back one of its own members the money or part of the money which he had su scribed to the capital of the company. In the present case, it is set forth the conclusions of the summons that the transfers which it is proposed reduce were executed 'without any price or consideration having been pai and it is established by the minute of admissions that they were given a accepted for the purpose of effecting a surrender of shares by an insolve shareholder who was unable at the time to meet the calls which had been ma upon him.

"Such a case is very clearly distinguished from a case of sale by all t learned Lords who took part in the decision of *Trevor* v. *Whitworth*. L Herschell, after explaining as the ground upon which a purchase by the co pany cannot be supported, 'that the statutes require that the whole of the su scribed capital, unless diminished by expenditure upon the objects of the m morandum, shall remain available for the discharge of its liabilities,' goes on say that the view which he had thus expressed is not inconsistent with t forfeiture and surrender of shares,—'The forfeiture of shares is distinc recognised by the Companies Act, and by the articles contained in the schedu which, in the absence of other provisions, regulate the management of a limi liability company. It does not involve any payment by the company, and presumably exonerates from future liability those who have shewn themselv unable to contribute what is due from them to the capital of the compan Surrender no doubt stands on a different footing. But it also does not invol any payment out of the funds of the company. If the surrender were ma in consideration of any such payment it would be neither more nor less than sale, and open to the same objections. If it were accepted in a case where t company were in a position to forfeit the shares, the transaction would seem me perfectly valid.' Lord Watson and Lord Macnaghten made observations the same effect.

"The question is whether the transaction between the company and t defender satisfies the conditions upon which, according to these opinions, surrender may be sustained. It is certain that it did not involve any payme by the company, and therefore the first condition laid down by Lord Hersche

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The pursuers reclaimed, and argued;—The question for the Court was whether the shares in question had been transferred to the company for a valuable consideration. The ground of the Lord Ordinary's judgment was that they had not. But the transaction was not a forfeiture, because there was nothing to shew that the company had proceeded under the forfeiture clauses of Table A of the Companies Act, 1862. The word "surrender" was used in the Companies Clauses Act of 1863 (26 and 27 Vict. c. 118), secs. 9, 10, and 11 (which modified the provisions of section 30 of the Companies Clauses Consolidation Act of 1845), but nowhere in the Companies Acts. The right of a shareholder to retire from a company by surrendering his shares must therefore depend upon the regulations of the company in question.[1] Here the only power which affected

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was completely satisfied. But it seems to me to be equally clear that the second condition also is satisfied, because the surrender was accepted from a shareholder who was quite unable to pay the amount due by him at the time as a contributor to the capital, and whose shares were therefore liable to be forfeited for non-payment. He was the holder of more than £20,000 of the stock of the City of Glasgow Bank, which failed in October 1878, and was liable for calls exceeding £562,000. He appears to have had no other liability of any moment, but his liability to the liquidators of the bank was enough to make him utterly insolvent. In December 1878 a call of £2 per share, or £500, became due to the pursuer's company, and the directors knowing him to be insolvent in consequence of the failure of the bank, agreed to accept a surrender, and to relieve him of his liability for the call.

"It is said that the discharge of his liability to the company was a consideration for the surrender; and therefore that the transaction was in effect a sale. But the same thing must happen in every case of the forfeiture or surrender of the shares of an insolvent shareholder, and also in every case of forfeiture when any part of the capital remains uncalled, even although the call for which the shares are forfeited may be recovered in full. The pursuer, however, maintains that in the present case there was a gratuitous discharge of the shareholder's liability to contribute to the extent of £500, because the liquidators of the bank might have been compelled to pay the call, since they were taking over the whole estate. Mr Haldane's statement makes it probable that the liquidators might have thought it reasonable to pay such a call rather than force a shareholder, who had no other debts, into bankruptcy. But they were not bound to consent to such an arrangement because the defender's estate was altogether insufficient to meet their claims, and a dividend upon the claim of the investment company would have fallen far short of £500. But whatever sum they might have agreed to pay, it cannot be supposed that they would have taken over the shares and so incurred personal liability for the £6 of capital still uncalled. For the evidence is that the shares were not marketable; and the liquidators thought they were not worth enough to cover the calls. If the liquidators had proposed to pay the call in these circumstances, it might have been a fair question for the consideration of the directors whether they should leave shares to which so large a liability would still be attached in the hands of an insolvent shareholder, or whether they should accept a surrender, with the hope of effecting a re-issue to persons who would be able to meet any future calls. This question did not arise for consideration, because no such proposal was made. But the validity of the transaction must depend upon the power of the directors to accept a surrender, and not upon the discretion with which they exercised that power. They had power to accept a surrender, according to the opinions expressed in the House of Lords, because the shareholder was unable to meet his liabilities to the company. He cannot be required to shew that no better arrangement could have been made for the company through the intervention of third persons, who were under no legal obligation to pay the calls in full."

[1] Lindley on Company Law (5th edn.), 517.

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the matter was the provision in the company's articles to the effec that no shareholder could transfer his shares until he had first mad offer of them to the company. Surrender was not authorised by th articles. Where it was authorised by a company's constitution a su render would be good, but, looking to the decision in *Trevor* v. *Whitworth* 1887, L. R., 12 App. Ca. 409, if any value were given by the compan it would be bad. The dicta of the learned Lords [1] who decided the case *Trevor* were to the effect that if a surrender were made in a case in whic the company were in a position to forfeit it would be good, but it would n be so otherwise. The general complexion of the present case shewed tha the transaction in question was looked upon by the parties as a sale. Th fact that there was a transfer was not of importance, for it must alway depend upon the nature of the contract itself whether a transaction was surrender or not. The purchase-money paid in this case by the compan was the remission of the call which was due at the date of the transfe Even in a case of forfeiture under the forfeiture clauses of table A of th Companies Act, 1862, forfeiture would have been attended by the conditio that any calls due at the date of the forfeiture should still be recoverable The case of *Klenck* [3] shewed that it was just as much a diminution of a capital for a company to grant a discharge of a payment due as for it to purchase its own shares. Further, it was to be kept in view that the surrender had been carried through at the request of the defender, wh wished to be relieved of his shares. The initiative in the transactio had been taken by the defender's agent, and Mr Haldane admitted tha the bank would have been obliged to relieve the defender of any liabiliti in connection with the shares if the company had not taken them ove It could not therefore be said that there was not a dealing with the share here just as in the case of *Matheson*.[4] The surrender, accordingly, w invalid, because it had not the same consequences as a forfeiture. Alte natively, it was bad altogether, because there was no power in the Act of Parliament or in the articles of the association sanctioning such a tran action. There was a third view which might be supported, for the com pany might have lain by, and after the composition arrangement wit the bank had been carried through they might have had recourse up the defender for the calls.[5]

Argued for the respondent;—The question to be decided was whethe he was still a shareholder, or whether he had not ceased to be so in 187 The distinction between the present case and those of *Matheson* and *Tre* in which it had been held that a company could not buy its own share was apparent from the terms of the transfer. There was here no con sideration given by the company. Surrender occupied an intermedia position between sale and forfeiture. A surrender of shares woul admittedly be bad if it approached the category of a sale, or went diminish the capital of the company.[6] The Companies Acts were silen

[1] Trevor v. Whitworth, L. R., 12 App. Ca. 409, Lord Herschell, p. 417, Lo Watson, p. 424, Lord Macnaghten, p. 438.

[2] *In re* United Service Company, Hall's Case, L. R., 5 Chanc. Apps. 707; Fe guson v. Central Halls Company, Limited, July 20, 1881, 8 R. 997; *In re* Espar Trading Co., 1879, L. R., 12 Chanc. Div. 191; Buckley on the Companies Ac (6th edn.), 475.

[3] Klenck v. East India Company for Exploration, &c., Dec. 21, 1888, 16 R 271.

[4] General Property Investment Co. and Liquidator v. Matheson's Trustee Dec. 21, 1888, 16 R. 282.

[5] Taylor v. Union Heritable Securities Co., Limited, June 1, 1889, 16 R. 711.

[6] *In re* Dronfield Silkstone Coal Co., 1880, L. R., 17 Chanc. Div. 76.

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as to surrenders. In the present case the facts were similar to those in the case of *Hall*,[1] with this essential distinction,—that the debtor in *Hall's* case was solvent,—here Mr Craig was at the date of the surrender hopelessly insolvent. The case was therefore in a different category as regarded the legal result. The reclaimer founded upon the negotiations and actings between the bank and Mr Craig, but the directors of the company had nothing to do with the bank, and knew nothing of any arrangement with it. The true view was that although the formalities of forfeiture had not been observed, nevertheless there was a real forfeiture of the shares, for Mr Craig had done all he could to sever his connection with the company.[2] The company had not given any consideration for the transfer, and had paid nothing towards the outstanding call. There was merely a discharge of future liabilities as the transfer bore. It must be assumed that the company had considered the matter, and had found that the defender was hopelessly insolvent, and it was not necessary that a debtor who was willing to surrender should be made bankrupt for past calls. Further, a company and its liquidator had the same power of compromising claims as an individual had, and the surrender must on that ground be upheld[3] as part of the compromise made with the bank. Besides, owing to the lapse of time and the discharge of the liquidators of the bank, no redress could now be obtained from them, although they admitted in evidence through Mr Haldane, one of their number, that they would have been bound to relieve the defender of any liability in connection with the shares in question. The surrender had remained unimpeached for many years, and there was a clear presumption of knowledge and acquiescence on the part of the company, preventing its now being opened up.[4]

At advising,—

LORD M'LAREN.—The question in this case is, whether the transfer of Mr Craig's shares to the company is void, as falling under the general rule that a company constituted under the Companies Acts is not entitled to purchase its own shares. There can be no doubt as to the justice of the rule or as to its obligatory character. It is a condition of the constitution of every limited company that there shall be individual liability to the extent defined by its memorandum and articles of association, and it is evident that the purchase of its own shares by such a company is equivalent to a reduction of its uncalled capital, or, in other words, is an extinction of individual liability to the extent of the value of the shares purchased by the company. This is the ground of the judgments of the House of Lords in *Trevor* v. *Whitworth*, and of this Court in the case of *The Property Investment Company* v. *Matheson*.

An exception to this rule of company law is indicated in the opinions of the Lords of Appeal who advised the case of *Trevor* v. *Whitworth*, and particularly in the passage quoted by the Lord Ordinary from the judgment of Lord Herschell. The exception is that, where the company is in a position to forfeit the shares, a surrender of the shares to the company may be valid. By a surrender I understand a transfer of the shares to the company without consideration.

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[1] *In re* United Service Co., Hall's Case, 1870, L. R., 5 Chanc. Apps. 707.

[2] *In re* Tavistock Iron Co., Lyster's Case, 1867, L. R., 4 Eq. 233; Knight's Case, 1867, L. R., 2 Chanc. Apps. 321; Buckley on the Companies Acts (6th edn.), 464, &c.

[3] Batti's Case, 1878, L. R., 8 Chanc. Apps. 334.

[4] Evans v. Smallcombe, 1868, L. R., 3 Eng. and Ir. Apps. 249.

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The statutes do not prescribe any special form of surrender, probably because was not thought desirable to give facilities for the release of a shareholder fro his obligations to the creditors of the company, and it may be assumed that surrender must take the form of a transfer by the shareholder to the company

Now, in seeking to apply that principle of the exception indicated by L Herschell and the other Judges of the House of Lords to an actual case, it m be observed that their Lordships had not a case of this kind before them. Th were only pointing out that there was or might be a limit to the application the general rule against the acquisition by a company of its own shares. T present case is said to be an exceptional case, and it is therefore necessary define the exception, or at least to consider its application to the circumstan of the present case.

Under the Companies Acts the shares of a member may be forfeited beca of his inability or refusal to pay calls which are due, and in such a case t right of the company is reserved to recover the unpaid calls, notwithstandi the forfeiture of the shares.

If a shareholder, being solvent, should refuse to pay his calls, it may theoretically true that the company would be within its rights in accep a surrender from him. It would, however, be the duty of the company enforce payment of the calls already made, notwithstanding the surren and the acceptance of a surrender from a solvent shareholder on a tacit un standing that he was to be released from his obligation to pay the calls alre made would, in my apprehension, be undistinguishable in principle from a chase of the shares, because it would amount to a surrender by the company a part of the capital which ought to be available for the payment of its de But if the shareholder be insolvent, and if the transaction he entered into good faith, I think it is within the spirit of the exception indicated in the of *Trevor* v. *Whitworth*. In the present case there can be no doubt tha Craig was insolvent when he surrendered his shares to the company whi now represented by its liquidator. Mr Craig was a shareholder in the C Glasgow Bank; calls had been made upon him by the liquidator of the which he was unable to meet, and he had in consequence assigned all his perty to the liquidator. It is not to be altogether overlooked that the dire of the General Property Investment Company might have reduced the as ment to the liquidator of the City of Glasgow Bank, or might have applied sequestration of the estates of Mr Craig, which would have had the effe cutting down the assignment, and might in one or other of these ways h recovered a dividend on these calls, less the expense of the proceedings neces to establish their right.

On the other hand, it is fair to remember that the creditors of an insolv when they come to consider an offer of compromise, never have exact informa as to what the insolvent's estate is likely to produce if brought to sale. this reason, and no doubt in many cases out of consideration for the chara and future prospects of a debtor who has been brought to bankruptcy by inn misfortune, creditors are generally willing to consider favourably a fair offe an honest debtor, and I may add that our law of bankruptcy recognises expediency of such voluntary arrangements, and makes provision for carr them into effect.

In the case before us, Mr Craig being unable to pay the calls due to the Gen Property Investment Company, and having, as I have said, conveyed his wh

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estate to the liquidator of the City of Glasgow Bank, proposed to transfer his shares in the Investment Company to the company by way of surrender. His proposal was accepted, and he executed a gratuitous transfer accordingly. The matter was arranged by correspondence, nothing being said in the letters about liability for past-due calls. It is right to notice that Mr Craig's agent gave evidence to the effect that he understood that the company waived its right to enforce the calls, but so far as I can gather this understanding rested on nothing more than reasonable expectation. Mr Craig had not the means to pay anything personally, and there was no question of cutting down the conveyance to the City of Glasgow Bank. It was therefore not an unreasonable expectation on the part of Mr Craig and his agent that after he had surrendered his shares the company would not press him further for payment of the past-due calls. The case against Mr Craig is thus reduced to this extremely fine point, that this surrender of shares is to be treated as a purchase by the company, either because the company did not expressly reserve its right to sue for arrears, or because the company did not in fact press Mr Craig for payment after accepting the surrender. The company could not get anything out of Mr Craig's estate without making him bankrupt, and I rather think that the argument for the pursuer must be carried this length, that it is the duty of a company in such a case to make its shareholder bankrupt on the chance of recovering a dividend, without any consideration of his conduct, of the value of his estate, or of the effect of such a proceeding on the prospects of their debtor and on the interest of other creditors. The other view is, that the surrender was a fair settlement with an insolvent debtor such as the law will support, and in no true sense a purchase of the company's shares or a giving away of the company's capital. The latter is in my opinion the true character of the transaction, and I agree with the Lord Ordinary that the defender has been released from his obligations to the company by the surrender of his shares, and that he is not liable to contribute to its funds.

LORD ADAM and the LORD PRESIDENT concurred; and the Lord President intimated that LORD KINNEAR, who was absent at the advising, had authorised him to state that he had not seen any reason to change the opinion he had formed in the Outer-House.

THE COURT adhered.

J. SMITH CLARK, S.S.C.—DAVID TURNBULL, W.S.—Agents.

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Lord Advocate v. Earl of Home.

THE LORD ADVOCATE, Pursuer (Respondent).—*Lord-Adv. Robertson—Sol.-Gen. Pearson—Johnston—C. N. Johnston.*

THE EARL OF HOME, Defender (Reclaimer).—*Murray—C. S. Dickson.*

Lease—Long lease—Valuation of buildings at end of lease—Contract—Construction.—A lease of ground with houses thereon for ninety-nine years, *inter alia*, provided,—"In regard the present houses on the subjects hereby set are in a most ruinous condition, insomuch as to be only proper for a quarry, and as the said" tenant "and his foresaids may during the currency of this lease erect different houses and buildings on these subjects, it is hereby specially agreed upon between the parties that, at the expiry of this tack, the whole houses and buildings then upon the subjects hereby let shall be valued and apprised by two neutral persons, one to be chosen by each party, and, in the case of variance between the said persons, by an oversman to be named by them"; and the land-

* Decided Jan. 12, 1891.

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lord bound himself and his foresaids, at the first term of Whitsunday after t expiry of the lease, to pay to the tenant and his foresaids "the one-half of t sums at which the said houses and buildings shall be so valued and apprised manner above mentioned."

Some years after the date of the lease the tenant sublet a portion of the grou with the houses thereon, to the War Office, and assigned to the subtenant t whole clauses and obligements incumbent on the proprietor under the princi lease. The War Office converted the houses into barracks, and also erect other buildings for the same purpose. At the expiration of the lease the L Advocate, for the War Office, brought an action against the proprietor, concl ing for decree ordaining the defender to nominate a neutral person in terms the principal lease, and to pay one-half the value of the buildings when so as tained. The defender averred that the barracks were not buildings in the se of the lease, and pleaded that, at all events, the Court ought to instruct valuers as to the principle of valuation on which they were to proceed.

The Court *ordained* the defender to nominate a neutral person in terms of lease, and further *found* that the neutral persons to be appointed were to as tain to what extent, if any, the value of the lands was enhanced by the exist buildings on the lands.

1st Division. Lord Kincairney. C.

By tack, dated 25th May and 18th June 1791, Archibald Lord Dou let to William Douglas, of Brigton, "and his heirs, assignees, and tenants, All and Whole the park of Dudhope, with the houses and offi thereof, and particularly the materials of the old house of Dudhope, of the other houses on the subjects hereby let," all in the parish Dundee and county of Forfar, and that for ninety-nine years from M tinmas 1790.

The tack, *inter alia*, provided,—"And further, in regard the pres houses on the subjects hereby set are in a most ruinous condition, in much as to be only proper for a quarry, and as the said William Doug and his foresaids may during the currency of this lease erect differ houses and buildings on these subjects, it is hereby specially agreed u between the parties that, at the expiry of this tack, the whole houses buildings then upon the subjects hereby let shall be valued and appri by two neutral persons, one to be chosen by each party, and, in the of variance between the said persons, by an oversman to be nam them: And the said Archibald Lord Douglas shall be bound and obl as he hereby binds and obliges himself and his foresaids, at the first t of Whitsunday after the expiry of this lease, to content and pay to said William Douglas and his foresaids the one-half of the sums at wh the said houses and buildings shall be so valued and apprised in man above mentioned."

By subtack, dated 10th August and 17th December 1796, betw Douglas of Brigton, of the first part, and the Right Honourable Will Windham, His Majesty's Principal Secretary at War, on behalf of Majesty, of the second part, on the narrative of the above principal t the first party sublet to the second party and his successors in offi portion of the park of Dudhope, amounting to about nineteen acres Sc and comprehending the old house or castle of Dudhope, and the w other houses and buildings on the said portion, and that for the term ninety-four years from Martinmas 1795, being the space then to ru the principal tack; and the first party further assigned the said princi tack to the second party, "with the whole clauses and obligements the contained incumbent on the part of the proprietor," in so far as concer the portion of the subjects thereby sublet.

The subtenancy having expired at Martinmas 1889, the military aut rities removed from the subjects sublet, and the Earl of Home, the s cessor of Archibald Lord Douglas in the lands of Dudhope, having decli

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to nominate a valuer to value the houses and buildings upon the lands sublet, in terms of the provision above quoted of the principal tack, the Lord Advocate, on behalf of the Secretary of State for War, on 8th March 1890, brought an action against the Earl, concluding for declarator that the defender was bound to pay to the pursuer one-half of the value of the whole houses, as at Martinmas 1889, erected and existing upon the portion of Dudhope Park sublet to Douglas of Brigton; for decree ordaining the defender to appoint a neutral person to value the said houses in terms of the provision of the principal tack; and for decree ordaining the defender to make payment to the pursuer of one-half of the value when so ascertained.

The pursuer, after narrating the lease and sublease, averred;—(Cond. 6) "During the course of their occupation under the said sublease the present Secretary of State for War, and his predecessors in office, have restored and greatly added to the old house or Castle of Dudhope and its pertinents described in the principal tack, and have used the same as military barracks. They have further, on the portion of the ground so sublet to them, from time to time erected other houses and buildings which are of a permanent character and of considerable value. With reference to the averment in the separate statement of facts for the defender, denied that" these houses and buildings "are of a different character from that of the houses and buildings which were contemplated by the said principal tack, and that they are not houses and buildings in the sense of the said tack."

The defender answered;—(Ans. 6) "Admitted that during the course of their occupation under the said sublease the present Secretary of State for War and his predecessors in office have restored and greatly added to the old house or Castle of Dudhope, and have used the same as military barracks. Admitted that they further, on the portion of the ground so sublet to them, from time to time erected other houses and buildings which are of a permanent character. *Quoad ultra* denied."

The defender in his statement of facts further averred;—(Stat. 3) "The *only* buildings on the said ground at the date of the said tack in 1791, consisted of the mansion-house of Dudhope, with the buildings and offices thereof, all of which buildings were then in a ruinous condition. The whole of said park, except so far as the said buildings occupied it, was then in grass. It was then a rural subject, lying outside the boundaries of Dundee, but now it has been included within these boundaries, and is largely occupied by streets and ordinary town buildings." (Stat. 4) "The buildings which the pursuer now wishes to be valued consist of the Castle of Dudhope, and of large barracks, guard-house, magazine, and other buildings erected for military purposes, are not useful to the defender, and are of an entirely different character from that of the buildings which were contemplated by the said tack, and they are not houses or buildings in the sense of said tack."

The pursuer pleaded;—1. The defender, as heritable proprietor of the lands of Dudhope Park mentioned in the summons, under the progress of titles set out in the condescendence, being bound to implement the lessor's obligations contained in the said principal lease, decree should be pronounced, in terms of the declaratory conclusions of the summons. 2. The defender having failed to nominate and appoint a neutral person to act as his valuator in terms of the lessor's obligation contained in the said principal lease, decree should be pronounced in terms of the remaining conclusions of the summons.

The defender pleaded, *inter alia*;—3. The defender should be assoilzied in respect . . . (3) the houses and buildings now on the ground in question are not houses and buildings in the sense of the said tack. 4.

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The pursuer's material averments being unfounded in fact, the defend should be assoilzied.

On 12th June 1890 the Lord Ordinary (Kincairney) pronounced t interlocutor—(after repelling pleas for the defender not here quoted): "Before further answer, decerns and ordains the defender to nominate a appoint a neutral person to act along with a neutral person to be nor nated and appointed by the pursuer in valuing and apprising the wh houses and buildings upon the subjects specified in the conclusions of t summons, at Martinmas 1889, reserving as to expenses meantime: Gra leave to reclaim." *

The defender reclaimed, and argued;—The sound construction of t clause here in question was that only buildings *ejusdem generis* with th on the ground at the date of the lease fell within the clause. The m generality of the clause was not enough, it was open to constructio At the date of the lease the subjects were agricultural, and it was o buildings appropriate to an agricultural subject that could fairly regarded as within the contemplation of the parties to the lease. At events, barracks could not be held to have been in the contemplation the parties. But admitting that the buildings were within the scope the clause, it was for the Court to settle the principle of valuation bef remitting to valuers;[2] and the sound principle of valuation was that t subjects were to be taken at their marketable value, not the acciden value which they happened to possess for the outgoing tenant,[2] i.e. t subjects here were to be valued not as barracks, but as houses.

Argued for the pursuer;—It was perhaps possible to figure buildi of a character which would not fall within the clause here in questi but it was to be remembered that this was a long lease—for ninety-n years—and it was therefore doubtful whether the parties contempla that any particular class of buildings should be on the ground at the e of so long a period. The subjects were no doubt agricultural at the d of the lease, but looking to their proximity to Dundee they might w have been covered with streets of houses or factories, and such buildi were as different in character from agricultural buildings as were barra Then if the buildings were within the clause the mode of valuation w settled by the contract; it was for the valuers to determine the valu

On 6th November 1890, the Court of consent, and before futher ans remitted to "Alexander Beith Macdonald, Master of Works, Glasgow examine the houses and buildings on the ground in question, and to rep

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* "OPINION.— . . . But there remains the defender's averment relative plea to the effect that the houses which have been built on the gro are not useful to the defender, and are not of the nature of the buildings refe to in the lease. As to their usefulness to the defender, that may possibly f an element in determining the sum which the defender will have to pay; an do not think that that averment necessitates an allowance of proof. As to averment that the houses are not of the kind contemplated by the lease, I h come, although not without hesitation, to the conclusion that there ought to be a proof about that either. Considering the generality of the langua the lease, and the fact that it was a lease for ninety-nine years, it was nex impossible to imagine that it was understood that the tenant was to be restri to any particular kind of houses; and I consider that far more specific averm on this point would be necessary before a defence of this nature could be regar as relevantly averred. But I think it would not be quite safe at this st absolutely to repel this plea, and it seems better to pronounce the operative p of the interlocutor before answer on this point."

[1] Scott v. Edmond, June 25, 1850, 12 D. 1070, 22 Scot. Jur. 473.

[2] Frier v. Earl of Haddington, Nov. 22, 1871, 10 Macph. 118, 44 Scot. Jur

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quam primum on the character and condition of the same, and how far they are and can be made available for ordinary occupation to the Earl of Home, as proprietor of Dudhope Park, having regard to the circumstances of the neighbourhood, including those of the remainder of Dudhope Park."

On 1st December the reporter reported in substance that in his opinion the buildings were in a state of more or less considerable disrepair, that in their present state they were not available for ordinary occupation, and that they were not by any reasonable expenditure capable of being made available for such occupation.

The parties were thereafter farther heard.

At advising,—

LORD PRESIDENT.—The only difficulty in construing this old tack of 1791 is the impossibility, one may call it, I think, of placing ourselves exactly in the position in which the parties stood when they entered into that contract. But there are some things that are expressed or very clearly implied in the clause of the tack which guide us at least so far. The subject conveyed in the tack is the "park of Dudhope, with the houses and offices thereof, and particularly the materials of the old house of Dudhope, and of the other houses on the subjects hereby let." Now, that seems to imply, if it stood alone, that it is rather the materials of the houses than the houses themselves that were then upon the ground. But this is made a great deal more clear in a subsequent clause of the tack, which says,—"In regard the present houses on the subjects hereby set are in a most ruinous condition, insomuch as to be only proper for a quarry"—shewing that the houses at the time, if they had any value at all, were valuable only as materials that might be used in the construction of other houses. That is one point that comes out very clearly. And another appears to me to be this, that it was contemplated—and indeed could not but be contemplated—that other houses might be erected on the land during the currency of the tack, and accordingly the parties express themselves thus—"As the said William Douglas and his foresaids may, during the currency of this lease, erect different houses and buildings on these subjects, it is hereby specially agreed upon between the parties that at the expiry of this tack the whole houses and buildings then upon the subjects hereby let shall be valued and appraised." Now, that shews again that the houses which the parties foresaw might be upon the lands at the expiry of the tack might be either houses substantially in the same dilapidated condition as those which were at the beginning of the lease, or they might be houses of a different description, or at all events there might be other houses in a very different condition from those that were on the lands at the commencement of the tack.

Now, these things being clear, I think the rest of the tack can be very easily construed. The conclusion is that the whole houses and buildings upon the subjects at the expiry shall be valued and appraised by two neutral persons, one to be chosen by each party, and in case of variance between these parties, by an oversman to be named by them, and then there is a conclusion for payment of the amount. Now, the suggestion which I have already made leads me to this further inference—that it is quite possible that at the expiry of the tack there may be no houses of any value on the land at all—that is to say, the subject may be at the expiry of the tack very much in the same condition as it was at its commencement—and in that case there would be nothing to value, or

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at least the value would be *nil*. It appears to me therefore that all of the must be kept open in any reference that is to be made to the persons who a to be appointed to value and appraise, and I think in that respect probably th interlocutor of the Lord Ordinary is a little defective, because I think the onl value which the lessee is entitled to get from the lessor at the expiry of th tack is the advantage which the lands have gained by the existence of buildin upon the lands at the expiry of the tack, or in other words, what the less has got to pay is any enhanced value of the lands by reason of there bei existing buildings on the lands at the expiry of the lease.

It therefore appears to me that before making any remit to valuers or a praisers it would be desirable to define what is the duty of those parties, what is the valuation or appraisement which they are to make under this clau of the contract, and that will be done probably most fittingly by a finding the effect that the neutral persons who are to appraise and value are to take in account only the enhanced value of the lands by reason of the existence of th houses at the expiry of the tack, and of course the extent of the enhancem will depend entirely on the value of the houses built on the land. Wha should therefore propose to your Lordships is that we should make a find to that effect, and *quoad ultra* adhere to the Lord Ordinary's interlocutor.

It might have been more conducive to despatch if the Lord Ordinary h made an appointment upon each party to appoint a valuator, but as I suppo the pursuer, the lessee, is anxious to get on, we may take it for granted tha would not interpose any delay in the way of constituting this valuing tribu if he gets decree against the lessor to appoint a man on his side.

Lord Adam.—I concur with your Lordship. What the predecessor of respondent undertook to do was to agree that the whole houses and buildi then upon the subjects thereby let—"then" being at the expiry of the tack should be valued and appraised by two neutral persons, and then he binds a obliges himself to content and pay one-half of the sum at which the houses buildings should be so valued. That is quite clear. But I agree with y Lordship that the expression "whole houses and buildings" on the subjects must be subject to some construction. It was suggested in the course of discussion, for example, that supposing a monument had been built on subject, a building of that character could not possibly be within the c templation of parties to this tack as being houses or buildings of that k which the defender was bound to pay for. I think that would be so, and think, as your Lordship has put it, that the true test is, whether there houses or buildings of that class or character which go to increase and enha the value of the subjects there. I think that is really what the parties inten by the clause, and therefore I agree with your Lordship that we should h a finding to that effect, and then do as the Lord Ordinary has done as regar the appointment of valuers.

Lord M'Laren.—I am of the same opinion as your Lordships, and have v little to add. I understand it to be the wish of both parties that the C should construe this contract so far as it stands in need of construction. T question is, what is the legal effect of the clause under which Lord Douglas, predecessor of the defender, agreed that the buildings to be erected upon land should be valued at the expiration of the term of ninety-nine years, a

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that the proprietor should then pay one-half of the appraised value. Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication, or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition. In the remit which the parties are to make, I apprehend it will be the duty of the neutral persons to ascertain the value in this sense, and the only way in which the exchangeable value of the buildings can be found is by taking the difference of the price of the land with the buildings upon it and the price of the land if these buildings had never been put up or are supposed to be non-existent. Now, if that test be applied, all the difficulties which have been suggested arising out of the character of the buildings disappear, because if buildings have been put on the land which are of no use to anyone but the tenant who erected them they do not represent any exchangeable value, and nothing would be allowed for them. These buildings are of a peculiar character, for they were put up for the purposes of a military station. The report we have obtained rather indicates that they have no commercial value, or very little indeed, because the cost of adapting them to civil purposes would be disproportionate to any benefit which could be obtained from them. That, however, is a matter for the valuers. I agree with your Lordships that all we have to do at present is to make a finding, and to appoint the defender to name a neutral person to act as a valuer, reserving the disposal of the second conclusion in case it should be necessary for the parties to come here to obtain decree for payment.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Adhere to the interlocutor of the Lord Ordinary: Refuse the reclaiming note, and further find that the neutral persons to be appointed in terms of the lease are to ascertain to what extent, if any, the value of the lands of Dudhope Park is enhanced by the existing buildings now on the land, reserving the question of expenses, and remit to the Lord Ordinary to dispose of the expenses incurred in the Inner-House as part of the expenses of the case."

DONALD BEITH, W.S.—ROBERT STRATHERN, W.S.—Agents.

No. 88.

Jan. 15, 1891. Paterson Brothers v. Gladstone.

PATERSON BROTHERS, Complainers (Respondents).—*M'Kechnie—Watt.*
ANDREW A. GLADSTONE, Respondent (Reclaimer).—*Law.*

Partnership—Liability—Firm signature—Bill of exchange.—A partner in a firm of builders, who by the contract of copartnery was precluded from signing bills, adhibited the firm name to certain promissory-notes in favour of a money-lender, with whom he discounted them at the rate of 40 per cent per annum. The notes were not granted in the course of the firm's business, and the proceeds were applied to the partner's own use. The firm, having been charged upon the notes, brought a suspension.

Held that the loss occasioned by the fraudulent granting of the notes must fall upon the money-lender, who discounted them in suspicious circumstances without inquiry, and not upon the partners of the firm, as they were ignorant of the transaction, and as the transaction was not in the course of the firm's business or for its behoof.

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Lord Kincairney.
M.

THE firm of Paterson Brothers, builders and joiners in Edinburgh, consisted of three partners, Robert, William, and John Paterson. The contract of copartnery provided that William should take the whole charge of the financial transactions of the copartnery, and alone sign the company name to bonds and bills.

The firm and William and John, two of the partners, brought a suspension of a threatened charge on four promissory-notes for £63, 10s. in all, dated in October and November 1889, and bearing to be granted by Robert Paterson, Paterson Brothers, Margaret Hope, and R. M. Ramage in favour of Mr A. A. Gladstone, a money-lender in Edinburgh. The stated that the signature of the firm's name was unauthorised, and that the bills did not relate to any transaction of the firm, or in the line of the firm's business, and pleaded;—(1) The complainers not being liable in payment of the said promissory-notes, or any of them, the threatened proceedings should be suspended as craved. (2) The signature of "Paterson Brothers" to the said notes having been unauthorised, and these not being related to any transaction of Messrs Paterson Brothers, or in the line of their trade, the respondent is not entitled to enforce the same against the complainers. (3) The said notes having been granted to respondent for private purposes, or in connection with private debts or advances, in which, as respondent knew, or ought to have known, the firm of Paterson Brothers had no concern, suspension and interdict should be granted, with expenses.

The respondent pleaded, *inter alia*;—(2) The sums specified in the said promissory-notes having been advanced by the respondent on the faith of the signature of the name of the complainers' firm, and the signature being equivalent to the signature of the names of all the partners of the firm, including the individual complainers, the reasons of suspension should be repelled. (5) The said sums having been advanced by the respondent to the said Robert Paterson without any knowledge on his part of the said Robert Paterson's contract with his copartners, and being in the belief of the respondent applied for purposes within the line of the firm's business, or at least not manifestly without that line, the reasons of suspension should be repelled.

It was proved that in all the notes Robert Paterson had adhibited the firm name without the knowledge or authority of the other partners, and not in the course of the firm's business; that he kept the contents, minus a discount charge at the rate of 40 per cent per annum retained by the respondent, and that the firm got no benefit by them. The further import of the proof sufficiently appears from the opinions of the Lord Ordinary and of the Court.

The Lord Ordinary (Kincairney), on 13th June 1890, suspended the proceedings complained of, &c.*

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* "Opinion.— . . . In point of fact, the notes were not signed in the course of the business of the company, or for its behoof. But, although that so, there is no doubt that, unless the settled law on this point has been alte by the 24th section of the Bills of Exchange Act of 1882, to which counsel the complainers has referred, no member of the public dealing with a part of a firm can be bound or affected by any private stipulation in the contract copartnery; and I think that *prima facie* a partner in a firm in trade will the firm by bills granted in the ordinary course of business, whatever the provisions of the contract of copartnery may be.

"I think that this rule of law applies to builders in the position of Paterson Brothers; and I therefore think that they would be liable on bills granted their name, in the ordinary course of business, by Robert Paterson, although

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The respondent reclaimed, and argued;—The advances in question were made in the ordinary course of business. At least it was represented to

signing of such bills was without any true authority, and in breach of the contract of copartnery. On the other hand, I think that they would not be liable for bills granted out of the ordinary course of business, nor if the person in whose favour these bills were granted knew, or ought to have known, or suspected, that the bills were granted without the authority of the firm. . . . . It has been pointed out that the respondent was aware that there were other partners of the firm, and that, from the first letter he had from Robert Paterson, he must have known that the firm kept a bank account; and that that letter suggested that the firm had no difficulties with their bankers. Various suspicious circumstances have also been brought out in evidence; such as the fact that many of the respondent's letters were addressed, and many, if not the whole of them, were sent, not to the place of business of the firm, but to Robert Paterson's private residence. It is further said to be suspicious that the respondent got the names of parties to the notes who were connected with Robert Paterson, and in no way related to the firm, and that he bolstered up his security by policies of insurance. . . . . But I take the case on the footing that the respondent did not know, or suspect, the true state of the facts. Thus taking the case, it comes to this, that Robert Paterson cheated both the complainers and the respondent, and the question is,—On which of the two is the loss to fall? In several cases in which that question has arisen, it has been solved by throwing the loss on the party who put the instrument of fraud in the hands of the party defrauding, and so enabled him to defraud. But there is nothing of that kind, I think, in this case. There was, in fact, no instrument of fraud at all in the hands of Robert Paterson. He could not have used the contract of copartnery for that purpose, for it would have, at once, disclosed his want of power. I think that, in this case, the loss should fall on the party whose negligence, or rashness, or supineness, made the fraud possible; and I see no negligence or rashness on the part of Paterson Brothers, but a great deal on the part of the respondent, in failing to make due inquiries.

"Further, the loss has fallen on the respondent, and I see no good reason for shifting it to the complainers.

"Perhaps it may be a simpler ground of judgment to say that, while the complainers might have been liable for bills or notes signed by their partner in the ordinary course of trade, they are not liable for bills which are not in the ordinary course of trade. And I am of opinion that, having in view what has been proved as to the character of the business of Paterson Brothers, and their financial position, bills at 40 per cent discount were not bills in the ordinary course of business. They may have been ordinary enough in the respondent's business, but there is no proof that such bills were in the ordinary course of the complainers' business, or of such a business as they carried on. When the partner of a firm of some years' standing, and in sound public repute, comes to a money-lender to borrow money at 40 per cent, I think that the money-lender is put on his inquiry, and if he advances money at that rate he does it at his own risk and peril.

"With regard to the Bills of Exchange Act it is not necessary that I should say much. The respondent appealed to section 23, which is to the effect that the signature of the name of a firm is equivalent to the signature by the person so signing of the names of the persons liable as partners in that firm. As to that provision, I shall only say that, whatever it means, it cannot possibly mean that a totally unauthorised subscription of the name of a firm can bind the partners of the firm. It must assume the authority of the person signing.

"Section 24 was pleaded by the complainers, and it was maintained that, in respect of its provisions, the unauthorised signature of their firm could not bind them, unless they were barred from proving the want of authority. I was informed that there has been, as yet, no decision on the import and effect of this clause. But as, apart altogether from the import of the clause, my decision is in favour of the complainers, it is not necessary that I should express any

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the respondent that the complainers' business was a speculative one and required frequent pecuniary advances in order to pay wages. It was true that William Paterson alone had charge of the financial transactions of the firm, but there was no special exclusion of Robert's authority. The reclaimer was not bound to inquire, and had not the means of inquiring into the special circumstances of Robert's position and powers.[1] By the terms of the 24th section of the Bills of Exchange Act, 1882, the complainers were not therefore entitled to plead "want of authority," and it was only in the event of their being in a position to state that plea that the firm's signature would be inoperative.

The complainers were not called on.

LORD PRESIDENT.—This is a suspension of a charge on certain promissory notes bearing to be granted by the firm of Paterson Brothers, the ground of suspension being that although the promissory-notes bear the firm's name the signature was adhibited without authority. *Prima facie* that is a very good answer to the charge, but there is a further question whether the firm may not be precluded by the circumstances of the case from pleading such a defence. There are many implied obligations in the law of partnership, one of which—and it is well known—is that the firm will be liable for all drafts made by any of the partners in the course of the business of the firm. But in the present case the circumstances are so remarkable that I am almost driven to wonder that Mr Law should have found so much to say in support of his reclaiming note.

The firm of Paterson Brothers appear to be engaged in a very respectable business, not only as contractors, but also as speculative builders who erect houses upon ground which they have feued. That is a perfectly legitimate branch of trade, and if the so-called speculative builders have capital to carry on that trade, I do not see why the name "speculative builders" should imply anything against the credit of the firm. There is nothing really against the credit. It is said that their balances fell low from time to time, and it is no wonderful that they should, because there must have been a constant drain upon their funds in providing materials for the erection of the houses. But this matter is not of any importance as tending to throw discredit upon the nature of the business they were engaged in conducting.

Robert Paterson, one of the partners of the firm, was expressly excluded from signing the firm's name for pecuniary obligations, and accordingly when he signed the name of the firm to these bills he committed a fraud upon his partners, because he did not use the proceeds for the purposes of their trade, but for his own private purposes. Mr Gladstone's position is that he met Robert Paterson in the ordinary course of business, and without any inquiry as to Paterson's position, or the authority he had to append the firm's name to the bills, he advanced money upon them, retaining discount at the rate of 40 per cent per annum. The circumstances were such as to create a suspicion against the conduct of Robert Paterson. In a letter dated 28th October 1887, the first which appears in the correspondence between the parties, Robert Paterson wrote to Gladstone enclosing a bill drawn by himself upon R. Ramage for £15, which he asked Gladstone to discount. He says in this letter,—"I would not have

opinion on the question whether this clause operates any change on previous existing law as to the right of the public to rely on the signature of the name of a firm by one of its partners."

[1] *Authority cited.*—Shitta v. Montaignac, July 1890, L. R. 15 App. Ca. 357.

troubled you but I cannot do without the money myself. . . . Of course this is strictly confidential between you and I." But when he comes back to Mr Gladstone to transact with him it is ostensibly not upon his own account, but for the firm, and it is then, I apprehend, that the money-lender begins to be in fault, for he must have had suspicions aroused that things were not all right when a firm of builders in good repute required to borrow at 40 per cent. He must have known that the strain would be such as very shortly to bring any ordinary business to an end, and that it was not a likely thing that a firm in good repute would find it necessary to resort to him for such a purpose. It was quite in Mr Gladstone's power to ascertain whether Robert Paterson was dealing fairly by him and with his copartners, and whether his action was authorised by the firm. But he abstains from inquiry of any kind, and is satisfied to take his 40 per cent and incur all risks.

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The question then comes to be, who is in fault? A fraud, and a very bad fraud, has been committed, but if it could have been shewn that the firm of Paterson Brothers had derived benefit from it they would have been liable, or if it could have been shewn that the firm had enabled Robert Paterson to commit the fraud, even although there had been no benefit to the firm, the law would also probably have held them liable. But they knew nothing about Robert Paterson's doings. In short, Paterson Brothers were perfectly faultless in the circumstances, and I do not see by what precautions they could have saved themselves. When their position is contrasted with that of Mr Gladstone, the case seems a very clear one. He had the means of finding out the true nature of the transaction, and if he had moved even his finger, no harm would have been done. Accordingly, upon him alone the loss must fall, because if one of two innocent parties is not in fault, and the other is grossly negligent, the latter must suffer as being the party who made the fraud possible.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT adhered.

MARTIN & M'GLASHAN, S.S.C.—ALEXANDER CAMPBELL, S.S.C.—Agents.

ROBERT THOMAS NAPIER SPEIR, Objector and Respondent.—*D.-F. Balfour—C. J. Guthrie.*
LORD WILLOUGHBY DE ERESBY, Respondent and Reclaimer.—*Asher—Dundas.*

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Teinds—Subvaluation—Summons of approbation—Decreet—Ambiguity—Construction—Prescription.—In a report in 1629 of a valuation by subcommissioners of lands and teinds in a parish, the lands of P. were reported to be of the value of forty bolls victual. In a note appended to the report, the lands of D. were declared to be "nocht valued becaus yai ar sett *decimis inclusis.*"

In 1797 an action of approbation and valuation was brought by A and B. The extract-decreet in the action set forth that the action was brought by A as proprietor of the lands of P., and by B as "infeft" in part of the lands of D., "with pertinents . . . and which lands of D. were formerly part of the said lands of P."; that the report of the subcommissioners of 1629 had valued the lands of P.; that therefore that report ought to be approved "in so far as concerns the valuation of the pursuers' lands before specified"; that the pursuers appeared by their procurators, who produced the report of the subcommissioners, "and particularly the valuation of the pursuers' lands libelled, and appearance was made for the Officers of State"; that the Lords thereupon ratified, allowed, and

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approved the said report, in so far as concerned the "valuation of the pursuers lands libelled" and interponed their decreet and authority thereto, and found and declared in terms thereof that the yearly avail of the stock and teind of the lands of P. were and should be in all time coming forty bolls victual, and decerned "conform to conclusions of the libel."

More than forty years after the date of the decree the proprietor of the part of D. which belonged to B objected to be localled on for augmentation of stipend maintaining that his part of D. had been valued under the above decree. Another proprietor lodged answers in which he maintained (1) that the decree of approbation, when fairly construed along with the report, which it expressly approved, did not value the lands of D.; or otherwise (2) that there was a latent ambiguity in the decree, which fell to be explained by documentary evidence.

Held (1) that the decree valued the part of the lands of D. which belonged to B as having formed part of the lands of P. at the date of the subvaluation; and (2) that the objections stated to it were extrinsic objections which could not be maintained after the lapse of forty years.

Teinds—Procedure in locality—Res judicata.—An augmentation of stipend having been granted and modified a process of locality followed in which in 1850 an interim scheme was approved. To this scheme the Lord Advocate, as having right on behalf of the Crown to the bishops' teinds, lodged objections in which he stated that the teinds of the lands of D. and certain other lands in the parish, the teinds of which were held on heritable rights, were unvalued. He objected to the scheme in so far as it laid no portion of the augmentation upon the teinds of these lands. The common agent lodged a note in which he admitted that the teinds of certain of the lands in question, including the lands of D., were unvalued, and stated what he believed to be the rental. In 1858 the Lord Advocate lodged a note stating that he was satisfied with the extent to which the common agent had given effect to the objections as regarded the rents stated for the lands which were let unvalued including the lands of D., and he craved the Lord Ordinary to sustain the objections, and to remit to the clerk to rectify the locality, and to allocate the augmentation *primo loco* on the teinds of these lands. By interlocutor of 3d June 1858, the Lord Ordinary allowed the note to be received and seen, and by interlocutor of 9th July he remitted to the clerk to rectify the locality and report. This interlocutor was not reclaimed against. The clerk reported a rectified scheme, but it was never approved final, and no further proceedings took place in the locality until after a new augmentation was granted in 1885.

In 1890 the question was raised whether the teinds of the lands of D. were valued or unvalued. The party alleging that the teinds were not valued pleaded *res judicata* in respect of the Lord Ordinary's interlocutor of 9th July 1858.

Held that the interlocutor of 9th July 1858 did not support the plea.

1st Division. Ld. Kyllachy. C.

In 1869 the minister of the parish of Muthill raised a process of augmentation, modification, and locality, and obtained an augmentation of three chalders. By the rectified interim scheme of locality of the stipend of the parish, dated in April 1873, the augmentation was localled on, *inter alia*, the teinds of the lands of half of Wester Drummawhance and three-quarters of Easter Drummawhance, both belonging to Mr Speir of Culdees, and of certain other lands belonging to Lord Willoughby de Eresby. The other teinds in the parish either were bishops' teinds or were valued and exhausted.

Mr Speir objected to the above allocation of the stipend on the ground *inter alia*, that the teinds of the one-half of Wester Drummawhance and of the three-quarters of Easter Drummawhance were valued and exhausted. He founded upon a decreet of approbation and valuation dated 5th July 1797, of which he produced an extract.

This extract-decreet of approbation and valuation narrated a summons of approbation and valuation at the instance of James Drummond of Perth, and Anthony Murray, of Crieff, against the Officers of State

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patrons of the parish of Muthill, and titulars of the teinds thereof, and the minister of the parish, "the which summons maketh mention that the pursuer, the said James Drummond, of Perth, stands heritably infeft and seised in All and Whole the lands of Pitzalton now called Pitkellony, Over and Nether, ... lying within the parish of Muthill and sheriffdom of Perth, conform to instrument of sasine in favour of the said James Drummond, dated the 31st day of January 1786, and registered in the Particular Register of Sasines for the shire of Perth the 20th day of February thereafter: That the other pursuer, the said Anthony Murray, stands heritably infeft and seised in All and Whole the just and equal half of the town and lands of Wester Drummawhance, with . . . . pertinents thereof, lying within the parish of Muthill and sheriffdom of Perth, and likewise All and Whole these parts and portions of the lands of Easter Drumachance which belonged to the deceased Mungo Graeme, of Gorthy, with the teinds thereof included, with . . . . whole pertinents thereof, lying within the said parish of Muthill and sheriffdom of Perth, conform to instrument of sasine in favour of the said Anthony Murray, dated the 12th day of May 1791, and registered in the Particular Register of Sasines for Perthshire the 5th day of July thereafter, and which lands of Easter and Wester Drummawhance were formerly a part of the said lands of Pitkellony; . . . and true it was that the Subcommissioners appointed for valuing the stock and teind of the lands within the presbytery of Muthill, now Auchterarder, by their report, dated the 20th day of October 1629, found and declared 'the lands of Pitkellonie, Over and Nether, pertaining to James Drummond of Pitkellonie, pays stock and teind fourtie bolls victual,' as the principal report of the Subcommissioners in the hands of the clerk of the High Commission will testify: Therefore the report of the Subcommissioners above recited ought and should be ratified, allowed, and approven by the said Lords Commissioners aforesaid, in so far as concerns the valuation of the pursuers' lands before specified, and their decreet and authority should be interponed thereto, and in terms thereof it ought and should be found and declared that the stock and teind of the pursuers' said lands shall be now and in all time coming the particular quantity of victual before specified and contained in the said report, conform to the laws and daily practice of Scotland used and observed in like cases in all points. . . ." The extract-decreet further set forth that the summons "being called, and the said pursuers compearing by Mr William Ereskine, advocate, their procurator, who, for instructing their active title and right to pursue the foresaid action and cause, produced in presence of the said Lords the instruments of sasine libelled on, of the dates, tenor, and contents above mentioned; and, for verifying the points and articles of the libel, produced a book or record containing the principal report of the Subcommissioners of Muthill, and particularly the valuation of the pursuers' lands libelled, of the date, tenor, and contents above mentioned, as the said writes in themselves more fully bear: And the Officer of State compearing by Mr Andrew Balfour, advocate, His Majesty's Solicitor for the late bishops' tythes, their procurator, and the other defenders being lawfully summoned to this action, . . . and not compearing. The foresaid summons and writes produced, with the desire of the pursuers' procurator after mentioned, being all at length read, heard, seen, and considered by the said Lords, and they therewith being well and ripely advised, the Lords of Council and Session, Commissioners aforesaid, have ratified, allowed, and approved, and hereby ratify, allow, and approve, the report of the Subcommissioners of the presbytery of Muthill in so far as concerns the valuation of the pursuers' lands libeled, and have interponed,

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and hereby interpone, their decreet and authority thereto, and in terms thereof have found and declared, and hereby find and declare, the just worth and constant yearly avail of the stock and teind of the lands of Pitkellonie, Over and Nether, with the pertinents, lying in manner libeled to be now and in all time coming 40 bolls victual, which quantitys of victual above mentioned the said Lords decern and ordain to stand, continue, and endure, and to be repute and holden the just worth and constant yearly avail of the stock and teind of the said lands above mentioned in all time coming; . . . which desire of the pursuers' procurator above mentioned, with the libel and report of the Subcommissioners of the presbytery of Muthill, being upon the day and date of these presents heard read, seen, and considered by the said Lords, and they therewith, and with the haill steps and procedure of this proces, being well and ripely advised, ratified, allowed, and approved the said report in so far as concerned the valuation of the pursuers' lands libeled, and interponed their decreet and authority thereto, and decerned, conform to the conclusions of the libel; and so the said Lords gave their decreet in the said matter in manner at length above mentioned."

Lord Willoughby de Eresby lodged answers to Mr Speir's objections, in which he denied that the teinds of the lands of Drummawhance had been valued, and founded upon the report of the Subcommissioners, which bore to be approved of by the decreet of approbation, and maintained that the lands in question were expressly excepted from the valuation.

The report of the Subcommissioners declared, *inter alia*, that "Pitcellonie ower and nethir perteining to James Drūmond of Pitzellonie payis stok and teind fourtie bollis victuall. . . . *Nota.*—Landis in this parochin of Muthill nocht valued becaus yai ar sett decimis inclusis viz Banibeg . . . Thrie Drūmaquhensis Warde of Muthill."

The objector further maintained that it had already been judicially decided by an interlocutor of Lord Mackenzie (Ordinary), of date 9th July 1858, that the teinds of the lands in question were not valued.

The facts bearing upon this latter question were as follows:—

In March 1849 an augmentation of the stipend of the minister of the parish of Muthill was granted and modified, and in the process of locality following thereon an interim scheme was, in March 1850, approved of. By that scheme the teinds of the parish were divided into teinds exhausted, teinds held on heritable right, and bishops' teinds, and by the same scheme the whole of the augmentation was laid upon the teinds of the lands of Braco and Middle Drummawhance (one of the three Drummawhances about which there was no question in the present case) as being held in heritable right, and no part was laid upon bishops' teinds.

In June 1850 the Lord Advocate, having on the part of the Crown right to the bishops' teinds, lodged objections to the interim scheme. He stated that certain lands in the parish, including the half of Wester Drummawhance and three-fourths of Easter Drummawhance, were described in the report of the Subcommissioners in 1629 as "nocht valued, becaus they are set *cum decimis inclusis*." He further stated that he could not "discover from the present locality who is now proprietor of the half of Wester Drummawhance and three-fourths of Easter Drummawhance, but the common agent can, of course, ascertain. Sir William Stirling, of Ardoch, appears to have been the proprietor in 1670. . . . . The objector therefore objects to the said interim locality in so far as it lays no portion of the present augmentation upon the teinds of the lands above mentioned, and protests against any portion of the present or any future augmentation being laid upon the bishops' teinds until the teinds of the whole of these lands are allocated upon and exhausted."

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In July 1851 the common agent lodged answers to these objections, in which he stated, with regard to the lands of Drumaquhance, that he had not yet had "an opportunity of making an investigation into the ancient titles of the Ardoch family, who are said to have been the proprietors of the half of the lands of Wester Drumaquhance and of three-quarters of Easter Drumaquhance so far back as 1670, but he expects to have this accomplished during the ensuing vacation by tracing the lands thro' the titles down to the present time."

In January 1854 the common agent lodged a note, in which he gave the result of his investigations. The note concluded thus:—"The common agent, contrasting the several lands of Drumawhance which appear to be unvalued for teind with the proportion valued for teind, must hold that the real rent of the lands Drumawhance, in so far as unvalued for teind, cannot be taken at a less sum than £750, one-fifth of which will be appropriated for teind. At the same time, if the proprietor of Culdees and Drumawhance can bring evidence to shew that the rental is overstated, it will be remedied in preparing for a final locality."

In November 1856 a rectified scheme of locality was prepared, in which a portion of the augmentation was allocated upon a portion of the bishops' teinds belonging to the Crown.

In December 1856 the Lord Advocate lodged objections to the rectified scheme, in which he referred to the objections formerly lodged by him to the interim locality, which objections were made upon the ground that it omitted certain lands to the teinds of which heritors had right, and did not lay any portion of the augmentation upon the teinds of these lands. The objector pointed out that the common agent had, in the note subsequently lodged by him, given effect to these objections so far as concerned some of the lands in question, and among these the Drummawhances. He therefore objected to the rectified scheme in so far as a portion of the augmentation was allocated upon the bishops' teinds belonging to the Crown instead of upon the teinds of the lands mentioned, which were *held* under heritable rights, and among them the Drummawhances; and he protested against any portion of the augmentation being laid upon the bishops' teinds until the whole teinds held upon heritable rights were exhausted. The objector further craved that effect might be given to his former as well as to his present objections, that the same might be sustained, and the interim and rectified schemes objected to be rectified accordingly.

On 21st May 1858 the Lord Ordinary (Mackenzie) sustained the objections for the Lord Advocate, and remitted to the clerk to rectify the locality. On 4th June following the Lord Ordinary of consent recalled the interlocutor of 21st May, and appointed the objections for the Lord Advocate and for the common agent to be revised respectively.

In June 1858 the Lord Advocate lodged a note, in which he stated that he "is satisfied that a revisal is quite unnecessary, as he is content, so far as regards the present locality, to rest satisfied with the extent to which the common agent, in said answers and note, has given effect to his objections, both as regards the lands the teinds of which are held upon heritable right, and as regards the rents which he states for these lands which are yet unvalued." He then set forth the lands as to which his objections had been given effect to, among which were included the half of Wester Drummawhance and three-quarters of Easter Drummawhance at a rent of £400, and he craved the Court to "sustain the objections to the interim schemes, in so far as they lay no portion of the present augmentation on the above lands, and remit to the clerk to rectify the same,

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and to allocate the present augmentation *primo loco* on the teinds of th said lands."

On 25th June 1858 the Lord Ordinary allowed the note for the Lor Advocate to be received and seen, and, on 9th July, pronounced the inte locutor particularly founded upon by Lord Willoughby de Eresby, b which he remitted to the clerk to rectify the locality and to report. N reclaiming note was lodged against this interlocutor.

Thereafter the clerk prepared a rectified locality, but it was nev approved of as final, and apparently was never acted upon. No furth proceedings took place in the case until after the new augmentation i 1873.

The objector pleaded;—(1) The teinds of the said half of Wester Drum mawhance and three-fourths of Easter Drummawhance having be valued by said decreet of valuation and approbation of 5th July 179 and having been exhausted by payment of old stipend, the said locali should be rectified accordingly.

Lord Willoughby de Eresby pleaded;—(1) *Res judicata*, in respect the interlocutor of Lord Mackenzie, Ordinary. (3) The objections shou be repelled, so far as regards the half of the lands of Wester Drum whance and three-quarters of Easter Drummawhance before mentio in respect that no part of the lands of Drummawhance is included in th subvaluation of 1629 or in the decree of approbation of 1797.

The record having been closed on the objections by Mr Speir and t answers by Lord Willoughby de Eresby, the Lord Ordinary (Kyllach on 19th June 1890, pronounced an interlocutor finding "that the lands one-half of Wester Drummawhance and the parts and portions of East Drummawhance, which belonged to Mr Graeme, of Gorthy, are includ in the valuation of the lands of Pitkellony, dated 20th October 1629, a approved 5th July 1797," &c.*

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* "OPINION.—The main question raised under this record, which has b made up between Mr Speir, of Culdees, and Lord Willoughby de Eresby, whether certain lands belonging to the former, and being one-half of the la of Wester Drummawhance and three-fourths of the lands of Easter Drum whance, are to be held as having been valued as part of the lands of Pitkel by subvaluation, dated 20th October 1629, and decree of approbation the dated 5th July 1797.

"The lands in question, it may be explained, were treated as valued do to the institution of the present locality in 1846, and thereafter down t preparation of the rectified scheme, No. 112 of process, in October 1860. have they been treated as unvalued in any scheme approved interim or i prior to the interim locality now objected to, which was approved interim 1870, and has since then formed the rule of payment of stipend.

"Mr Speir (the objector) maintains that the decree of approbation expre applies the subvaluation to the lands in dispute, identifying them as part of lands of Pitkellony, of which the stock and teinds were valued by the Subs missioners at forty bolls victual. At least he maintains that this identifica will be complete on his proving—as he says he is prepared to prove—that three-fourths of the lands of Easter Drummawhance are identical with the p and portions of Easter Drummawhance which belonged to the deceased Mr Graeme, of Gorthy.

"The respondent, on the other hand, maintains that the lands in que were expressly excepted from the subvaluation as being held, or supposed t held, *cum decimis inclusis;* that this appears from a note appended to the valuation; and that the decree of approbation cannot in these circumstance read as including those lands, or, if it must be so read, cannot receive effec valuing them. He further maintains that the question is *res judicata*, hav been decided in his favour by an interlocutor in the present process, dated

Lord Willoughby de Eresby reclaimed, and argued;—It was clear that in 1629 the lands in question were not valued, because in the subvalua-

July 1858. He has also a minor point to the effect that, at all events, one quarter of the three-fourths of Easter Drummawhance did not belong to Mungo Graeme, of Gorthy, and do not therefore, in any view, fall within the valuation.

"I confess that I am not able to read the decree of approbation otherwise than as the objector reads it—that is to say, I do not think it is doubtful that on its just construction it imports a finding that the one-half of Wester Drummawhance and the parts of Easter Drummawhance which belonged to Graeme of Gorthy were included in the valuation by the Subcommissioners of the lands of Pitkellony. There is no doubt that the summons of approbation so concluded, and that decree was granted conform to the conclusions of the summons; and I am not able to attach the importance which the respondent attaches to the absence in the operative decree of renewed reference to the fact that the lands of Pitkellony—which were the lands valued—included the parts in question of the lands of Drummawhance. That matter is, after all, one affecting only the correctness of the extract. There can be no doubt as to what was the judgment of the Court.

"But if the decree of approbation does, upon its just construction, profess to value the lands in question, or identify them as valued by the Subcommissioners under a different name, I do not see how the respondent can now challenge that decree, or claim that it shall be denied effect. It may be that the 'Three Drummawhances' mentioned in the note to the subvaluation are the lands, or include the lands, to which the present question relates. It is not certain that that is so, but it very probably is so. But so taking it, the result only is that the decree of approbation was erroneous—that is to say, was wrong on its merits. It was certainly its function to apply the subvaluation to the various parcels of land which, under old names, or some common name, the subvaluation included; and if it did so erroneously, either from misreading the subvaluation, or ignoring or misreading the note on which the respondent founds, I am not aware that, after forty years have passed, there is any remedy. The judgment is now as much *res judicata* as if it had passed *causa cognita;* and I do not suppose it can be suggested that if the respondent or his authors had appeared in the process of approbation, and raised the present question, and had done so unsuccessfully, they could at any time afterwards have contended that the decree of approbation was disconform to the subvaluation, and that therefore they were not bound by it.

"I am therefore against the respondent on the merits of Mr Speir's objection. But it remains to consider whether the objection is not foreclosed by previous judgments in the present process of locality.

"There is no doubt that the question as to the valuation of the lands of Easter and Wester Drummawhance was raised in the present locality so far back as the year 1850—the Lord Advocate on the part of the Crown having in that year lodged objections claiming that the 'Three Drummawhances' should be treated as unvalued. There is no doubt also that the common agent appears upon such inquiry as he happened to make, to have conceded that unless the proprietor brought forward further evidence before the locality was approved final, the objection of the Lord Advocate must receive effect. It is also true that after some delay the Lord Advocate in June 1858 moved to have his objections sustained and the locality rectified, and that on 9th July 1858 the Lord Ordinary (Mackenzie), having allowed the Lord Advocate's note to be seen, pronounced the following interlocutor:—'*Act.* Buchanan—*Alt.* A. B. Shand.—Lord Mackenzie.—9th July 1858.—The Lord Ordinary remits to the Clerk to rectify the locality, and to report. T. MACKENZIE.'

"There was no reclaiming note. The clerk did report a new rectified scheme, but the same was never approved. Nothing more was done in the locality until after the new augmentation in 1873 when the present interim

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tion of 30th October of that year they were expressly exclude supposed to be held *cum decimis inclusis*. In construing, decreet of 1797 which professed to approve of the subvaluation would not readily adopt a construction which involved a det that the commissioners had gone beyond their powers. Fairl decreet of 1797 did not value the lands of Drummawhance only the lands of "Pitkellonie, Over and Nether." The cla decree in which the lands of Easter and Wester Drummawh said to have been "formerly a part of the said lands of P formed merely the closing portion of the description of Anthon sasine, which was inserted *narrative* to instruct his title to clause did not imply that he desired to have all the parcels of l which he said were to be found within his infeftment. The su of the summons shewed that he put forward the subvaluati as the foundation of his case, and in that deed the "lands of Over and Nether," were alone valued. The operative part of contained no finding that the lands of Drummawhance were i the lands of Pitkellony, and in that it was consistent with the tion of the summons.[1] The clause "with pertinents" could n as including parts of Drummawhance.[2] (2) If, however, this v proper construction of the decreet, then there was a latent ambi phraseology, to explain which extrinsic evidence was competen cases of *Earl of Fife's Trustees* and *M'Intyre*,[4] which were fou by the respondent, it was patent, upon the face of the de the commissioners had gone beyond their powers, and in suc stances it was held that after forty years the decrees could no lenged. (3) It was *res judicata* that the teinds of the lands of whance belonging to the objector were unvalued.[5] The questio they were valued or not was raised in 1850 by the Lord Adv maintained that they were unvalued, and he had a good title t question on behalf of the Crown, as the holder of the bishops the parish. The heritors' interests, and more particularly t objector, were represented by the common agent, whose duty

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locality was established, giving effect for the first time practically t Advocate's objection.

"The question is whether all this constituted a *res judicata*. I an in the negative. It is not perhaps enough to exclude that plea tha as yet been no final locality. The more important fact is that the been no proper trial of the question. For I cannot hold that a re clerk to prepare a rectified scheme and to report amounted to a final ju foreclosed further discussion. I rather think that the interlocutor n remit may still be reclaimed against, I mean, *ex gr.*, along with the approving the final locality. But whether that be so or not, I am hold that as the interlocutor stands it is a *res judicata*."

[1] Cameron v. Macpherson, April 1, 1853, 15 D. 657, 25 Scot. Jur. 3

[2] Murray v. Common Agent in Locality of Selkirk, July 6, 1864 1312.

[3] Bell's Prins. sec. 524; Morton v. Hunters & Co., Nov. 26, 1830, 379, 3 Scot. Jur. 104; Macleod v. Smith, &c., May 25, 1869, 7 Macpl July 10, 1873, 11 Macph. (H. L.) 62, 41 Scot. Jur. 325 and 435.

[4] Earl of Fife's Trustees v. Commissioners of Woods and Forests, Fe 11 D. 889, 21 Scot. Jur. 310; M'Intyre v. Maclean, March 7, 1828, Sh Cases, 160, and also reported in 3 Fac. Decns. March 8, 1828, p. 794

[5] Earl of Hopetoun v. Ramsay, &c., March 27, 1846, 5 Bell's App. Jur. 398; Dundas v. Waddell, Dec. 19, 1878, 6 R. 345, revd. Feb. 27, (H. L.) 19.

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defend the heritors' rights against anyone attacking them.[1] The point was, in short, properly contested between the parties.[2] The common agent was satisfied on inquiry, and allowed that the Lord Advocate was right. The result was that, on the motion of the Lord Advocate, the Lord Ordinary remitted to the clerk to rectify the locality, and to report. That interlocutor was not reclaimed against within twenty-one days, and therefore became final.[3]

Argued for Mr Speir;—(1) Upon a sound construction of the decreet of approbation, the teinds of the lands of one-half of Wester Drummawhance and the parts of Easter Drummawhance which belonged to Graeme of Gorthy were valued by the decreet as having formed a part of the lands of Pitkellony at the date of the subvaluation. Both the pursuers in the summons of approbation concurred in stating this, and they each asked that the subvaluation should be applied to their respective lands. Decreet was given "conform to the conclusions of the libel." The respondent's objections were extrinsic objections not appearing *ex facie* of the decreet, and they were cut off by the negative prescription.[4] There was no such ambiguity here as in the *Morven*[5] case, where a number of lands were valued under a general name, and it was doubtful whether certain lands called Knock, specially mentioned neither in the subvaluation nor in the operative part of the decree of approbation, had been valued under the general name. (2) The respondent's plea of *res judicata* was ill founded. The interlocutor of 9th July 1858 was in no sense one upon the merits of the Lord Advocate's objections. Further, the common agent acted for the general body of heritors, and not for a dissentient, and accordingly he could not from 1850 to 1858 have properly represented the interest of the objector against the Lord Advocate. The question then whether the objector's lands of Drummawhance were unvalued had never been properly raised between parties who were proper contradictors and had a good title to raise it.[6]

At advising,—

Lord Adam.—It appears to me that the first question for consideration is, whether on a sound construction of the decree of approbation and valuation of 1797 the teinds of the objector's lands in question are thereby valued. If they are so valued, then all objections not appearing *ex facie* of the decree will, having regard to its date, 1797, be cut off by the negative prescription. [His Lordship then recapitulated the substance of the narrative of the extract decree.]

Now, I think, there is no doubt or difficulty as to what is here meant by the "pursuers' said lands," and that they are the pursuer James Drummond's lands

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[1] Duke of Buccleuch v. Common Agent in Locality of Inveresk, Nov. 10, 1868, 7 Macph. 95, 41 Scot. Jur. 55, per Lord President, 7 Macph. 98.

[2] Earl of Mansfield, &c. v. Stewart, Jan. 30, 1880, 7 R. 552, per Lord Rutherfurd Clark, p. 98.

[3] Judicature Act, 1825 (6 Geo. IV. c. 120), sec. 54; Act of Sederunt, Nov. 12, 1825, sec. 16.

[4] Earl of Fife's Trustees v. Commissioners of Woods and Forests, 11 D. 889; M'Intyre v. Maclean, Shaw's Teind Cases, 160, and 3 Fac. Decns. p. 794; Dean of the Chapel Royal and Her Majesty's Advocate v. Johnstone, &c., Feb. 20, 1867, 5 Macph. 414, 39 Scot. Jur. 220, affd. March 18, 1869, 7 Macph. (H. L.) 19, 41 Scot. Jur. 348.

[5] Macleod v. Smith, &c., *supra*.

[6] Dean of the Chapel Royal and Her Majesty's Advocate v. Johnstone, &c., *supra*, per Lord Chancellor (Hatherley), 7 Macph. (H. L.) p. 24.

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of Pitkellony, Over and Nether, and the other pursuer Anthony Murray's part of the lands of Drummawhance, Easter and Wester.

It accordingly appears to me that the summons clearly concluded that it ought and should be found and declared that the stock and teind of the lands of Pitkellony, Over and Nether, and of the parts of the lands of Drummawhance Easter and Wester, in question should be in all time coming the particular quantity of victual "before specified." If, therefore, decree was pronounced by the Lord High Commissioners in terms of the conclusions of the summons it would appear to me to be clear that the objector's lands in question are valued by the decree of approbation and valuation.

Now, we learn from the extract decreet that the pursuers appeared by the procurator, who produced a book or record containing the principal report of the Subcommissioners of Muthill, and particularly the valuation of the pursuers' lands libelled, that appearance was made for the Officers of State, but not for the minister, and that the Lords "ratified, allowed, and approved the said report in so far as concerned the pursuers' lands libelled, and interponed their decreet and authority thereto, and decerned conform to the conclusions of the libel."

The extract of the decree so pronounced is given out in the following terms. [His Lordship quoted the extract decree.]

It appears to me to be clear that the teinds of the objector's lands in question are valued by this decree as having been parts of the lands of Pitkellony, Over and Nether, at the date of the subvaluation.

For the reasons which the respondent now alleges, it is possibly not consistent with the facts of the case that the objector's lands were included in the subvaluation. But the decree affirms that the lands were valued, and confirms the valuation of the Subcommissioners. It is too late, however, now to inquire into that matter. The objections which the respondent urges are extrinsic objections not arising *ex facie* of the decree, and all such objections are, as I have said, cut off by the negative prescription. On this part of the case, therefore, I agree with the Lord Ordinary.

The respondent, however, pleads that it is *res judicata* that the lands in question are unvalued, and he founds upon an interlocutor of the Lord Ordinary of 9th July 1858 in these terms—"The Lord Ordinary remits to the clerk to rectify the locality and to report." That interlocutor certainly does not appear on the face of it to be a judgment of the Court on any question of right, but to be merely a direction that a farther step of procedure should be taken in the case.

But as I understand the respondent's contention, he maintains that it was a direction to rectify the locality so as to give effect to certain objections stated by the Lord Advocate in the locality in which the question had been raised between him and the common agent as to whether the teinds of the lands in question were valued or not, and that the common agent had admitted that they were not valued.

In order to see how this matter stands it is necessary to refer in some detail to the proceedings which took place in the locality. [His Lordship then narrated the proceedings as stated above.]

Now, I agree with the Lord Ordinary that the question whether the teinds of the lands now in question were valued or unvalued was raised in the course of the proceedings as between the Crown and the common agent. It is true that it was not raised in the form in which it is raised in the present case, viz.

whether the lands in question were valued in 1797 as part of the lands of Pitkellony. No. 89.

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Neither was the question directly raised in the course of the proceedings, but it was necessarily involved in the question whether or not the lands in question were liable to be localled on for one-fifth of the real rent as being unvalued, and if the interlocutor of 9th July 1858 is to be held as importing a judgment of the Court to that effect, then I think it is *res judicata* that the teinds of these lands are unvalued.

But then I agree with the Lord Ordinary that the interlocutor in question does not import a judgment to that effect. It will be observed that the note of the Lord Advocate craves the Court to sustain his objections, but the interlocutor does not do so, but merely remits to the clerk to rectify the locality. I agree with the Lord Ordinary that such a remit does not imply any judgment on the merits of the objections and answers, and I think the interlocutor submitted to us ought to be affirmed.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT refused the reclaiming note.

HAMILTON, KINNEAR, & BEATSON, W.S.—DUNDAS & WILSON, C.S.—Agents.

Poor MICHAEL M'EVOY, Pursuer (Reclaimer).—*Cosens.* No. 90.
ALEXANDER MILLER AND OTHERS (Braes' Trustees), Defenders (Respondents).—*M'Lennan.*

Jan. 16, 1891. M'Evoy v. Braes' Trustees.

Process—Judicature Act, 1825 (*Geo. IV. c.* 120), *sec.* 18—*A. S.*, 11*th July* 1828, *s. 7*—*Reclaiming Note without record appended—Competency.*—A reclaiming note against a judgment by a Lord Ordinary sustaining the defenders' pleas, and dismissing an action at the instance of a person who sued *in forma pauperis*, *quoad* as incompetent, in respect that the record was not appended.

MICHAEL M'EVOY, who sued *in forma pauperis*, brought an action in the Court of Session for reduction of a decree obtained against him in the Sheriff Court in an action under the Debts Recovery (Scotland) Act, 1857, which the Lord Ordinary (Wellwood), on 11th December 1890, dismissed, his Lordship sustaining certain pleas for the defender.

1ST DIVISION. Ld. Wellwood. M.

The record had not been printed in the Outer-House of consent of the parties.

The pursuer reclaimed, but did not print or append the record to the reclaiming note.

When objection was taken in the Single Bills to the competency of the reclaiming note the pursuer argued that the provisions of the 18th section of the Judicature Act, 1825 (quoted in the Lord President's opinion, *infra*), regarding the boxing of printed copies of the record, were directory and not imperative.[1] Accordingly, it was in the discretion of the Court to dispense with the printing here.

Argued for the respondents;—The practice under the provisions of the 18th section of the Judicature Act, 1825, and the 77th section of the Act of Sederunt of 11th July 1828 (quoted by the Lord President) following upon it was quite settled; a reclaiming note without the record appended had been frequently held to be incompetent.[2] There was no decided case originating in the Court of Session where the provisions of the Act

[1] Campbell's Trustees v. Campbell, March 7, 1868, 6 Macph. 563, 40 Scot. Jur. 290.

[2] Miller v. Simpson, Dec. 9, 1863, 2 Macph. 225, 36 Scot. Jur. 116; Muir v. Muir, Oct. 17, 1874, 2 R. 26.

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had been dispensed with. The reclaimer ought to have presented manuscript note to the Court before the expiration of the reclaiming da to ask that printing should be dispensed with, and it was now too la to make such an application.

The Lord President intimated that before giving judgment the Co would confer with the Judges of the Second Division.

At advising,—

LORD PRESIDENT.—This is a reclaiming note against an interlocutor of L Wellwood (Ordinary) pronounced *in foro*, which runs thus :—"Having c sidered the debate, together with the process, sustains the first, third, and fou pleas in law for the defender, dismisses the action, and decerns." It theref appears on the face of the interlocutor that it was pronounced after heari parties and disposing of the whole merits of the case.

An objection has been taken to the competency of the reclaiming note on t ground that the record is not appended to it. In discussing that objecti several cases were cited, which left an impression that there was some doubt to the practice of the Court in such circumstances. That turns out to ha been quite a mistaken impression, and I cannot help thinking that there w some confusion in the minds of the parties or of their legal advisers betwe questions of competency, such as this is, and questions as to the printing appeals under the Court of Session Act. Being under that impression, we in mated at the close of the discussion that, before disposing of the matter, would consult our brethren in the other Division. But, on looking into t cases we find that there is no occasion for any such conference, for the mat is settled by a whole series of authorities, and therefore the object which had in view in proposing such a conference does not require to be attained.

The question depends on the 18th section of the Judicature Act of 1825, a on the 77th section of the Act of Sederunt of 11th July 1828, following up the statute. Now, the statute provides,—"That when any interlocutor sh have been pronounced by the Lord Ordinary, either of the parties dissatisfi therewith shall be entitled to apply for a review of it to the Inner-House of t Division to which the Lord Ordinary belongs, provided that such party sh within twenty-one days from the date of the interlocutor, print and put in the boxes appointed for receiving the papers to be perused by the Judges a re reciting the Lord Ordinary's interlocutor, and praying the Court to alter t same, in whole or in part; and if the interlocutor of the Lord Ordinary sh have been pronounced on cases, the party applying for review shall, along wi the note as above directed, print and put into the boxes the cases which ha been before the Lord Ordinary; and if the interlocutor has been pronounc without cases, the party so applying shall, along with his note as above directe put into the boxes printed copies of the record authenticated as before, an shall at the same time give notice of his application for review by delivery six copies of the note to the known agent of the opposite party; and it sh in no case be competent for either party . . . to bring any interlocut of the Lord Ordinary under review of the Inner-House by the form of reclaimi petition now in use, but only in the mode thus directed."

There cannot be the least doubt that this provision is expressed in imperati terms. Certain things shall be done to enable the party to bring the Lo Ordinary's interlocutor under review. One of these things is that he shall "pu into the boxes printed copies of the record."

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whether the lands in question were valued in 1797 as part of the lands of Pitkellony.

Neither was the question directly raised in the course of the proceedings, but it was necessarily involved in the question whether or not the lands in question were liable to be localled on for one-fifth of the real rent as being unvalued, and if the interlocutor of 9th July 1858 is to be held as importing a judgment of the Court to that effect, then I think it is *res judicata* that the teinds of these lands are unvalued.

But then I agree with the Lord Ordinary that the interlocutor in question does not import a judgment to that effect. It will be observed that the note of the Lord Advocate craves the Court to sustain his objections, but the interlocutor does not do so, but merely remits to the clerk to rectify the locality. I agree with the Lord Ordinary that such a remit does not imply any judgment on the merits of the objections and answers, and I think the interlocutor submitted to review ought to be affirmed.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT refused the reclaiming note.

HAMILTON, KINNEAR, & BEATSON, W.S.—DUNDAS & WILSON, C.S.—Agents.

No. 90.

Jan. 16, 1891.
M'Evoy v. Braes' Trustees.

Poor MICHAEL M'EVOY, Pursuer (Reclaimer).—*Cosens.*
ALEXANDER MILLER AND OTHERS (Braes' Trustees), Defenders (Respondents).—*M'Lennan.*

Process—Judicature Act, 1825 (*Geo. IV. c.* 120), *sec.* 18—*A. S.*, 11*th July* 1828, *sec.* 77—*Reclaiming Note without record appended—Competency.*—A reclaiming note against a judgment by a Lord Ordinary sustaining the defenders' pleas, and dismissing an action at the instance of a person who sued *in forma pauperis*, *refused* as incompetent, in respect that the record was not appended.

1ST DIVISION. Ld. Wellwood. M.

MICHAEL M'EVOY, who sued *in forma pauperis*, brought an action in the Court of Session for reduction of a decree obtained against him in the Sheriff Court in an action under the Debts Recovery (Scotland) Act, 1867, which the Lord Ordinary (Wellwood), on 11th December 1890, dismissed, his Lordship sustaining certain pleas for the defender.

The record had not been printed in the Outer-House of consent of the defenders.

The pursuer reclaimed, but did not print or append the record to the reclaiming note.

When objection was taken in the Single Bills to the competency of the reclaiming note the pursuer argued that the provisions of the 18th section of the Judicature Act, 1825 (quoted in the Lord President's opinion, *infra*), regarding the boxing of printed copies of the record, were directory and not imperative.[1] Accordingly, it was in the discretion of the Court to dispense with the printing here.

Argued for the respondents;—The practice under the provisions of the 18th section of the Judicature Act, 1825, and the 77th section of the Act of Sederunt of 11th July 1828 (quoted by the Lord President) following upon it was quite settled; a reclaiming note without the record appended had been frequently held to be incompetent.[2] There was no decided case originating in the Court of Session where the provisions of the Act

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that the residue of the estate should "be under the control and at the dispo of my said executor, W. P." W. P. founded on the settlement as giving hin beneficial right to the residue.

In an action of reduction of the trust-settlement raised against W. P. b brother of the deceased the pursuer averred that the deceased had signed t deed under essential error as to its import and effect induced by the false a fraudulent representations of the defender—that the deed merely appointed h the trustee or manager of the estate, and that the pursuer and other relati were to have the beneficial interest therein.

The pursuer contended that he was entitled to an issue of essential er induced by the defender's misrepresentations. *Held* that the issue must b essential error induced by the defender's false and fraudulent representations

1st Division. Ld. Stormonth Darling. C.

GEORGE COLLIE, grocer in Aberdeen, died on 12th August 1889, p sessed of moveable property of the value of £2726, and of certain herita estate. He left a trust-disposition and settlement, dated 12th Septem 1888, by which he revoked all previous settlements made by him, a made over to William Pyper, of Hillhead, Pitfodels, Aberdeen, for t purposes therein mentioned, the whole heritable and moveable est which should belong to him at the time of his death, and also appoint William Pyper to be his sole executor.

The trust-settlement contained directions to his trustee and execu (1) to pay his debts, &c.; (2) to pay various legacies, amounting £1199, 15s., including legacies of £500 each to his brothers, Thom and James Collie, and further bore,—"And whatever residue there m be of my said estate shall be under the control and at the disposal of m said executor, William Pyper."

William Pyper claimed the whole residue after deduction of the deb legacies, &c. Thomson Collie, on 13th August 1890, brought an act against him for reduction of the settlement, and to have him ordain to make payment of such sum as should be found to be the pursue true interest in the estate of his brother George Collie.

The pursuer averred that the truster had, upon 12th October 1883, ex cuted a trust-settlement under which the pursuer and his brother Jam or the survivor, succeeded to the whole estate (with a small excepti of which the truster should die possessed; that the pretended settlem of 12th September 1888 was not the deed of the deceased; that it w procured by the defender by fraud, circumvention, and undue influe on the part of the defender at a time when the deceased was in a we and facile state of mind consequent upon excessive drinking.

The pursuer further averred;—"The deceased gave no instructions f the preparation of said settlement. At the time the testator signed it h did not understand the nature and effect of said settlement, and that cancelled all previous settlements. Defender purposely did not expl to him that, in particular, it revoked his prior will of 12th October 18 and made the defender his sole residuary legatee. The deed was pu posely and fraudulently made by defender in the form of a trust favour of defender, in order to lead the deceased to suppose that the fender was appointed merely a trustee or manager of the estate for benefit of the relatives of the deceased. It was not explained to testator that the said settlement was truly an absolute conveyance to defender of the bulk of the testator's estate. The defender alone instru the preparation of the said settlement. He got Messrs J. & G. Col who are his own law-agents, and were not the law-agents of the decea to draft the deed, and the signature of the deceased was adhibited to said draft in defender's business premises. The defender prevented deceased from having the advice of his own or any law-agent, and con

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The Act of Sederunt does not add any additional condition or penalty, but merely makes provision for giving effect to the provisions of the statute. Section 77 says that reclaiming notes shall first be moved as Single Bills and sent to the roll, "provided always that such notes, if reclaiming against an Outer-House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute, if the record has been closed."

That is merely a direction to the Clerks of Court to give effect to the statutory provision by refusing to receive reclaiming notes to which a print of the record is not appended.

There is therefore no room for doubt or hesitation as to the meaning of the statute or the force and effect of the Act of Sederunt.

Accordingly, it has been decided over and over again that any failure to comply with these provisions is fatal to the reclaiming note. The first case I find upon the point is the case of *Brown and Others* v. *Moodie and Others* (19th July 1845, 17 Scot. Jur. 568). The failure there consisted in not having appended to the reclaiming note the original summons and defences, although the revised condescendence and answers were appended. That was in the days when the original summons and defences formed part of the record.

The second case was a case where the party had failed altogether to print the record, viz., *The National Exchange Co.* v. *Drew & Dick* (Nov. 16, 1860, 23 D. 27, 33 Scot. Jur. 11), and that was followed by the case of *Bell* v. *Ogilvie* (Jan. 28, 1872, 24 D. 375, 34 Scot. Jur. 249). In these cases the statutory provision was held to be imperative, and the want of the record was held to be fatal.

But there are cases which go further, *e.g.*, *Carter and Others* v. *Johnston and Others* (Feb. 6, 1847, 9 D. 598). There were three papers there on which the record was closed, viz., the summons, defences, and the pleas in law for the pursuer. The omission to print the pursuer's pleas was held to be fatal.

There is yet another case which strongly illustrates the same principle, giving effect to the statute in circumstances in which the application of it seemed rather hard,—I mean the case of *Muir* v. *Muir* (Oct. 17, 1874, 2 R. 26). There the record had, in the Outer-House, been amended in writing. The record appended to the reclaiming note was the original record without the manuscript additions. That was held to be fatal to the reclaiming note, although the failure there looked very like an inadvertence.

In these circumstances, I think it would be spending judicial time very idly to consider the matter further, for we have here a complete *series rerum judicatarum*. It is obvious from the judgment that there must have been a closed record here. It is thus an indispensable appendage of the reclaiming note, without which it cannot be received.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT refused the reclaiming note as incompetent.

A. GORDON-PETRIE, S.S.C.—THOMAS LIDDLE, S.S.C.—Agents.

No. 91.

Jan. 20, 1891.
Collie v. Pyper.

THOMSON COLLIE, Pursuer (Respondent).—*Comrie Thomson—Glegg.*
WILLIAM PYPER, Defender (Reclaimer).—*D.-F. Balfour—Shaw.*

Error—Issue—Fraud—Reduction—Essential error induced by misrepresentation—"Falsely and fraudulently."—In a trust-settlement the testator directed

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that the residue of the estate should "be under the control and at t of my said executor, W. P." W. P. founded on the settlement as gi beneficial right to the residue.

In an action of reduction of the trust-settlement raised against brother of the deceased the pursuer averred that the deceased had deed under essential error as to its import and effect induced by th fraudulent representations of the defender—that the deed merely app the trustee or manager of the estate, and that the pursuer and oth were to have the beneficial interest therein.

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1st Division.
Ld. Stormonth Darling.

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The trust-settlement contained directions to his trustee an (1) to pay his debts, &c.; (2) to pay various legacies, am £1199, 15s., including legacies of £500 each to his brother and James Collie, and further bore,—"And whatever residue be of my said estate shall be under the control and at the disp said executor, William Pyper."

William Pyper claimed the whole residue after deduction of legacies, &c. Thomson Collie, on 13th August 1890, brought against him for reduction of the settlement, and to have hi to make payment of such sum as should be found to be the true interest in the estate of his brother George Collie.

The pursuer averred that the truster had, upon 12th October cuted a trust-settlement under which the pursuer and his brot or the survivor, succeeded to the whole estate (with a small of which the truster should die possessed; that the pretended of 12th September 1888 was not the deed of the deceased; procured by the defender by fraud, circumvention, and undue on the part of the defender at a time when the deceased was and facile state of mind consequent upon excessive drinking.

The pursuer further averred;—"The deceased gave no instr the preparation of said settlement. At the time the testator si did not understand the nature and effect of said settlement, a cancelled all previous settlements. Defender purposely did n to him that, in particular, it revoked his prior will of 12th Oct and made the defender his sole residuary legatee. The deed posely and fraudulently made by defender in the form of favour of defender, in order to lead the deceased to suppose th fender was appointed merely a trustee or manager of the est benefit of the relatives of the deceased. It was not explain testator that the said settlement was truly an absolute conveya defender of the bulk of the testator's estate. The defender alone the preparation of the said settlement. He got Messrs J. & who are his own law-agents, and were not the law-agents of the to draft the deed, and the signature of the deceased was adhibi said draft in defender's business premises. The defender prev deceased from having the advice of his own or any law-agent, a

tuted himself his sole adviser. Neither Messrs J. & G. Collie, nor any one on their behalf, ever received instructions from the deceased or consulted him regarding it. The deed was not read over to or by the deceased. For some time prior to execution of said settlement the defender stood in the relation of adviser to the deceased as regards his money matters. He invested his money for him, advised him in reference to his affairs generally, and had great influence over the deceased, and by fraud and circumvention and undue influence, or one or other of them, upon the deceased, who was at the time in a feeble condition of body and mind, and weak and facile, the defender induced him to sign the said settlement. He fraudulently represented to the deceased that his estate was, by the said deed, conveyed to his (deceased's) relatives or some of them, and not to the defender, and he fraudulently concealed the fact that by said settlement nearly two-thirds of his estate was conveyed to the defender himself. This was not the intention of the testator, and if he had not been deceived by defender as to the import of the deed, and been acted upon by the fraud and circumvention and dominating and undue influence and pressure used by the defender, he would not have signed it. The deceased signed the said settlement under essential error as to its contents and its effect fraudulently induced by defender."

The defender denied these averments.

The pursuer proposed issues as to whether the deed was the deed of the testator, and of facility, fraud, and circumvention. The fourth issue proposed was in these terms:—"(4) Whether the defender represented to the deceased that the said trust-settlement merely appointed the defender a trustee or manager of the estate, and that the pursuer and other relatives of the deceased were to have the beneficial interest therein—such not being the nature and import of the said deed; and whether the said deceased George Collie executed the said deed under essential error as to its nature and import induced by the said misrepresentation?"

On 2d December 1890 the Lord Ordinary (Stormonth Darling) approved of the issues proposed, and appointed them to be the issues for the trial of the cause.

The defender reclaimed, and argued;—The fourth issue fell to be disallowed. It could not be reasonably extracted from the averments in the record, which were absolutely inconsistent. The pursuer first charged the defender with concealment, and then charged him with having represented that which he was said to have concealed. In any view, if an issue of essential error were to be allowed, it should only be of error induced by "false and fraudulent" representations. His representation might be quite innocent, for he might have had an honest though mistaken belief that the will had the particular effect which he was said to have represented to the pursuer.

Argued for the pursuer;—The fourth issue should be allowed. The averments on record were not inconsistent. The pursuer charged the defender with guilty silence, and then with having made certain representations. There was authority for holding that though it was averred upon record that a deed had been executed under essential error induced by false and fraudulent representations, still it was not necessary that "false and fraudulent" should be inserted in the issue, even although some benefit might be taken by the person said to have made the representations.[1]

LORD PRESIDENT.—We are of opinion that the fourth issue should run thus:

[1] Munro v. Strain, Feb. 14, 1874, 1 R. 522; Hogg and Others v. Campbell and Others, March 12, 1864, 2 Macph. 848, 36 Scot. Jur. 428.

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—"Whether the defender falsely and fraudulently represented to the deceased that the said trust-settlement merely appointed the defender as trustee or manager of the estate, and that the pursuer and other relatives of the deceased were to have the beneficial interest therein; and whether the said deceased George Collie executed the said deed under essential error as to its nature and effect induced by the said false and fraudulent representations?"

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"The Lords hold the issue as amended at the bar as adjusted and settled: Approve of the same as now authenticated accordingly: Appoint the same to be the issue for the trial of the cause, and remit to Lord Stormonth Darling to proceed."

MACPHERSON & MACKAY, W.S.—R. C. GRAY, S.S.C.—Agents.

No. 92.
Jan. 20, 1891.
Stiven v. Reynolds & Co.

DAVID LITTLEJOHN (Sheriff-Clerk of Aberdeenshire), Pursuer and Nominal Raiser.
WILLIAM STIVEN (John Grieve & Company's Trustee), Claimant and Real Raiser (Appellant).—*Asher—Rhind.*
CHARLES REYNOLDS & COMPANY, Claimants.—*Jameson—M'Lennan.*

Bankruptcy—19 *and* 20 *Vict. c.* 79, *secs.* 5 *and* 108—*Computation of time*—*Arrestment.*—*Held* that the 108th section of the Bankruptcy Act of 1856* applied in a case where an arrestment had been used on 20th April and sequestration had taken place on June 19th, according to the computation of time prescribed by the 5th section of the Act.†

Bankruptcy—Arrestment—Consignation—Preference—1696, *c.* 5.—A pursuer used arrestments on the dependence of an action. Subsequently by arrangement between him and the defender, who denied liability, the latter consigned a sum in the hands of the Clerk of Court. The defender was sequestrated within sixty days of the arrestment, and thereafter the pursuer obtained decree in the action, in respect of the trustee not having sisted himself as a defender and the bankrupt having failed to find caution. In a competition for the consigned fund, between the bankrupt's trustee and the pursuer, *held* (*diss.* Lord Rutherfurd Clark) that the pursuer was entitled to the fund, on the ground that the effect of the consignation was to divest the bankrupt of all right in the sum consigned, and that it was not struck at by the Act 1696, c. 5.

2D DIVISION. Sheriff of Aberdeenshire.

CHARLES REYNOLDS & COMPANY, manufacturers and warehousemen in London, on 18th March 1889 raised an action for a sum of £79, 16s. 2d against John Grieve & Company, auctioneers in Aberdeen, in the Sheriff Court there, and, on 20th April, used arrestments in the hands of the Town and County Bank to the extent of £100 on the dependence of that action. Thereafter parties arranged that the arrestment should be recalled the defenders consigning £100 in the hands of the Sheriff-clerk. This was done by the defenders on 27th April, and the arrestments were withdrawn.

The estates of John Grieve & Company were sequestrated on 19th June, and William Stiven, accountant, Dundee, was appointed trustee

* Sec. 108.—" . . . . And no arrestment or poinding executed of the funds or effects of the bankrupt, on or after the sixtieth day prior to the sequestration shall be effectual."

† Sec. 5.—"Periods of time in this Act shall be reckoned exclusive of the day from which such period is directed to run."

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The action was intimated to the trustee, who did not sist himself, and, on 6th November 1889, the defenders having failed to find caution, decree was pronounced against them.

William Stiven, as real raiser, then raised an action of multiplepoinding, to determine the right to the consigned money, in name of the Sheriff-clerk as pursuer, calling himself and Charles Reynolds & Company as defenders.

Charles Reynolds & Company stated in their claim,—"Explained that the intention of the parties in carrying out the arrangement entered into for the consignation of said sum was that the consignation was to be in security of such sums, principal, interest, and expenses, as might be decerned for in the claimants' favour in the said action, and to allow of the said arrestment being withdrawn."

They pleaded;—(8) The claimants having obtained decree in the said action for the amount sued for, with interest and expenses, the right of the claimants to the free fund *in medio*, whether the same was judicially consigned or only extrajudicially consigned, or to so much of the said fund as is necessary to satisfy their claims, is preferable to that of the said William Stiven, as trustee for the creditors of the said John Grieve & Company, and the claimants are therefore entitled to be ranked *primo loco* on the free fund *in medio* in terms of their claim. (9) The said arrestment on the dependence of the said action having been used in the hands of the said bank more than sixty days before the date on which the said John Grieve & Company were rendered notour bankrupt, or the date of the said sequestration of their estates, the claimants are entitled to be ranked *primo loco* as aforesaid.

Stiven claimed the fund also, pleading;—(3) The deposit of the said sum of £100 cannot in the circumstances give the defenders, the said Charles Reynolds & Company, a higher right than they held under their said arrestment, and that arrestment having been cut down by the sequestration, the present claimant is entitled to be preferred to the fund *in medio*. (4) The bankrupts, the said John Grieve & Company, having been in a state of hopeless bankruptcy at the time when the said deposit was made, were not entitled to do anything to change the condition of matters under which a preference would be given to any creditor, and especially to a creditor whose debt was *bona fide* disputed, to the prejudice of the general body of creditors.

A proof was led.

The Sheriff-substitute (Brown), on 16th July 1890, pronounced this interlocutor:—(After findings in fact)—"Finds that said consignation is not struck at by the Act 1696: Therefore repels the claim for the said William Stiven, as trustee on the sequestrated estate of the said John Grieve & Company: Sustains the claim for the said Charles Reynolds & Company, and ranks and prefers them on the fund *in medio*, in terms thereof: Grants warrant to the Clerk of Court to pay over the consigned money to the said Charles Reynolds & Company, so far as is necessary to satisfy the said claim," &c.*

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* "NOTE.— . . . . The trustee says that the transaction is struck at by the Act 1696. To this the claimants Messrs Reynolds & Company answer, in the first place, and I think with some force, that it being the contention of the trustee, that what was done before the Sheriff-clerk on the 27th of April was a mere substitution of another *nexus* for that imposed by the arrestment used on the 20th of April, they are, according to the computation of time applicable to such challenges, outwith the limitation of the statute, the transaction not falling within the period of constructive bankruptcy. But apart from the

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The Sheriff (J. G. Smith), on 8th October 1890, dismissed the appeal and affirmed the judgment.*

The trustee appealed, and argued;—That the arrestment fell within the sixty days, and was therefore ineffectual, was plain upon the Statute of 1856.[1] Any doubt[2] was unintelligible in the face of so plain an enactment. That being so, and the arrestment being ineffectual, then either (1) the consignation, being a mere *surrogatum* for the arrestment, must, like it, be ineffectual, or (2) if it was not a *surrogatum*, but a security by which the creditor was bettered, it was struck at by the Act 1696, c. 5. Now the Court did not order consignation, but only allowed it. It was no payment, for the action went on after it. And it was a bargain between the parties. The claimants Reynolds & Company themselves called it security, and they were right. The right of the successful party was

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effect of the arrestment, which, indeed, was recalled, my opinion is that the challenge under the statute is not well founded. In the first place, I think the point is concluded by authority, for in *Gordon* v. *Brock* it was held that the trustee of a bankrupt had no claim on money consigned by him, Lord Gillies remarking,—'To say that this is defeated by the bankruptcy, would just be to make every consignation a mere mockery.' The ratio of the principle thus applied apparently is that consignation operates as a cash payment through the medium of the Court, the consigned money, indeed, being subject to arrestment to the extent of any balance after the orders of Court are satisfied, but otherwise being not only earmarked, but placed by the bankrupt beyond his control, and specifically appropriated. No doubt the consignation was conditional on the issue of the action, and if the defence had been successful it would have reverted to the bankrupt, and as a consequence fallen to his trustee, but Reynolds & Company having prevailed, the decree of the Court in their favour, operating *retro*, practically puts the consigned money in the position of a cash payment. . . ."

* "NOTE.—It is well settled that money consigned in a depending process ceases to be part of the estate of the person consigning it. The Sheriff clerk becomes custodier or trustee for the party in whose favour the process may ultimately be decided. If the defender succeeds he will get it back; if he fails the other party will be entitled to it. It is in fact conditional payment, the condition being that the creditor who has brought the action will succeed in making the claim good to meet which the consignation has been made. I agree with the Sheriff-substitute that there is no difference between consignation judicially ordered and consignation arranged by the parties, for in either case the money, through the medium of the Clerk of Court, is placed *in manibus curiæ*. This being the nature of the transaction, I do not see how the trustee can reclaim the fund, whether the bankrupt succeeds or no, for, as Lord Gillies puts it in the case of *Gordon* v. *Brock*, 1 D. 1, what is the meaning of consignation if it is not 'to provide against the risk of the debtor's bankruptcy.' It is evidently one of those cases in which the trustee, on the principle of *tantum de tale*, is bound by the act of the bankrupt, just the same as if he had withdrawn his defence and made payment of the debt. Arrestment is a different matter. That is a diligence done by the creditor for his own protection, and requires to be cut down when executed within the period of constructive bankruptcy with a view to the equal distribution of the estate. But I cannot accede to the view of the trustee, that because the bankrupt in this case was forced to make consignation in order to get rid of the arrestment of his bank account, it is to be treated as the substitution of one form of security for another, and that both are equally challengeable in the interests of the general body of creditors. The argument probably would have prevailed if the depositary chosen had been a private party; but the moment the money was placed *sub judice* the matter was ended, as far as the bankrupt was concerned, if the case ended against him."

[1] Murdoch on Bankruptcy, p. 222.

[2] Goudy on Bankruptcy, p. 83, note c.

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secured by putting the money to satisfy it in a safe place. There was another kind of consignation, viz., where a person admittedly owing money, but knowing not to which of several claimants to pay it, paid it into Court and washed his hands of it, leaving the rival claimants to establish their rights to it. That was *Gordon's* case,[1] and it was quite fair to hold consignation such as that payment. The present case, where the debt was disputed to the end, and consignation was made simply to have the arrestment removed, was very different. It was absurd to speak of payment of a debt when that debt was not admitted to be due. (Second) If this was not payment, but a deposit in security, and something different from the arrestment, then it was struck at by the Act 1696, c. 5.[2]

Argued for Reynolds & Company;—Before 1856 diligence used as here was held to be beyond the sixty days,[3] and it had been doubted whether the Act of 1856 had made any change, and whether it was not merely declaratory of the old law.[4] [LORD RUTHERFURD CLARK.—It is plainly declaratory that diligence on the sixtieth day, the day of sequestration being excluded, is ineffectual. That is the whole matter.] Consignation was truly payment. It stopped the running of interest; it removed the risks of the arrestee's bankruptcy. The consigner was no longer debtor. The consigned fund could be arrested either by a creditor of the consigner or of his opponent, and that arrestment would, on the determination of the suit, draw back to the date at which it was used.[5] An arrestment in the hands of a consignee was preferable to one in the hands of the consigner.[6] That was because the debt was extinguished by the consignation. Even an order to an agent to pay a sum in his hands to a particular creditor operated so as to earmark that fund, and preserve it for that creditor against the general body of creditors.[7] But consignation had been pronounced to be equivalent to payment in *Gordon's* case,[1] and the dicta in that case were quite general.

At advising,—

LORD JUSTICE-CLERK.—(After narrating the facts)—The first question which arises in these circumstances is whether there was consignation of this money, and for the determination of that question it is important to see what was said by Mr Conner and Mr Murison, the Sheriff-clerk-deputes, who are perfectly independent witnesses. Mr Conner states that the parties' agents came to him and stated that they wished steps taken to have the arrestment recalled. He then says,—"Mr Murison asked Mr Mitchell," the pursuers' agent, "in my presence, whether he was agreeable the £100 should be consigned with the Sheriff-clerk, and the arrestment should be given up, and whether he would not give the bank a letter withdrawing the arrestment. Mr Keith," the defenders' agent, "then handed me £100, and asked a receipt for it. I said we did not give receipts for such sums, but that we entered them in the usual way in the consignation book. Then, to satisfy Mr Keith, and after consulting with Mr Murison, I marked the consignation of the £100 on the interlocutor sheet."

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[1] Gordon v. Brock, Nov. 13, 1838, 1 D. 1, 11 Scot. Jur. 25.
[2] Speir v. Dunlop, May 30, 1827, 5 Shaw, 680, *aliter* 729.
[3] Scott v. Rutherfurd, Dec. 7, 1839, 2 D. 206, 12 Scot. Jur. 234.
[4] Goudy on Bankruptcy, p. 83, note c.
[5] Pollock v. Scott, July 16, 1844, 6 D. 1297, 16 Scot. Jur. 551.
[6] Lockwood v. Wilson, 1738, M. 736.
[7] Brierly v. Mackintosh, June 1, 1843, 5 D. 1100, 15 Scot. Jur. 440, affd. Feb. 19, 1846, 5 Bell's App. 1, 18 Scot. Jur. 380.

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Mr Murison, who had been consulted on the matter, says,—"I then suggested to Mr Mitchell to withdraw the arrestment on the consignation of the £100. The consignation was deliberately made. If I recollect rightly, Mr Keith asked for a receipt, and I told him that we were not in the habit of giving receipts, but that the usual marking would be made in the consignation book and interlocutor sheet."

I take that evidence to mean that this consignation was made in the ordinary form in the books of the Sheriff Court of Aberdeenshire. There is no cross-examination on that evidence, and the only possible meaning of it is that consignation was made in the ordinary form. I cannot understand how a man of business should decline to give a receipt for the money which was handed to him if it is merely deposited with him; but if it is consigned with an official of Court, and that official enters it in the usual way in the Court records, then there is no need for a receipt. There is no evidence before us to shew that anything else is required in the Sheriff Court to constitute consignation than what was done here. On the contrary, the ordinary course was followed: the money was paid to the proper officer, and entered in the ordinary way. There was therefore effectual and sufficient consignation.

If that be so, what is the legal effect of that consignation? In my opinion the legal effect is, as it is expressed by Lord Mackenzie in the case of *Gordon* (1 D. 1), which was cited to us, that "nothing more remained to be done by the debtor to pass the money to the creditor." After consignation was made the debtor could have no claim on the money except in so far as too much had been consigned, or the result of the action was unfavourable to the party for whose satisfaction the money was paid in. The creditor, if he obtained a decree would do so as at the date of the consignation. In short, the decree would convert the consignation into payment as at that date.

It would be rendering the consignation altogether nugatory if, merely on the ground—and this is the only ground left for the trustee to take—that the debtor had a good defence against the action, it were to be held that effect should not be given to the consignation in favour of the party in whose favour it was made. If the defenders had a good defence, it is an extraordinary thing that the trustee should not have sisted himself as a party to the action and got back the money in that way. I have no doubt that Reynolds & Company are entitled to make good the decree which they hold, to the effect of getting payment of this fund.

The result is that we shall adhere to the interlocutors of the Sheriff and Sheriff-substitute. I observe that the Sheriff-substitute has found the trustee liable in expenses "as an individual." I think these words should not have been inserted, for they might be read as implying that he has litigated improperly. At the same time, it will not be necessary to recall that interlocutor. His liability for expenses will follow the ordinary rules in such cases, viz., that the trustee may employ the funds in his hands to pay the expenses incurred by him. He is, of course, liable as an individual, and, should he not have sufficient funds of the estate to pay the expenses, may have to pay any balance himself. That is the only effect to be attached to the finding of the Sheriff-substitute.

LORD RUTHERFURD CLARK.—I cannot assent to the judgment which your Lordship proposes.

The arrestments were used within sixty days of the sequestration of the estate

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of the common debtors. It is plain, therefore, that they could not of their own force create any preferential security in favour of the arresters. This is, indeed, admitted, and it follows as a necessary consequence from the provisions of the 12th and 108th sections of the Bankruptcy Act of 1856.

But the arrestments were withdrawn on an arrangement under which the common debtors consigned £100 in the action on the dependence of which the arrestments were used. I do not think that this makes any difference. The consigned money came in place of the arrested fund. The new security was originated by the arrestments, and was created over a part of the common debtor's estate.

It is true that the arrangement for the consignation was made by the agreement of parties. But it was not in a proper sense voluntary. The arresters might have been compelled by the intervention of the Court, on a petition for loosing or recall of arrestments, to take the consignation in place of the arrestments. On the part of the common debtors the consignation was made by the constraint of the arrestments. If it had been purely voluntary on their side it would, in my opinion, have fallen under the Act 1696, c. 5.

A security which takes its origin in an arrestment cannot, I think, have a greater force than the arrestment itself so long as it is constituted over the estate of the common debtor. Of course, there would be a difference if the arrestments had been loosed on caution, for in that case the security is constituted by the obligation of a third party, so that the provisions of the Act of 1856 are no longer applicable. But when the arrestments are recalled or withdrawn on consignation, the security remains over the estate of the common debtor. The consignation is, I think, made in order to give to the arrester the same security in character and legal effect which he had under the arrestments. It works out the security by anticipation, so that in the meantime the common debtor shall be freed from the arrestment, and the arrester shall not be under the necessity of raising an action of furthcoming. But the consigned fund represents the sum which the arrester could have recovered under the action of furthcoming, and must, I think, be taken under the same conditions as those which would affect any sum recovered under a decree of furthcoming. It is unnecessary to say that if they had resorted to a furthcoming the respondents could have no preference.

It is said that the money on being consigned ceased to be a part of the common debtors' estate. I cannot adopt that view. It was nothing more than a part of the common debtors' estate put into the hands of the Court to await the issue of the action, to be paid to the pursuers if they succeeded, and to be handed back to the defenders if they were assoilzied. I do not see anything more in all this than a security over a part of the common debtors' estate, originating in an arrestment, and having the same legal force. From what circumstance it can acquire greater force I fail to see.

I do not think that the case of *Gordon* is at all applicable. The circumstances were very different. But what is most material, the Court had not to consider the questions which are before us in this case.

LORD TRAYNER.—I concur with the Sheriff in thinking that there was here effective judicial consignation of the money which forms the fund *in medio*. The effect of such consignation is determined by the decision in the case of *Gordon* v. *Brock* (1 D. 1), which is not distinguishable in principle from the present case. It is quite true that in that case the person who made the consignation admitted that he was debtor in the sum consigned, and consigned it in order

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that it might be awarded by the Court to the person who could shew the be right to it; while here the consignee denied liability, and made consignation on to get rid of his creditor's, or pretended creditor's, diligence. I think that th makes no difference in the effect of judicial consignation when once made. Th effect of such consignation is to divest the consigner of the sum consigned, a to place it in the hands of the Court, to be dealt with as the Court may ord If the pursuer of the action in which consignation has been made obtains decr the consigned money is his as from the date of its consignation, and it is his in t character of a cash payment as from that date. From that date the creditor h no claim for interest on the amount consigned as against his debtor.

It was maintained for the appellant that consignation only came in place the arrestment, just as if one security had been substituted for another, but bo alike subject to be cut down by the debtor's bankruptcy. I cannot adopt th view. The arrestment only laid a *nexus* on the bankrupt's estate for the cre tor's security, but the consignation divested him of that estate, and the subs quent bankruptcy could not carry to the bankrupt's trustee estate which was n his at the date of the sequestration. Nor is there any room for the contenti in my opinion, that the consignation is struck at by the Act 1696, c. 5.

Lord Young was absent.

The Court found, in fact and law, in terms of the interlocutor of th Sheriff-substitute of 16th July 1890, and dismissed the appeal.

Auld & Macdonald, W.S.—William Officer, S.S.C.—Agents.

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Alexander Tennant, Appellant.—*Murray—C. J. Guthrie.*
Inland Revenue, Respondents.—*Sol.-Gen. Sir C. Pearson—A. J. Fe*

Revenue—Income-tax—Abatement—Income-Tax Act, 1842 (5 *and* 6 Vict. 35), *Schedule D, Case II., Rule I.—Income-Tax Act*, 1853 (16 *and* 17 Vict. 34), *sec.* 51—*Customs and Inland Revenue Act*, 1876 (39 *and* 40 *Vict. c.* *sec.* 8.—The Customs and Inland Revenue Act, 1876, sec. 8, provides for abatement of income-tax in the case of any person whose "total income f all sources" is less than £400.

A bank-agent, who had an income of £374 and occupied rent free a ho forming part of the bank premises, which was of the annual value of £50, disallowed the abatement by the Assessor of Income-Tax, on the ground t the value of the house fell to be reckoned as part of his income, and that income was not under £400. The bank-agent objected, on the ground that was part of his duty as bank-agent to occupy the house, and that he could sublet the house or vacate it even temporarily without consent of the direct and without another bank official being appointed to occupy it in his absen and that he was liable to be removed at any time. The house was suitable the bank-agent, and if it had not been provided he would have required anot of the same annual value.

Held, by a majority of seven Judges, the Lord President, the Lord Just Clerk, Lord Rutherfurd Clark, and Lord M'Laren, *diss.* Lord Young, Lord Ad and Lord Trayner, that the annual value of the house occupied by the ba agent fell to be reckoned as part of his income.

Exchequer Cause.
2d Division, with three consulted Judges.
M.

At a meeting of the General Commissioners of Income-Tax for district of Brechin Alexander Tennant, agent at Montrose for the Ro of Scotland, appealed against an assessment made on him under sched D and E of the Income-Tax Act, for the year ending 5th April 1890, £317 of income, less £22 of insurance premiums, on the ground that he w

entitled to a further abatement from his income of £120 allowed on incomes under £400.*

The appellant stated that his whole income was £374, but that the assessor had improperly taken his income as above £400 by adding £50 as the value of a house in the bank occupied by him.

The Commissioners of Income-Tax sustained the appeal, and allowed the abatement.

The Surveyor of Taxes took a case for appeal.

The facts as stated in the case were as follows:—

Mr Tennant had a stated income from the bank of £300 per annum, from commissions, &c., £17, making together £317, besides an income from invested capital, from which tax had been deducted, £57. These three sums amounted to £374.

With respect to the house the case bore:—"1. The appellant is bound, as part of his duty, to occupy the bank house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours. He is not allowed to vacate the house even for a temporary period unless with the special consent of the directors, who, in that case, sanction the occupation of the house by another official of the bank during the absence of the agent. It is imperative that in the absence of the agent some responsible person should occupy the house and attend to the carrying on of the bank's business, so far as that may be necessary, after bank hours, and to the due locking up of the premises, and specially to the security of the cash and books in the bank's safe, communicating with which there is a night bolt from the agent's bedroom. The annual value of the house so occupied is £50. 2. The appellant is not entitled to sublet the bank house or any part thereof, and is not entitled to use it for other than the bank's business, but the appellant, with the tacit consent of the bank, carries on insurance business in the bank's premises. 3. By bond of fidelity granted by the appellant on his appointment as agent at Montrose, dated 17th February 1888, he agreed that he should be liable to removal at any time, and in case of his removal from office, that he should be obliged forthwith to flit and remove from the whole premises occupied by him. 4. If the appellant were to desire not to occupy the bank house, the sanction of the directors would be necessary for any arrangement which he might propose. In other cases where a bank-agent has desired not to occupy the bank house, the directors have agreed to his not doing so, and have made arrangements for its occupation by a subordinate official at the branch. In such cases the bank-agent's salary has not been affected by the change, and the subordinate officer of the bank who was appointed to occupy the house did not pay the agent any rent for the bank house, and the said officer's own salary was not affected by the change. In some special cases the bank have increased the salary to the official required to occupy the house

* The Act 39 and 40 Vict. c. 16 (Customs and Inland Revenue Act, 1876) enacts (sec. 8) that "the exemption granted by the Act 5 and 6 Vict. c. 35, to persons whose respective incomes are less than £150 a-year is hereby restored, and . . . any person . . . who shall claim, and prove in the manner prescribed by the Acts relating to income-tax, that his total income from all sources, though amounting to £150 or upwards, is less than £400 shall be entitled to be relieved from so much of the said duties assessed upon or paid by him as an assessment or charge of the said duties upon £120 of his income would amount unto, and the relief shall be given either by reduction or abatement of the assessment upon such person, or by the repayment to him of so much of the excess as he shall have paid, or by both of those means as the case may require."

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on account of their requiring him to do so. In such cases the bank hou was unsuitable for his use. 5. The general rule of the bank is that t bank-agent must occupy the bank house, and no case has ever occur in which they have asked the agent to give up his house, and they ha accordingly never had to consider whether any increase of salary wo be given to the agent if such a case ever arose. 6. The bank house suitable in respect of size and accommodation for the appellant. I dwelling-house were not provided by the bank, he would require to p vide a house for himself of similar size to the bank house. . . ."

Mr Tennant's contentions against the annual value of the house be reckoned as part of his income were thus stated in the case:—"(1) T the occupancy of the house is imposed upon him as part of his duty. That the premises are not a dwelling-house in the sense of the Act, are truly bank premises occupied by him specially in connection with bank's business. (3) That his occupancy of the premises does not under schedule E and the rules applicable thereto. (4) That the p mises come under the exemption of section 51* of 16 and 17 Victo cap. 34, as being a necessary expense incurred in the performance of duties of his office."

The arguments of the parties fully appear from the opinions of t Judges.

The undernoted authorities were referred to.[1]

On 4th June 1890 the Second Division, in respect of the difficulty a importance of the question submitted for decision, appointed the cause be argued before them and three Judges of the First Division.

At advising,—

LORD PRESIDENT.—The premises belonging to the Bank of Scotland Montrose consist of buildings in which the business of the branch is tra acted, and also of a dwelling-house occupied by the local manager and family and servants. In this respect the case seems indistinguishable in facts from the Town and County Bank at Aberdeen, which was the subj of consideration by the First Division of the Court nearly four years ago it were now proposed by the officers of the Inland Revenue to assess the B of Scotland under schedule D of the Income-Tax Acts on the annual profits their business, allowing deduction only of the premises in which the bank bu ness is transacted, but refusing deduction of the portion occupied as a dwelli house by the local manager, they would be violating the rule established in former case of the *Town and County Bank* by this Court and the House of Lor

That case, however, is not decisive of the present, nor indeed has the one a direct bearing on the other. But the rules of schedule D for ascertaining pro of trade and of professional income afford a good deal of light to guide us in determination of the question now before us. Neither the trader nor the p fessional man is chargeable with tax in respect of the value of any premi occupied for the purposes of the trade or professional business which he carr on. And in estimating his income from his trade or business he is entitled deduct the value of the premises so occupied. But premises or part of premi occupied by the trader or professional man as a residence stand in the oppos category. In framing the balance-sheet of a professional man's business, t

* Quoted *infra* in opinion of Lord Justice-Clerk.

[1] Town and County Bank, Limited, v. Inland Revenue, March 4, 1887, 14 R 528, aff. (*sub nom.* Russell v. Town and County Bank), April 26, 1888, 15 R (H. L.) 51; Bent v. Roberts, 1877, L. R., 3 Ex. Div. 66.

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annual value of such premises cannot be deducted in striking the balance of professional income and expenditure, but must be entered as an item of credit.

In this case the dwelling-house in question is not occupied by the trader, but by his official or servant free of rent. It is therefore within the meaning of the *Town and County Bank* case occupied for the purpose of the trade or professional business, and forms an item of debit in ascertaining the balance of trade profit or professional income.

But we are dealing here not with the income of the trader or professional man, but with the income of his official or manager.

The question arises in this form. The appellant, who is agent or manager for the Bank of Scotland at Montrose, has an income of £374, exclusive of the annual value of the house, which he holds rent free from the bank. If no account is to be taken of the rent-free house as part of his emoluments, then his income being under £400 he would be entitled in accounting with the Inland Revenue to the abatement of £120 allowed on incomes under £400. But the annual value of his rent-free house is £50, which, if taken into account, would raise his income above £400, and so disentitle him to the abatement demanded.

It was not, as I understand, disputed in argument that the appellant holds an employment or vocation from which he derives profits or gains within the meaning of both schedule D and schedule E of the whole series of Income-Tax Acts. Of what such profits or gains consist we must ascertain from the rules applicable to the second case under schedule D, and to the case of employments under schedule E. Rule second applicable to professions, employments, or vocations under schedule D requires the duty to be "computed at not less than the full amount of the balance of the profits, gains, and emoluments of such professions or vocations." And in the first rule applicable to both the first and second cases under schedule D, "No sum shall be allowed to be set against or deducted from such profits or gains," "for the rent or value of any dwelling-house or domestic offices," "nor for any sum expended in any other domestic or private purposes distinct from the purposes of such" "profession, employment, or vocation." The first rule under schedule E directs that the duties shall be charged on the persons holding the employments mentioned in the schedule "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such employment." The fourth rule directs that "the perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments."

The only question therefore is whether the annual value of the rent-free house occupied by the appellant is within the meaning of schedule D part of the "profits, gains, and emoluments," or under schedule E part of his "salary, fees, wages, perquisites, or profits whatsoever accruing by reason of" his employment as bank-manager.

This question would be somewhat difficult to answer in the abstract, because the circumstances under which a house is occupied rent free may greatly vary, and make the occupation either a clear pecuniary benefit or a heavy burden.

If the employer gives the employee money to pay the rent of his dwelling-house, which he has hired from a third party, merely requiring the employee to report the receipts for rent; or if the employer pays the rent direct to the landlord, it cannot be disputed that the employee receives as part of his salary or wages the amount of the rent.

On the other hand, if the employee is taken bound as part of his contract of

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employment personally to occupy a house quite unsuitable for his domesti arrangements, and which may require him to live separately from his wife an family, this would be not a benefit but a burden, and the annual value or ren of the house would form no part of his profits or emoluments.

These are extreme cases. But others may arise between the limits of the extremes, which may create difficulties in the application of the enactment referred to.

The facts of the case before us do not appear to me to present such difficu ties.

On the one hand, the bank-agent is bound to constant occupation, exce when absent with the sanction of the directors, when his place is occupied b another official. He cannot sublet the house. And he is liable to removal bot from his office and his house at any time. In other words, his tenure of offi is at the pleasure of the directors.

On the other hand, we have it distinctly found as matter of fact in the ca stated by the commissioners that the house is suitable in respect of size an accommodation for the appellant, and that if a dwelling-house were not pro vided by the bank he would require to provide a house for himself of simila size. It is not said that a house of similar size could be provided by himself at a less rent than £50, and in the absence of any such statement we cannot assume the fact to be so.

Something was suggested in the argument to the effect that the conditions the tenure of this house were productive of hardship to the appellant as unde restraining his natural liberty in the choice of a place of abode. But this nothing but sentiment, and very fanciful and false sentiment. For I cann conceive anything more desirable for a bank-agent, or more conducive to h comfort and convenience, than that he should be able to occupy a house suitabl to his domestic requirements in immediate vicinity to the centre of his dai labours and duties.

It seems to me a matter of very small importance whether the assessment held to fall more appropriately under the second case of schedule D or und schedule E. It has been in fact made under both, and I have no doubt th both schedules are applicable.

I am therefore for reversing the determination of the Commissioners, a sustaining the assessment.

Lord Justice-Clerk.—Your Lordship, in your opinion, has so clearly a fully stated the facts upon which this case must be decided, that I shall n recapitulate them.

The question to be decided upon these facts relates not to assessment but exemption from assessment. It is not the question whether a certain pers assessable income shall be assessed to income-tax, but whether, on its bei assessed, relief shall be given from a portion of the assessment under the S section of the Act 39 and 40 Vict. c. 16. By that clause any person who m be assessed or charged to any of the duties of income-tax, "who shall cla and prove in the manner prescribed by the Acts relating to income-tax that h total income from all sources, although amounting to £150 or upwards, is le than £400, shall be entitled to be relieved from so much of the said duti assessed upon or paid by him as an assessment or charge of the said duties £120 of his income would amount unto." Three things are clear in this ena

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ment—first, that it relates to a relief claimed from part of an assessment made, such relief to be allowed either by "deduction or abatement" from the charge as assessed, or repayment of part of an assessment paid; second, that the abatement shall only be given where the claimant's income from all sources, whether assessable to income-tax or not, is less than £400; and third, that the person claiming the abatement must prove the fact that his income from all sources is less than £400. Under the Income-Tax Acts the income of a person in a profession such as that of the bank-agent in this case falls to be computed on the "profits, gains, and emoluments" of such profession under schedule D, and on the "salaries, fees, wages, perquisites, or profits whatsoever" under schedule E. And in ascertaining the income no deduction is to be made for any premises occupied as a dwelling-house; that is to say, that the amount assessable is not to suffer diminution by reason of part of it being expended in house-rent.

Mr Tennant maintains that although he occupies a dwelling-house which is stated in the case to be a suitable house in size and accommodation for his requirements, which is provided for him rent free by his employers, and which he occupies under his employment by them, the value of his occupation is not to be computed as an emolument—that is, as a profitable advantage—of his employment. He bases his objection on the grounds that his occupancy is imposed on him as part of his duty; that the house is not a dwelling-house but bank premises occupied in connection with the business, and that, in any case, he is entitled to the deduction under the 51st section of the Income-Tax Act of 1853.

The first ground is one plainly not tenable. For it may be necessary for a person to occupy a certain dwelling-house for the proper fulfilment of his duty, while, beyond all possibility of doubt, the provision of the particular house for his occupation may be a most substantial addition to the gains he makes or the emoluments he enjoys in consequence of his being appointed to the office. In my opinion the occupation of the house in this case constitutes a gain to the person obtaining the office to which it is attached, and is a substantial emolument which he enjoys.

The second ground is equally untenable, for the house is provided to Mr Tennant by the bank as a dwelling-house and nothing else, and it is occupied by him solely as a dwelling-house, although in occupying it as such he is doing that which is also of advantage to the bank's business.

The third ground is, I think, sufficiently answered by quoting the terms of the clause itself:—"In assessing the duty chargeable under schedule E of this Act, in respect of any public office or employment where the person exercising the same is necessarily obliged to incur and defray out of the salary, fees, or emoluments of such office or employment, the expenses of travelling in the performance of the duties thereof, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties of his office or employment, it shall be lawful to deduct from the amount of the said salary, fees, and emoluments to be assessed under this Act, the amount of all such expenses and disbursements necessarily incurred and defrayed in manner aforesaid."

Now, in the present case Mr Tennant in occupying this house does not incur expenses or lay out or expend money in the performance of the duties of his employment. I cannot look upon his occupation of the house as a burden,

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He has agreed with the bank that he shall receive a certain salary, and have that house rent free, upon condition that he occupies it, it being to the advantage of the bank that he should do so. The case must be dealt with on its own facts, and not on any abstract or general view. It is a question of fact in the particular case whether a person provided with a house by his employer has it value as part of his income from all sources. That a person being a candidate for a position in the employment of a bank should not consider a house provided by the bank as a profit, gain, or emolument of the office in considering whether he will accept the employment, seems to be contrary to common sense. So much salary and a free house constitute the profit, gain, or emolument offered to him, in respect of which he is to give certain services, of which one is, that he shall personally reside in the house. No doubt all his gains, both from salary, commission, and house, are at the pleasure of his employers, who may dismiss him when they please. But it is what a man enjoys, apart altogether from certainty of future enjoyment, upon which he must be assessed for income-tax; and if he in fact enjoys the occupation of a house, I consider that his liability to be removed from the house is no more a ground for holding that its annual value while he does occupy is not a gain of his office, than his liability to lose his whole money income by dismissal is a ground for holding that the money he has received is not a profit or gain of his position. Of course if a citizen has paid income-tax in respect of a salary which he is drawing, and is removed from his office, he is entitled to restitution of such an amount of the duty paid by him on computation as corresponds to what he is deprived of by the loss of his office during the year for which the computation was made. But what he pays upon is what he is at the time of the computation enjoying. The respondent in this case has not been assessed for income-tax upon the annual value of the house which he occupies rent free. There is no question of assessment before us. The question before us is, whether the respondent's income in money having been duly assessed, he is entitled to a deduction from the assessment corresponding to £120 of his income, on the ground that his income from all sources is less than £400 a-year. It is not disputed that if the annual value of the house he occupies rent free is to be held to be a gain or emolument of his office, and therefore to be computed as part of his income, that then his income does exceed £400 a-year. I am of opinion with your Lordship that it is in accordance with the true meaning and intent of the Income-Tax Acts that it should be so computed, and that we should therefore find that the deliverance of the Commissioners was wrong.

LORD YOUNG.—This question, as the Lord Justice-Clerk has accurately pointed out, is not one of assessment but one of exemption from assessment. Your Lordship in the chair, if I rightly followed, dealt with the question as if it were whether the annual value of the bank-agent's house were assessable for income-tax. I think that is also quite accurate. The arguments of your Lordship and the Lord Justice-Clerk go to this, that the annual value of the house which is £50, is part of the gain or emoluments of the bank-agent, and therefore that he is liable to be assessed for income-tax thereon. If so, I distinctly differ from both your Lordships. My opinion is indeed quite the opposite, except indeed upon one point, which is that the case of *Russell* v. *Town and County Bank* has no application to the question in this case at all. There the question was only whether the bank's outlay, the cost and charge to the bank

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of providing an establishment for the agent, must be deducted before ascertaining the profit upon which the bank was to be taxed. It is certain that such expenditure on their premises, including the house in which the agent lodged, was necessary for conducting their business as they did conduct it. If the profit was not sufficient to meet that, there was no profit for the year. That expenditure must all be provided before there could be profit to be divided by the bank.

That therefore was a plain question. The view might have been suggested that the bank might have demanded a rent from their officer or anyone else who was occupying their house. But they did not demand any rent, and could not have got any rent without giving their officer just so much more salary, and that would have amounted to just the same thing, for it would have been so much expenditure which would have required to be deducted before any profits were struck. The question here is altogether different. It is not doubtful that a bank-agent occupies a situation, the income of which is subject to be assessed for income-tax. In this instance the emoluments or income of the agent consist of £300 a-year of salary, and £17 of commission. That is his whole income as bank-agent. But he has other income amounting to £57 a-year from invested capital. Upon that he pays tax in the usual way by retention, that is, his debtors deduct income-tax in paying their interest to him. There are thus three sources of income, and it amounts to £374. He pays tax, as I have said, by retention upon £57, and he has been assessed upon the remaining £317. The question is whether the accommodation in the bank buildings is also to be included as part of his income. Is the house part of his income?

Now, I think we must deal with this case as raising a general question, and that it would not be proper to enter upon any question as to the domestic surroundings of the bank-agent in a particular case, as for instance whether he was married or had a family. Such considerations would lead to what are mere questions of sentiment as your Lordship has called them. I avoid them by dealing with the case as one presenting a general question. The first thing to be considered is, what is the establishment of the bank at this place? The bank, which best knows its own business, sees fit to conduct it by having premises such that a responsible agent may live in them. His duty is to give attention to the bank in and out of bank hours, and he has to attend to the safety of the premises and contents by sleeping in a room which is in communication with the safe. The bank further think it right that the agent shall be liable to be dismissed at a moment's notice. Now, the question is whether the accommodation of their servant, so employed, in their premises is part of that servant's income. Some observations were made to us as to his occupation being a thing distinct from his vocation. But it is imperative on him as part of his duty to occupy the house. He must do it in order to earn his salary. Of course he may like it, he may enjoy it as men like and enjoy their employment. Men can hardly be induced in some cases to relinquish even their employment when they have no need at all as a matter of earning their income to remain in it. A bank-agent may enjoy living as this agent is called upon to do. But the occupation is not at all distinct from his vocation. It is given in the course of his vocation, for which he is paid. The case informs us that "the appellant (the agent) is bound as a part of his duty to occupy the house as custodier of the whole premises belonging to the bank, and also for the transaction of any special bank business after bank hours. He is not allowed to

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vacate the house even for a temporary period unless with the special consent of t directors, who in that case sanction the occupation of the house by another offic of the bank during the absence of the agent. It is imperative that in the abse of the agent some responsible person should occupy the house and attend to t carrying on of the bank's business so far as that may be necessary after bank hou and to the due locking up of the premises, and specially to the security of t cash and books in the bank's safe, communicating with which there is a ni bolt from the agent's bedroom. The annual value of the house so occupied £50. The appellant is not entitled to sublet the bank house or any p thereof, and is not entitled to use it for other than the bank's business, but t appellant, with the tacit consent of the bank, carries on insurance busines the bank's premises." I cannot regard a house so occupied as a free house. is so in the sense that the bank-agent does not pay for it any more than t servants in one's house pay for their bedrooms. I suppose £50 is the valu it according to the Valuation-roll. But could such a rent be got for such a ho if the tenant were told that he must live in it, cannot let it, and that he m be turned out of it without any notice? For a house occupied on such co tions it is clear that the rent stated on the Valuation-roll could not be obt I see quite well that the occupation of the house is an advantage to the ag But it is not income. In like manner the captain of a ship may enjoy t accommodation provided for him in a ship. He may prefer it to any oth But it is not part of his income. I pointed out during the argument th income must be money, or money's worth, convertible into money at t recipient's pleasure. Therefore, if a man had a house worth £50 a-year, wh he could live in or let at his pleasure, that would be money's worth, and if l let it the rent would be income subject to duty. But when he cannot let t house, but it is simply part of the premises in which he must give his perso presence and attendance the case is different. Let me put one or two case which a man must occupy a house, yet it is not income to him. Take a bish Lambeth Palace is a building which the Archbishop of Canterbury must occ for the honour of the Church. But it is not income to him, but a source expense. If he could let it and draw income from it he might get a large su But he cannot. Surely it is not assessable for income-tax. Or take a hou keeper in a large mansion-house put there to keep it. She must live the Her income from her savings and moneys may be close upon £400 a-year, a she has rooms and maintenance in the great house, the value of which pro sions would raise her income above £400 if added. But that is not inco In my opinion, accommodation in premises where business is carried on is n income of the official who occupies the accommodation as part of his duty, a in order to discharge his other duties.

I think there is a distinction between the question whether a sum is asse able and whether it is to be taken into account in bringing an income up to above £400 a-year. It was not dwelt upon in argument. Income or profit to be assessed. In considering whether an income is to be considered ov £400 a-year "income from all sources" is to be considered. My view is th the occupation of this house is not income from any source.

A suggestion was made that income from a source abroad though not asses able in this country might be taken into account in considering whether a income exceeded £400 a-year. I concede that, though there is no need here t determine it either way. But that could only be where there is no objection

being assessed, except that the income is from abroad. But that cannot aid this argument. This alleged income does not come from abroad.

On the grounds I have stated I am of opinion that the annual value of this house is not part of the appellant's income, and that the abatement ought to be allowed.

LORD RUTHERFURD CLARK.—I agree with your Lordship in the chair.

LORD ADAM.—The question in this case is whether Mr Tennant's income from all sources amounts to less than £400 per annum, and that depends upon whether the annual value of the bank house, which is stated to be £50 and is occupied by him rent free, is to be reckoned as part of his income.

Prima facie it would not occur to me that a person's income was increased by his occupying a house rent free. His income no doubt would be more valuable to him by the extent to which he did not require to expend it on house rent or other necessaries, but I do not see that the amount of his income would be thereby in any way altered, although his expenditure would be less.

But however that may be, the question must depend for its solution upon the terms of the assessing Acts. Mr Tennant's income is derived from several sources, but it appears to me that that part of it which he derives from the bank falls to be assessed under schedule E.

The duties granted by that schedule are directed by rule 1 to be charged on persons having, using, or exercising the offices or employments of profit, mentioned in the said schedule, for all salaries, fees, wages, perquisites, or profits whatsoever, accruing by reason of such offices and employments. Rule 3 specifies these offices and employments of profit, and among these there is included any office or employment of profit held under any public corporation, or any company, or society, whether corporate or not corporate.

Mr Tennant holds an office or employment of profit under the Bank of Scotland, which is a public corporation, and he therefore falls to be assessed under this schedule as regards his income from that source. If that be so, then I think he is not assessable under schedule D, because the duties granted under that schedule only apply to every description of property or profits which shall not be contained in either schedule A, B, or C, and to every description of employment of profit not contained in schedule E. If this case were within schedule D at all, it would fall within the second case, but that case relates only to the duty charged in respect of professions, employment, or vocations not contained in any other schedule of the Act. But if I am right in thinking that Mr Tennant's employment of profit is contained in schedule E, then it does not fall within schedule D.

In my view, therefore, we have only to consider the terms of schedule E. Now, schedule E declares that the duties shall be charged on the persons holding such offices or employments "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, &c." I think that if the annual value of the house is to be treated as assessable income it must be brought under one or other of these words. Now, the word "salary" seems to me to imply a money payment. If Mr Tennant were asked how much he got from the bank, he would probably, and I think quite correctly, answer so much salary and a free house. So the words "fees" and "wages" imply money payments, and can have no reference to the annual value of the house. The next

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word is "perquisites," and I think that if it had been intended that such advantages or emoluments as a free house should be treated as assessable income, that it would have fallen under this word, but rule 4 explains what we are to regard as "perquisites" in the sense of the Act. It is there said that "the perquisites to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject in the course of executing such offices or employments." Now, this free house may be said to be, in one sense, an emolument received by Mr Tennant in respect of his office—but does it at all answer the description of an emolument payable by the Crown or the subject? Is it possible to say that the annual value of the house is paid by the bank to Mr Tennant? I think not. I cannot think therefore that the annual value of the house falls under the word "perquisites," as interpreted by the statute.

The only other word used is "profits," and it also appears to me to refer to money only. I think accordingly that the Act treats as income only money payments made to the recipient, or it may be immediately convertible into money.

The manner in which the duties are directed to be dealt with in rule 3 also appears to me to point in the same direction. That rule declares that in all cases where any salaries, wages, or other perquisites or profits shall be payable at any public office, which includes such an office as the Bank of Scotland, the duties chargeable under the Act in respect of such salaries, fees, wages, perquisites, or profits shall be detained and stopped out of the same, or out of any money which shall be payable upon such salaries, fees, wages, perquisites, or profits, and be applied to the satisfaction of the duties on such offices or employments in the manner directed by the Act.

I do not see how the duties could be detained or stopped out of perquisites, emoluments, or profits, which are not money perquisites, emoluments, or profits.

For these reasons I am of opinion that the annual value of the house in question ought not to be reckoned as part of Mr Tennant's income, assessable for income-tax, and that therefore the deliverance of the Commissioners ought to be affirmed.

I only wish further to add that I doubt whether the house ought to be considered an emolument at all, or whether it is not more of the nature of a burden. It is true that its annual value is stated in the case to be £50. It is not stated what that value is, but I suppose it is the value appearing in the Valuation-roll, or the value which such a house would fetch in the market. If that be so, and if the house is to be treated as an emolument of the office, then I think that that is not the true criterion of value in this case. The question is, what is the value to Mr Tennant? and looking to the terms and conditions on which he is bound to occupy the house, its value to him cannot possibly be the same as if he were free to let in the market or turn it into money.

LORD M'LAREN.—I concur in the opinion of the Lord President. I wish only to add one observation in order to make it quite clear that, in my opinion, the question does not depend on the possibility of assessing the bank-agent in respect of his occupation of the bank-house. The bank-agent is not entitled to claim the benefit of the statutory abatement unless his "income from all sources" is less than £400 per annum. The word "income" is not here used in any technical sense. In my opinion it includes income from foreign estates although such estate may not be assessable under the Income-Tax Acts, and

see no reason why "income" in this use of the word should not include income derived from estate within the United Kingdom, although the enjoyment of such estate may not in that particular case be assessable for income-tax. I only use this illustration to shew that there may be income which is not assessable, and yet which everyone would admit ought to be taken into account in considering whether the abatement can be claimed.

The question is, whether the occupation of the bank-house is a source of income in the sense of the statute. It is certainly a source of income in the economic sense. Its value to the agent is £50 per annum, which I take to be part of his income, although it comes to him not in the form of money but of money's worth. I cannot agree that the conditions of the bank-agent's occupancy are comparable with domestic services. I think the bank-agent is not in the position of a person whose income from all sources is less than £400 a-year, and he is therefore not entitled to the abatement given to persons in that position.

LORD TRAYNER.—The appellant, Mr Tennant, is agent for the Bank of Scotland in Montrose, and receives from the bank a yearly salary, or, as it is called in the case before us, "a stated income" of £300. He has income from other sources amounting to £74. As bank-agent he has also the occupancy as a dwelling-house of part of the bank's premises, and this house is said to be of the yearly value of £50. Mr Tennant, maintaining that his income from all sources does not amount to £400, claims that in estimating the amount of income-tax payable by him he shall have the abatement allowed to those persons whose income does not amount to £400 per annum. This claim the Commissioners have allowed, and the question we have to decide is whether the determination of the Commissioners is right.

If the yearly value of the dwelling-house is regarded as part of Mr Tennant's income, then he is not entitled to any abatement, for in that case his income exceeds £400 a-year. On the other hand, if the value of the house is not regarded as part of his income, Mr Tennant is entitled to the abatement which he claims.

I think it of importance to keep in view the conditions under which Mr Tennant occupies the house in question. It is not optional to him to occupy the house or not, according as his desire or convenience dictates. It is required of him "as part of his duty" to occupy the house as custodier of the whole premises belonging to the bank, and "for the transaction of any special bank business after bank hours"; he is not permitted to vacate it even for a temporary period without the special consent of the directors; he may not sublet the whole or any part of it; he must not use it for other than the bank's business; he may be required to remove from it, even while he remains the bank's servant, "at any time," and if he ceases to be the bank's servant, he is obliged "forthwith to flit and remove" from the premises. I note these facts to shew that the nature and conditions of Mr Tennant's occupancy are very different from the usual conditions attending the ordinary tenancy of a dwelling-house. They appear to me to shew that the occupancy of the house is not in any sense an emolument or benefit attached to the office which Mr Tennant holds, but rather that such occupancy is a condition or obligation which must be observed and fulfilled by him (along with others no doubt) in order to his earning the salary of £300 a-year, which the bank pays him for all the services he renders or duties he performs. His occupancy of the house, as custodier of the whole bank

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premises, and for performance of bank business after bank hours, is just as much a part of his duty or service, in return for which his salary is paid, as his occupancy of the agent's or manager's room in which he performs bank business during bank hours.

Apart from this view, and assuming it to be unsound, the question remains, under what provisions in the statute is Mr Tennant chargeable for the value of the house as income upon which income-tax is chargeable? In *Russell's* case (1 R. 528), the Lord President expressed the opinion that it falls within the provisions of schedule E, while in the same case in the House of Lords Lord Herschell said (15 R. 51, H. L.), "that the liability, if it exists, is not under schedule E, but under schedule D, case 2." I am humbly of opinion that the Lord President's view is the right one, at all events in so far as the salary derived from the bank is concerned, but as this difference of opinion has been expressed, both schedules must be examined to see under which, if either, the liability exists. Schedule E provides that income-tax shall be exigible from "all salaries, fees, wages, perquisites, or profits" accruing from employment. I think it plain that the words "salaries, fees, wages," are nothing else than money payments received by the servant in return for his service; and the Lord President has clearly shewn in *Russell's* case that the word "profits" means pecuniary gain. "Perquisites" might be regarded in some circumstances as including something other than money payments. But the statute interprets this word so that there is no room for doubt as to what it means. "The perquisites (rule 4) to be assessed under this Act shall be deemed to be such profits of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject," &c. So that perquisites, just like salaries, fees, wages, and profits, are things payable to the recipient. Now, the right, or privilege, or duty, of occupying the house in question cannot be said to be anything payable to Mr Tennant, and therefore, in my opinion, there is no liability imposed on him for income-tax in respect of the value of the house in question under schedule E.

Under schedule D (case 2) income-tax is chargeable on "the full amount of the balance of the profits, gains, and emoluments of such professions, employments, or vocations, after making such deductions and no other as by this Act are allowed," &c. Here again the words used (which are synonymous) to designate the kind of income which is chargeable are words descriptive of money payments. They represent just the money profits or gains derived from profession or vocation. It is out of them that those sums are paid, expended or disbursed, which are allowed as deductions in estimating or ascertaining the net income on which duty is to be paid. I think it impossible to read the Income-tax Acts in any other sense than as meaning that income-tax—a money tax—is to be chargeable on, and paid in respect of, and out of, the money gains by the person chargeable. The right to occupy the house in question cannot be so described. It is not, in my opinion, in any proper sense income, and I am of opinion therefore that the determination of the Commissioners is right.

THIS interlocutor was thereafter pronounced in the Second Division:—"In respect of the opinions of the majority of the Judges present at the hearing, reverse the decision of the Commissioners of Income-tax, and sustain the assessment."

TODS, MURRAY, & JAMIESON, W.S.—D. CROLE, Solicitor of Inland Revenue—Agents.

GUINNESS, MAHON, & COMPANY, Pursuers (Respondents).—*Asher—Ure.*
JAMES GOODWIN & COMPANY, Defenders (Reclaimers).—*Murray—Kennedy.*

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Guinness, Mahon, & Co. v. Coats Iron and Steel Co.

Process—Amendment of Record—Court of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.—After a judgment had been pronounced by the Lord Ordinary against the defenders in an action, certain defenders, after reclaiming, moved the Court to allow them to amend the record to the effect of stating an entirely new defence, on payment of all expenses already incurred in the action.

Held (1) that under sec. 29 of the Court of Session Act, 1868,† the Court were bound to allow the amendment on such conditions as to the Court should seem proper; and (2) that the amendment should be allowed on payment of the expenses already incurred by the pursuers.

2D DIVISION. Lord Trayner. M.

MESSRS GUINNESS, MAHON, & COMPANY, bankers, Dublin, raised an action, concluding for payment of £6000, against (1) the Coats Iron and Steel Company and the individual partners thereof, and (2) James Goodwin & Company, and James Goodwin, John Goodwin, David Goodwin, Robert Boyd Goodwin, John Topping Goodwin, and David Boyd Goodwin, the individual partners of the said latter firm. The pursuers averred that they were holders for value of certain promissory-notes, all dated 16th April 1889, which were granted by the defenders, the Coats Iron and Steel Company and James Goodwin & Company, in favour of Hume Webster, Hoare, & Company, London, "payable at the Union Bank of Scotland, Limited, Cornhill, London, E.C., on 19th July 1889."

The action was not defended by the Coats Iron and Steel Company, but William Jardine, one of the partners of that firm, appeared and lodged defences, which he afterwards withdrew.

Defences were lodged for the partners of the firm of James Goodwin & Company (other than John Topping Goodwin), in which, besides explaining the circumstances in which the promissory-notes were granted, they averred that various sums had been paid to Hume Webster & Company to account, leaving only a balance of £2028 unpaid, and payment of that sum was accordingly tendered. They also (ans. 2) averred that "all of said promissory-notes were made payable in London, and were only signed as follows:—'Coats Iron and Steel Co., William Jardine, partner, James Goodwin & Co.' By the law of England none of said notes import any liability on these defenders, *et separatim*, none of them import any joint and several liability on the defenders." They also averred (stat. 6) a

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* Decided Jan. 20, 1891.

† The Court of Session Act, 1868, sec. 29, enacts,—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms, as to expenses and otherwise, as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made: Provided always that it shall not be competent by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment: And provided also that no such amendment shall have the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but shall be operative to the effect of obviating any objections to such diligence when stated by the defender himself, or by any person representing him, by a title or in the right of a debt contracted by him subsequent to the execution of such diligence."

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special agreement with the pursuers, entered into in January 1890, to accept a promissory-note for £3500 and a cash payment of £500 in full of their claim.

They pleaded;—(3) In respect of the terms of the said promissory-notes, and that by the law of England the same import no liability on the defenders, *et separatim*, no joint and several liability, the defenders should be assoilzied. (4) In respect of the agreement condescended on by the defenders, they should be assoilzied.

John Topping Goodwin adopted the statements and pleas of the other defenders, but averred in addition that he had ceased to be a partner of the firm of James Goodwin & Company prior to 19th April 1889, when the notes were granted; and pleaded (2) that the said promissory-notes not having been granted by the defender or any firm of which he was a member, he should be assoilzied. In consequence, however, of a decision in another case that he was still a member of the firm at that date, he withdrew this special defence.

A proof was led, and on 19th July 1890 the Lord Ordinary (Trayner) decerned against the defenders in terms of the conclusions of the summons.

The defenders James Goodwin, John Goodwin, Robert Boyd Goodwin, David Boyd Goodwin, and John Topping Goodwin reclaimed, and craved permission to amend the record. The purport of the proposed amendment was to withdraw the whole of the original defence on which the proof had been led, and to substitute averments to the effect that the firm of James Goodwin & Company had ceased to exist from and after 31st March 1889 for all purposes except that of winding up; that none of the defenders had signed or authorised the signature of the firm name James Goodwin & Company, to the promissory-notes or any of them; and that the notes were granted, without the knowledge of these defenders, by the defenders William Jardine and Matthew Dean Goodwin, and after the said firm had ceased to exist except for the purpose of winding up.

They proposed to add the following pleas, viz.:—(1) The signature of James Goodwin & Company to the promissory-notes sued on having been unauthorised by these defenders, they are not liable thereon. (2) The firm of James Goodwin & Company having ceased to exist prior to the granting of the said notes, the said signature is not binding on these defenders or any of them.

Argued for the reclaimers;—This new defence was one on which, if the facts averred were true, they were bound to prevail.[1] The only question was whether judicial admissions did or did not preclude the defence. These, however, were not enough for the decision of the case. It was one thing to admit the debt; quite another to admit the authority to grant bills. There was a good answer to Hume Webster & Company, viz., that money was duly paid to them, and an answer to them, apart from negotiable instruments, would be good against anybody in their right. What was asked was leave to amend only on payment of all expense caused by this defence not having been originally stated, and, if that were refused, substantial justice between the parties would not be done.[2] This was not a mere reverting to John Topping Goodwin's original defence. He denied, it was true, having given authority, on the ground that he was out of the firm, not on the ground that the bills could not be signed during the liquidation, and when in another case there was a judgment settling that he was still a partner of James Goodwin & Company, he put in a minute withdrawing this defence.

[1] Goodwin v. Industrial and General Trust, Limited, Dec. 6, 1890, *supra*, p. 193.

[2] *Cf.* Gelot v. Stewart, March 4, 1870, 8 Macph. 649, 42 Scot. Jur. 321.

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Argued for the respondents;—The defenders adopted and paid nearly the whole of the notes. Assuming the competency of such amendment as was asked, no sufficient reason had been given for this change of front. If the amendment were allowed, the result would be that a man who wanted delay would merely have to state a bad defence, and after judgment had been pronounced against him, come and start a new and seemingly sound defence. The case of *Gelot* was very special. There a new ground of liability emerged in the proof, and so a new trial was allowed. There was absolutely no precedent for allowing a record to be opened up, and amended to the extent of contradicting judicial admissions on which judgment had proceeded.

At advising,—

LORD JUSTICE-CLERK.—When this reclaiming note for James Goodwin & Company came before us the reclaimers indicated that on the pleadings as then existing they could have no case, and they asked that they might be allowed to amend the record. The statement which was made to us of that proposed amendment very plainly indicated that practically the whole of the record as it existed was to be set aside in so far as it raised a question between the parties—a new question altogether was to be set up by the amendment. That was so very strong a motion, and one which hitherto, as far as I know, has never been dealt with judicially in the Inner-House—although I understand such a motion has been made in the Outer-House, and made successfully—that we thought it desirable to take time to consider whether or not so sweeping an alteration of the pleadings in a case could be made consistently with the Court of Session Act of 1868; but after considering the statute, and in particular clause 29, which relates to this matter, I have come to be of opinion that such an amendment may be made. The clause is to the effect that "the Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." That appears to me to be a most general and comprehensive enactment, that where a case has been brought into Court, and where an alteration of the record is necessary for the purpose of enabling the real question between the parties to be decided in that action, such amendment shall be allowed upon conditions. And the comprehensiveness of the clause I think is brought into very sharp relief by the portion of the clause which follows, and which appears to me to be the only restriction which is put upon the broad power and duty of the Court to allow the record to be amended and put into such shape as shall really shew the question between the parties,—"It shall not be competent by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment." It seems to me that the Legislature carefully guarded against allowing the scope of the pleading to be enlarged, while on the other hand making it quite clear that the statement necessary to bring out what should really try the question between the parties was ordered to be allowed, because the words are not "may be so made," but "shall be so made." Therefore I have come to be of opinion that the reclaimers

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here must be allowed to make the amendment upon the record which they propose. The conditions of course are a totally different question, and in this case I do not think it would be doing justice to the opposite party to make any other condition than that the reclaimers must pay the whole previous expenses of the cause.

LORD YOUNG.—I quite understood that the defenders who make this motion offered to pay the whole expenses as the condition of the amendment being allowed, and if they had not, I should have been for allowing the amendment only upon that condition. The case is brought upon a question which is capable of being very briefly stated. The statute not only authorises but requires that any amendment shall be allowed which is in the opinion of the Court necessary in order to decide in the existing action the real question in controversy between the parties. Now, it appears from the statement made to us in support of the motion to allow an amendment, that the real question in controversy between the parties does not appear upon the record as it stands at all. Now, it is a question worthy of consideration whether the Legislature does not mean that if the Court shall think an amendment necessary in order to determine the real question in controversy between the parties as it is to be gathered from the imperfect and inaccurate record, it shall be allowed, but not a question which that record does not suggest at all. I am not disposed so to limit it. The case for a pursuer is simple enough. If he discovers that he has put his action upon a wrong ground, or if he discovers his true ground of action, which had only dawned upon him after the record was closed, his course is to abandon his action and bring another. But a defender cannot do that, where he discovers at a late stage that his only defence has not been stated at all, unless an amendment by which that only real defence may be put on the record shall be allowed. But is that the real question in controversy between the parties? I think it is, notwithstanding that the defective, imperfect, or inaccurate record did not disclose or suggest it in any way. Upon the explanation made to the Court in support of the motion for amendment, the defence proposed to be put upon record raises the only question in controversy between the parties, or raises the real question in controversy between the parties, and I think the considerations of justice upon which the provision of the statute is founded require that that amendment shall be allowed. The statute not only permits it but requires it upon terms which shall sufficiently guard the interests of the other party. The only consideration which could be urged against it would be that it was made for the purpose of delay. I am not in this case inclined to listen to that. I do not think it is meant for the purpose of delay. It may be very rapidly tried, and the satisfying of the condition as to expenses shews that the motion is made in all seriousness. I concur with your Lordship that the amendment may be made, and that it ought to be made. I think that under the statute it is imperative upon us to make it upon the conditions we think necessary.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—The amendment proposed in this case is no doubt a very radical one, but I agree with your Lordships in thinking that it is of the character of those amendments which section 29 of the Act of 1868 directs. I am of opinion that the Court must allow the amendment upon the conditions proposed.

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THE COURT pronounced the following interlocutor:—"The Lords having considered the amendments proposed by the defenders James Goodwin and others, and by the defender John Topping Goodwin, Nos. 223 and 224 of process, allow said amendments to be made by said defenders on payment by them to the pursuers of the expenses of the action hitherto incurred; remit the same to the Auditor to tax and to report; further, allow said amendments to be answered by the pursuers within eight days."

J. & J. ROSS, W.S.—MACKERSY & MUNRO, W.S.—Agents.

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LORD ELIBANK AND OTHERS (Lord Elibank's Trustees), Pursuers (Respondents).—*Murray—C. N. Johnston.*

HENRY WALTER HOPE AND OTHERS, Defenders (Reclaimers).—*Asher—Dundas—Sym.*

Teinds—Subvaluation—Decree of approbation.—A report of subcommissioners of teinds has no effect as a valuation until it has been approved by the High Commission or by the Court of Teinds.

Jurisdiction—Teind Court—Reduction of locality subject to qualification.—In 1888 the proprietor of the lands of B. obtained decree of approbation of a report by subcommissioners in 1630 valuing his teinds. In 1890 he brought a reduction of a locality approved final in 1868, in which a stipend in excess of the teinds as reported to be the value in the subvaluation of 1630 had been localled upon his lands. He sought to have the locality set aside as erroneous *ab initio*, on the ground that the teinds were valued by the subcommissioners in 1630, and that their report had been eventually approved by the Court of Teinds.

The Court of Teinds *granted* decree of reduction, but the decree "to have effect only from and after the date of the decree of approbation, 16th July 1888, for the second half of the crop of 1888, and in all time coming."

TEIND COURT. 1ST DIVISION. Ll. Kyllachy. Teind Clerk.

IN 1886 Lord Elibank and others, trustees acting under a trust-disposition granted by his Lordship, brought an action against Lord Wemyss, the titular, and the Rev. John Hart, minister of the parish of Aberlady, concluding for approbation of a subvaluation, dated 10th May 1630, of the teinds of the lands of Ballencreiff (with certain exceptions) and of the lands of Lochiehill, lying in the parish of Aberlady.

The pursuers averred that the teinds of these lands had been valued by the Subcommissioners for the Presbytery of Haddington in 1630, and that the existence of the subvaluation first came to their knowledge and to that of the other heritors in Aberlady in the year 1885, the teinds in question having for a long time been believed to be unvalued.

By decree of the Court of Teinds, pronounced in a process of augmentation, modification, and locality at the instance of the minister on the 13th and 20th March 1868, the whole of the augmentation had been localled on Lord Elibank's lands of Ballencreiff, with the result that there was localled upon the lands in question from and after that date a sum in excess of the teind as valued in the subvaluation.

On 16th July 1888 the Court pronounced this interlocutor:—"The Lords . . . ratify, allow, and approve of the report of the Subcommissioners of the Presbytery of Haddington libelled on, so far as regards the lands libelled: Find and declare accordingly in terms of the conclusions of the libel, but reserving to the minister such rights as he has acquired by prescription or otherwise to stipend in excess of the teind as valued in said report."—(See report of the case in 15 R. 927.)

On 18th January 1889 the same pursuers brought an action against the Rev. John Hart and other persons, amongst whom was Mr Hope, of Luffness, to have the decree of locality, dated 13th and 20th March 1868,

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reduced and declared "to have been from the beginning, to be now, and in all time coming, null and void and of no avail, force, strength, or effect in judgment or outwith the same in time coming," and to have the pursuers "reponed and restored thereagainst *in integrum*." The summons further concluded that the Court ought to local anew the stipend modified in 1868 to the minister and his successors in office, in the said process of augmentation, modification, and locality raised at his instance, in which the said decree was pronounced, and that upon the teinds of the lands in the parish in the order and proportions in which they respectively were liable for the same and in the same manner as if the said process were still in dependence and no final decree had been pronounced.

The pursuers averred that there were no free teinds of the estate of Belencrieff when the decree of locality sought to be reduced was pronounced in 1868, and that there were sufficient free teinds belonging to other heritors in the parish to pay the augmentation granted to the minister. The pursuers further reserved right to sue before the proper Court for repetition from the other heritors in the parish of all stipend paid by them and their authors in respect of the augmentation.

Of the defenders called Mr Hope and the Earl of Wemyss compeared but the question with the latter was settled. Mr Hope did not object to decree of reduction being pronounced, but pleaded;—2. In the event of any decree of reduction being pronounced, it should be so qualified as to exclude all claim by the pursuers against the present defender for repetition of stipend paid by the pursuers under the said decree of locality in respect (1) the said payments were made under a final decree of locality, (2) the pursuers were parties to the process in which the said final decree was pronounced; (3) all parties have acted, with the acquiescence of the pursuers, on the footing that the said decree of locality finally fixed the measure of their liability.

On 19th June 1890 the Lord Ordinary (Kyllachy) pronounced the interlocutor:—"Repels the defences for the whole defenders: Reduces decerns, and declares in terms of the conclusions of the libel: Ordains the locality now set aside to stand as an interim rule of payment to the minister until furnished with a new locality, and remits to the Clerk to prepare a locality accordingly, and report: Finds the defender Mr Hope liable to the pursuers in expenses so far as occasioned by his appearance in the action," &c.*

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* "NOTE.—In this case the only defender who now appears is Mr Hope, of Luffness. He does not object to the decree of reduction; at least no argument against the reduction was submitted on his behalf. But he contends that the decree should be qualified by a reservation to the effect that the existing locality should remain the rule of payment of stipend up to the date of decree of reduction being pronounced. His object, of course, is to obviate claims against him at the instance of the pursuer for overpayments of stipend since the locality was approved final in March 1868.

"I do not doubt that it is competent—that is to say, that it is in accordance with the practice of the Court of Teinds—to qualify a reduction of a locality in the way proposed. This appears to be settled by the case of *Duncan* v. *Brown*, 10 R. p. 332, and the report by the Clerk of Teinds, which was in that case furnished to the Court. But in the present case I do not consider that the circumstances call for such a reservation. It is here ascertained that the pursuers have during the whole period of the locality under reduction been paying stipend out of stock. In other words, the valuation on which the reduction proceeds is a valuation made so far back as 1630, although only discovered and approved by the High Court in 1888.

"The case is therefore not at all the same as if the reduction had proceeded

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Mr Hope reclaimed, and argued;—The judgment of the Lord Ordinary, as explained in his Lordship's opinion, was a judgment to the effect that not only must the decree of reduction be unqualified, but that it would expose the defender to claims for overpayments of stipend since the locality was approved final in 1868. The defender was therefore not in safety to acquiesce in that judgment, although he admitted that the decree must be reduced. He was entitled to a qualification finding that the new locality should take effect only from and after 1888, when the decree of approbation of the sub-report of 1630 was pronounced. Until 1888 there was no valuation of the teinds, but only a report, which stood unapproved. The locality of 1868 was therefore not only unchallenged but was quite right; but nevertheless the conclusion of the summons was that it should be held null and void from the beginning. It was said by the pursuers that the Teind Court had no concern with questions between heritors as to overpayments, these being money claims to be decided in the Courts of law, and therefore that the decree must be unqualified. That view of the nature of such claims was admitted, but not the inference which the pursuers drew from it. The Court which was competent to grant an absolute reduction was competent to grant it subject to a qualification. Further, such a qualification was according to teind practice. That was shewn by the print prepared by the Clerk of Teinds for the information of the Court in *Duncan* v. *Brown*.[1] In that case, which related to overpayments, the majority of the Court read an unqualified decree of reduction as being substantially a qualified decree, and there were opinions that the decree might properly have been qualified by the Teind Court. The case of *Weatherstone*,[2] assuming its authority to be unimpeached by subsequent cases,[3] shewed that where overpayments had been made under an interim locality, there was an implied contract among the heritors that subsequently their rights were to be adjusted, but that did not apply to payments under a final locality. It was equitable that the qualification contended for should here be introduced, for the pursuer could have obtained his decree of valuation long before 1886. Indeed, in the judgment by which he obtained it, it was held to be proved[4] that if the pursuers had made diligent inquiry they would probably have discovered the subvaluation. But it was only in 1886 that the pursuers first moved in the matter. Meantime the other heritors had

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on a valuation led, say in 1888, which could have been no criterion, or at all events, no certain criterion, of the previous value of the pursuer's teinds, and particularly of their value when the locality was established in 1868.

"In that state of the facts it might be quite proper that, as in the case of *Duncan*, the decree of reduction should be qualified so as only to operate from its date, but here I have not been able to see any sufficient reason why it should not operate *retro*; nor was any authority quoted to me for making the suggested reservation in a case like the present, where it has been ascertained that the locality has been from the first, and all along, erroneous. I must therefore repel the whole defences, and grant decree in terms of the conclusions of the summons."

[1] Duncan v. Brown, Dec. 8, 1882, 10 R. 332. The print referred to will be found in the Session Papers in this case.

[2] Weatherstone v. Marquis of Tweeddale, Nov. 12, 1833, 12 S. 1, 6 Scot. Jur. 89.

[3] Sinclair's Trustees v. Campbell's Trustees, *et al.* July 18, 1877, 4 R. 1126, revd. April 15, 1878, 5 R. (H. L.) 119; Earl of Fife v. Duff, Dec. 23, 1887, 15 R. 238.

[4] Lord Elibank's Trustees v. Hart, July 16, 1888, 15 R. 927, per Lord Adam, 934.

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bona fide consumed their teinds, and the principle of *bona fide* consumption was applicable.[1]

Argued for the pursuers;—The defender had no legitimate reason for defending the action. The only question was whether he was entitled to have the decree qualified. It was no doubt true that, until approved by the High Commission, the report of the subcommissioners had no legal effect. Once, however, it was approved, it found as a fact that the pursuers' lands had all along been valued since 1630. The decree of reduction could not injure the defender in any action in the civil Court as *Duncan* v. *Brown* shewed. The opinion of the Lord Ordinary was against him, for his Lordship held that the reduction would operate res. The Court of Teinds would only interpone authority to a sub-report ministerially. It would also reduce a locality based upon error if found to be wrong, but without intruding on the province of the civil Court to regulate money questions between heritors. Questions of overpayments were mere questions of civil debt. The defence was therefore irrelevant.

Lord President.—A good deal of the argument which we have heard depended upon what is the true character of the report of the subcommissioners which was issued by them for the valuation of the teinds of the lands of Ballencrieff. The heritor was the party to come forward and have the teinds valued, and accordingly led evidence, and the effect might be either favourable or unfavourable to him. He might have found that upon the report of the subcommissioners less stipend was due than hitherto upon the unvalued lands, and, on the other hand, he might have found, and did find, that he took no benefit by the report, but that, on the contrary, he would have been better off as a heritor with unvalued teinds, paying one-fifth part of the rent. Now, there was no obligation on the heritor to carry on the matter further unless he was desirous, and of course he would not do so if he found the report of the subcommissioners adverse to him.

There are a number of cases referred to in the books in which such reports have been acted on by all concerned, and so have come to receive the same effect as if a decree of approbation had been pronounced.

In the ordinary case, until the report has been approved of by the High Commission, it has no effect at all. No one knows anything about it beyond the subcommissioners and heritors, and, it may be, the procurator-fiscal of Court. It remains a dead letter until someone gives it vitality by getting it approved by the High Commission, and the only person who can do this is the heritor. There is no one else I am aware of who is entitled to pursue a summons of approbation of the subvaluation.

The conclusion seems, I think, necessarily to follow that the report of the subcommissioners is of no practical avail whatever until it is approved. It may be acted upon, but no one can be forced to act upon it, or be subject to liability under it. In short, it remains entirely dormant. It seems curious that the statute of Charles I. (Statute 1633, c. 19) did not limit the time within which the subvaluation was to be approved if it was to be operative. But so it is, and accord-

[1] Cuthbert v. Waldie, Jan. 24, 1840, 2 D. 447, 12 Scot. Jur. 296, and Magistrates of Montrose v. King's College of Aberdeen, Nov. 12, 1834, reported in note, p. 457 of 2 D.; Haldane v. Ogilvy, Nov. 8, 1871, 10 Macph. 62, 44 Scot. Jur. 32; Sinclair's Trustees v. Campbell's Trustees, *et al. supra*, note 3.

[2] Sinclair's Trustees v. Campbell's Trustees, *supra*; Earl of Fife v. Duff, *supra*.

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ingly subvaluations have sometimes been approved at a distance of centuries beyond the time at which the reports were actually made.

The conclusion I therefore come to is that the report of the subvaluation has no practical legal effect until it is approved of by the High Commission: it is really a document of no legal existence.

If that is so, when did this subvaluation come into existence and receive effect? That is easily answered,—on the 16th of July 1888. It had no existence, and could receive no effect, before that date, and therefore that is the date at which it became for the first time a valuation of the teinds in question.

Now, the ground upon which the decree of locality is sought to be set aside here is that the heritor has been made to pay more than he had to pay under the old subvaluation. But the teinds were not valued till 16th July 1888, because there was no valuation before that date. His teinds were before that unvalued, and he was just in the same position as every other heritor whose teinds were unvalued. His valuation of teinds must consequently, in my opinion, date from 1888. From all this I arrive at the conclusion that this decree of reduction must be qualified in some way in order to do justice to the parties, because as it stands now it might be read—though not necessarily—as meaning that the reduction of the final decree of locality proceeded upon the footing that this heritor had made overpayments since 1630. If the reasoning I have been endeavouring to state is conclusive, then that is just what he has not been doing. He has not overpaid anything until 1888, when the subvaluation was approved. The decree of reduction, then, must, I think, be qualified by some such words as these—"This decree shall have effect only from and after the decree of approbation of 1888 for the second half of the crop of 1888 and in all time coming."

Lord Adam.—No one disputes that the decree of locality in 1868 is to be reduced. The only question is whether the decree in the action of reduction is to be qualified by such additional words as are proposed, to the effect that it is only to receive effect from and after the 16th July 1888, the date of the decree of approbation.

The Lord Ordinary is of opinion that it is competent thus to qualify the decree, for he says in his note,—"I do not doubt that it is competent—that is to say, that it is in accordance with the practice of the Court of Teinds—to qualify a reduction of a locality in the way proposed. This appears to be settled by the case of *Duncan* v. *Brown*, 10 R. 332, and the report by the Clerk of Teinds which was in that case furnished to the Court." We are at one with his Lordship on the question of competency. But then the Lord Ordinary goes on to say.—"But in the present case I do not consider that the circumstances call for such a reservation. It is here ascertained that the pursuers have during the whole period of the locality under reduction been paying stipend out of stock. In other words, the valuation on which the reduction proceeds is a valuation made so far back as 1630, although only discovered and approved by the Court in 1888." Now, these words shew wherein lies the Lord Ordinary's misapprehension. He has treated the approbation of the report of the Subcommissioners as if it had the same effect as a decree of the High Commission at the date of the report of the Subcommissioners. It is obvious that the teinds of the lands in question were never valued until 1888, because the effect of that decree of approbation of 1888 was for the first time to

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value those teinds, and from that date only the stock and teinds in the lands i question were separated. If that is so, then during the long period down 1888 the teinds were unvalued, and were rightly estimated as at one-fifth of t rent. There was therefore nothing wrong in the valuation of the teinds co tained in the scheme of locality of 1868, and it was only in 1888 that th scheme of locality ceased to contain a proper allocation on the teinds of L Elibank's lands.

Now, as to the competency of qualifying the decree in the manner propos as I have said, I entertain no doubt. The question, I think, depends upon wh is the fact which requires the final scheme of locality to be altered. It may such a fact as the discovery of a valuation of the High Commission of a d preceding that of the final scheme. If that is so, it may well be that you cann qualify the decree by stating a date from which it is to receive effect later th the date of augmentation granted, because where that is the state of the fact is obvious that during the whole period there has been an encroachment up the stock of the heritor's lands which there ought not to have been. Wh we deal with the particular fact here, and see that the lands were for the fir time valued in 1888, I think the inference we derive from that fact leads t this, that the decree of approbation shall not have any effect except from i own date.

LORD M'LAREN.—I concur, and only desire to add that I think the s solution of the question is to be found in an observation which was made Lord Kinnear in the course of the argument, to the effect that the Act of t Scottish Parliament gave every landed proprietor the option of paying stipe according to the actual rental of his lands or according to a valuation to be as tained by a public commission. The Act further declared that until a perman valuation was made the annual value of the teinds should be one-fifth of the rent These considerations make it plain that the scheme of locality, which was m up prior to the valuation of the particular lands by the decree of approbation a scheme in accordance with the Act of Parliament. Payments under it legal payments, and are not liable to be altered or rectified by any author It follows that the present decree must be qualified in the way your Lords has suggested.

LORD KINNEAR.—I am of the same opinion. The summons assumes that decree of locality which it is proposed to reduce was erroneous at its date, beca it has now been ascertained by a decree of approbation in 1888 of a report Subcommissioners in 1630 that the teinds of Ballencrieff were not of the va of which they were believed to be when the locality was made final in 1868.

I agree with all your Lordships in thinking that the report of the Su commissioners was ineffectual until approved by the Teind Court. It follo that the decree of approbation did not fix the value of the teinds of Lord Elib for the past but only for the future, and therefore the decree does not ascert that the locality of 1868 was erroneous, but only that the stipend payable o of teinds of the pursuer's lands as then allocated is in excess of the amount wh he is liable to pay in the future. It follows therefore that the allocation ma by the decree of locality ought not to be altered for the period prior to that da because it was up to that time a perfectly right decree. The teind of the pursu was fixed by law at a fifth part of the rent for the time being until the consta

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rent should be ascertained, and the constant rent was not ascertained until the decree of approbation had been pronounced. The decree of reduction must therefore be qualified in the manner proposed.

As to the competency, I am of opinion that it is not only competent for us to determine whether the decree we are now to pronounce should be qualified in the manner proposed, but that this is a question for this Court alone. It is for the Court of Teinds to fix the respective liabilities of the heritors in a process of locality, and that is all we are asked to do. The pursuer is to substitute a new locality for that which was declared final in 1868, and we are now to determine whether the stipend should be allocated according to the new scheme or according to the old scheme during the period between the last augmentation and 1888. That is a question of locality which in my judgment is competent for the Court of Teinds alone. If our decision had been adverse to the defender, the pursuers might have raised an action for repetition of overpayments in the Court of Session, and in that action the defender might have stated the plea of *bona fide* consumption which has been argued before us. But we have nothing to do with any such question in this Court, nor can it arise at all in consequence of our decision. It might or might not have been available to the defender if his payment of stipend for the period in question had been below the amount for which he was legally liable, but the decision is that he paid according to his liability, and the plea is therefore unnecessary and inapposite.

THE COURT pronounced this interlocutor:—"Vary the interlocutor in so far as to insert in the seventh line thereof after the words 'conclusions of the libel' the words 'but this decree of reduction to have effect only from and after the date of the decree of approbation, 16th July 1888, for the second half of crop 1888, and in time coming': Recall the interlocutor in so far as it finds the said Henry Walter Hope liable in expenses occasioned by his appearance: Find him entitled to expenses in the Outer-House: *Quoad ultra* adhere: Find the reclaimer entitled to expenses in the Inner-House."

REID & GUILD, W.S.—THOMSON, DICKSON, & SHAW, W.S.—Agents.

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MISS MARY COCHRANE, Appellant (Reclaimer).—*Salvesen.*
ROBERT C. KING (John Lamont's Trustee), Respondent.—*Cosens.*

Husband and Wife—Bankruptcy—Debt by husband to wife—Married Women's Property (Scotland) Act, 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 1, *subsecs.* 1 *and* 4.—By the Married Women's Property (Scotland) Act, 1881, sec. 1, subsec. 1, it is provided that in the case of a marriage after the date of the Act the whole moveable estate of the wife shall be vested in her as her separate estate, and shall not be subject to the *jus mariti*. By subsec. 4 of the same section it is provided that any money of the wife lent to the husband shall be treated as assets of his estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money after, but not before, the claims of the other creditors of the husband have been satisfied.

A husband six days prior to his sequestration granted to his wife a promissory-note, payable one day after date, for £1370, as the amount of sums lent to him at various times by his wife out of her separate estate. On the same day the wife assigned the promissory-note and the sum contained therein to a relative in consideration of a payment of £50. The wife's assignee thereafter lodged a claim for £1370 in the husband's sequestration.

Held that, having regard to subsecs. 1 and 4 of sec. 1 of the Married

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Women's Property (Scotland) Act, 1881, the wife's assignee was only entitled to be ranked upon whatever assets might remain after the whole claims of the ordinary creditors of the bankrupt had been satisfied.

THE estates of John Lamont were sequestrated upon his own petition on 3d February 1890. A claim was lodged in the sequestration for Miss Mary Cochrane to be ranked as an ordinary creditor for the sum of £1370.

The claim arose under the following circumstances:—

Mrs Lamont, the bankrupt's wife, to whom he was married after the date of the Married Women's Property Act of 1881, had separate moveable estate, in virtue of the provisions of that Act, and out of that estate she was alleged to have lent, at various times, sums of money to her husband amounting in all to the said sum of £1370. On 28th January 1890, being the date upon which he granted a mandate to his agent to apply for sequestration, the bankrupt granted to his wife a promissory-note for that sum payable one day after date.

On the same date Mrs Lamont, with consent of the bankrupt, and in consideration of £50 paid to her by William Anderson junior, accountant, Glasgow, assigned to the latter the sum contained in and due under the promissory-note, and the promissory-note itself, which was described in the assignation as having been granted "for sums advanced by me, the said Mary Anderson or Lamont, from my separate means and estate, as a loan to the said John Lamont." On 28th May 1890 Mr Anderson executed in favour of the claimant, Miss Cochrane, an assignation of the sum of £1370 and the promissory-note, upon the narrative of the assignation in his favour, and that Miss Cochrane had purchased the debt from him for the sum of £50. Mr Anderson was a cousin of Mrs Lamont, and Miss Cochrane was her daughter by a former marriage.

The trustee in the sequestration, Mr Robert C. King, rejected Miss Cochrane's claim, as an ordinary claim, but "admitted the same to ranking on whatever assets (if any) may remain after, but not before, the whole claims of the other or ordinary creditors of the bankrupt have been satisfied." The grounds of his deliverance were that subsec. 4 of sec. of the Married Women's Property (Scotland) Act, 1881, applied to the case.*

On 9th December 1890 the Lord Ordinary (Low) dismissed an appeal against the trustee's deliverance.†

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* The Married Women's Property Act, 1881, sec. 1, subsec. 1, provided: "Where a marriage is contracted after the passing of this Act, and the husband shall, at the time of the marriage, have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*."

Subsection 4 provided,—"Any money or other estate of the wife lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after, but not before, the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

† "Opinion.—[After narrating the circumstances in which the claim arose and referring to the trustee's deliverance]—It is argued for Miss Cochrane that the deliverance of the trustee is erroneous, on the ground that the provision in the Act applies only to the case of the wife herself claiming in bankruptcy, and does not affect an onerous assignee who has acquired right to the debt prior to sequestration. Until sequestration, it was argued, the wife was in as good a position as any other creditor, and that the disability imposed by the Act ... n

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Miss Cochrane reclaimed, and argued;—(1) During the husband's solvency his wife had a good claim as a creditor for sums advanced by her to him. If she assigned her claim of debt to an onerous assignee prior to her husband's bankruptcy, such assignee was entitled to claim in the husband's sequestration as an ordinary creditor for the amount of the claim of debt. In any view the limitation imposed by the Act upon the wife's claim on her husband's sequestration was personal to herself. It could not apply to an assignee of the wife who had obtained right to the debt before the bankruptcy of the husband. (2) Miss Cochrane held the promissory-note on a good title. Section 29, subsec. 2, of the Bills of Exchange Act, 1882,[1] contained an exhaustive enumeration of the possible disabilities by which the holder of a bill or note could be affected. The disability of title alleged here was not contained in the enumeration, and could not affect a holder who acquired the promissory-note for value before it was over-due.

Argued for the respondent;—The maxim *assignatus utitur jure auctoris*

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came into existence after sequestration, and in the event of the wife herself claiming as a creditor in the sequestration.

"I am of opinion that this argument is not well founded. It seems to me to be a clear case for the application of the maxim *assignatus utitur jure auctoris*. By the first section of the Act, subsection 1, it is provided that the whole moveable estate of the wife shall be vested in her as her separate estate, and shall not be subject to the *jus mariti*. By this enactment the wife is given right to her moveable estate, which, but for the Act, would have become the property of the husband. The right so given is, however, limited by the subsequent enactments of the section. Thus, by subsection 2, it is provided that the wife shall not be entitled to assign the prospective income, or, unless with the husband's consent, to dispose of such estate; and by subsection 4, already quoted, it is provided that money lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, subject to the right of the wife to a postponed ranking therefor. These limitations appear to me to affect the quality of the right which is given to the wife in her moveable estate, and an assignation cannot alter the quality of the right assigned. I do not think that it could be disputed that an assignation by a wife without the consent of her husband would not be effectual, because the Act which gives to the wife right to her moveable estate subjects that right to the qualification or condition that she shall not dispose of it without her husband's consent. In the same way, I think that it is a qualification or condition of the wife's right, that if her separate estate is lent or entrusted to the husband, she shall only be entitled to a postponed ranking in the event of his bankruptcy.

"The present case is a very strong one for the application of the principle to which I have referred, because it is evident that the promissory-note and assignation were granted on the very eve and in contemplation of the husband's sequestration, for the purpose of taking the case outwith the provisions of the statute. If such a device was lawful, the provision of the Act founded on would easily be, and would probably generally be, substantially defeated; because it would be open to the wife, when her husband's bankruptcy became imminent, to dispose of her claim at the best price which she could get, and the assignee would rank upon the estate as an ordinary creditor, for the full amount of the money lent or entrusted to the husband. Such a transaction would entirely defeat the intention of the Legislature in making the enactment in question, which, I take it, was to prevent the husband's creditors being prejudiced by the change which the Act made in the law in regard to the wife's right, in cases in which her moveable estate had, as matter of fact, come into the husband's possession.

"I am therefore of opinion that the deliverance of the trustee is right, and should be sustained."

[1] Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), sec. 29, subsec. 2, sec. 89.

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applied.[1] The reclaimer took the wife's right to claim for the amount the debt subject to the qualifications imposed by subsec. 4 of sec. 1 the Act.

LORD PRESIDENT.—I do not think that the Bills of Exchange Act has any app cation here. This is a question of ranking upon a sequestrated estate, and t provisions of the Bills of Exchange Act have reference merely to the rules whi are to regulate the relations of parties to a bill in ordinary circumstances.

The promissory-note is not worth anything at all, and must be looked up as a donation between husband and wife. Being gratuitous, it is quite witho effect as regards the present question, and it is granted without any cause wh ever, if it is granted for the same right as the wife has already under subsecti 4 of section 1 of the Married Women's Property Act, 1881. There is therefo no need to appeal to the Bills of Exchange Act.

As regards the construction of the Married Women's Property Act, 188 there is no difficulty at all. It is there provided by section 1, subsection that "any money or other estate of the wife lent or entrusted to the husb or immixed with his funds, shall be treated as assets of the husband's estate bankruptcy." That is the leading provision. If a wife lends or entrusts her husband her separate estate and he afterwards becomes bankrupt, then the money so lent or entrusted to him is to be treated as assets of his estate That is a very broad and sweeping proposition, and it is only qualified by reservation in favour of the wife in very special terms, "under reservation the wife's claims to a dividend as a creditor for the value of such money other estate after, but not before, the claims of the other creditors of the husba for valuable consideration in money or money's worth have been satisfie Now, giving effect to this latter clause it is plain that no wife could possi claim to compete with the onerous creditors of her husband for the amount her own estate which had been allowed to pass into the hands of her husb and to be immixed with his funds.

Then the only other question is whether an assignee of the wife is in a be position with regard to a claim in the husband's sequestration than the herself. I am very clearly of opinion that he cannot be. He knows q well what he is taking,—that it is a claim of debt by a wife against her husba —a claim of debt which is created by her having allowed her funds to be immixed with those of her husband, or by her having allowed them to be entrus or lent to him,—and knowing this, the assignee must of course also know (fo is bound to understand the Act of Parliament) that this claim for £1370 wh he bought at the price of £50, on the eve of the husband's bankruptcy, nothing more than a right to rank for that sum after the claims of the other creditors of her husband had been satisfied.

I think therefore the Lord Ordinary's decision is well founded.

LORD ADAM.—I am of the same opinion.

Mrs Lamont, the bankrupt's wife, is said to have lent her husband sums money at various dates amounting in all to £1370, and on 28th January 18 a few days before his sequestration, the husband granted her a promissory-n for that sum. If the husband were solvent, the wife, or any person in right the promissory-note, would be entitled to receive payment of it from him,

[1] Scottish Widows' Fund v. Buist, &c., July 14, 1876, 3 R. 1078.

hat is not the position of matters. The husband has been sequestrated, and his claim consequently is a claim in his sequestration, and the provision of the th subsection of section 1 of the Married Women's Property Act, 1881, must e taken into account, which is to the effect that "any money or other estate of e wife, lent or entrusted to the husband, or immixed with his funds, shall be ated as assets of the husband's estate in bankruptcy,"—that is to say, that £1370 alleged to have been lent to the husband by the wife is to be treated assets of the husband's sequestrated estate. Now, if there had been no ervation of the wife's claim, it would have been impossible for her to recover y part of the money lent to her husband, for it would have been part of the sband's estate in bankruptcy, but then there follows a reservation in the wife's vour—and it is the only right she has—of a claim to a dividend as a creditor er the claims of the other creditors of her husband have been satisfied. That is the nature of the wife's right, and it being of that nature, I agree that e cannot give a higher right to her assignee.

Lord M'Laren.—This is a claim by the wife's assignee against the estate of e husband in bankruptcy for money lent by the wife to the husband. The rd Ordinary has affirmed the trustee's deliverance and rejected the claim on grounds which appear to me to be clear and unanswerable. The claim is neces-rily founded on the 1st section of the Married Women's Property Act of 1881, and in considering the rights given by that section the several subsections into which it is divided must be read together as one substantive enactment. Now, the operation and effect of the Married Women's Property Act was not imply to rescind the *jus mariti*, leaving the wife to have the same interest in r estate as an unmarried woman, but the Act gives the wife by operation of w what is called a "separate estate," a kind of property not known to the mmon law, and which could only be constituted prior to the date of this Act y means of a trust. Now, the first section, while giving the wife a separate tate, is careful to define what is meant by that term. You have in separate bsections a definition of the separate estate by its various incidents. Her wers as to disposal and anticipation of income are limited, and there are pecial provisions with reference to diligence and bankruptcy. Therefore it is in vain to contend that the estate which is here given is the same thing as the state in moveable property taken by a man or an unmarried woman.

One incident of the separate estate thus created is that in the case of such estate being lent to the husband or immixed with his funds, the wife's claim in bank-ruptcy shall be postponed to the claims of other creditors. It appears to me, agreeing with the Lord Ordinary, that the restriction thus imposed is one affecting the estate itself, and that it would therefore affect the claim of any assignee to the rights which the wife had against her husband.

It was endeavoured to distinguish the claim here made from the case contem-plated in the statute by the circumstance that the husband had granted to his wife a promissory-note for the money lent to him, and it was said that the clause referred to in the Bills of Exchange Act contains an exhaustive enumeration of all the objections which can be maintained against the onerous assignee of a bill. I agree with your Lordship that the case contemplated by the Bills of Exchange Act is the case of a claim against a solvent debtor. The argument on that clause would really amount to a reversal of all the conditions of bankruptcy law intended to secure creditors against improper alienations, because we know

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very well that bills come under the bankruptcy laws, although we do not find any reference to the exceptions under these laws in the Bills of Exchange Act which is not intended to regulate every possible legal proposition that might be maintained with reference to bills of exchange, but only those points which are in immediate connection with the subject. Agreeing with the views of the Lord Ordinary, I am of opinion that the present claim is not well founded, and that the judgment ought to be affirmed.

LORD KINNEAR.—I am of the same opinion. It appears to me that the effect of subsection 4 of section 1 of the Married Women's Property Act of 1881 is to put the wife in exactly the same position as regards her husband's bankrupt as any other creditor of his in so far as she has lent money to him, subject only to the condition that her claim to a dividend is after the claims of the other creditors have been satisfied.

It is provided in the Act that any money "lent by a wife to her husband shall be treated as" assets of his estate in bankruptcy. That is exactly the position of money lent to anyone else who becomes bankrupt. The money is treated as part of the whole assets of the bankrupt estate, and the lender is ranked with the rest of the creditors. The effect of this provision therefore is that the wife is not entitled to have the money separated from her husband's estate but must submit to having it treated as part of his estate in bankruptcy. But the Act proceeds to add a very material qualification, and provides that the wife shall be entitled to claim a dividend for the value of the money she has lent to her husband "after, but not before," the claims of the other creditors have been satisfied. It appears to me, then, that the wife's right is simply a personal claim to a debt, which she may assign if she please, but only subject to the qualification which attaches to it in her own person.

I agree in thinking the Bills of Exchange Act has no application whatever.

THE COURT adhered.

GILL & PRINGLE, W.S.—F. J. ROBERTSON, W.S.—Agents.

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Cochrane.

HON. T. H. A. E. COCHRANE, Petitioner.—*Murray—Maconochie.*

Parent and Child—Father's duty as administrator-in-law of pupil child—Factor loco tutoris.—A father presented a petition for the appointment of a factor loco tutoris to his daughter—in respect of a sum of £9000, to which she had right—with power to prosecute an action of damages for the loss of part thereof—on the ground that the petitioner's interests might conflict with those of his daughter in the prosecution of the action. The Court *refused* the petition on the ground that the petitioner had failed to shew that any conflict of interest would arise.

2D DIVISION.
Lord Low.
M.

THE HON. THOMAS H. A. E. COCHRANE, Dankeith, Kilmarnock, presented a petition to the Junior Lord Ordinary for the recall of the appointment of a factor loco tutoris to his pupil daughter, Miss Louisa C. M. Cochrane, and for the appointment of another factor loco tutoris, with certain powers hereafter referred to.

The Lord Ordinary (Low) reported the petition to the Second Division. The circumstances in which the petition was presented were thus described in a note to his Lordship's interlocutor reporting the petition —"In 1882 the late Earl of Glasgow borrowed under the sanction of the Court £150,000 over his entailed estates. The petitioner's daughter

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Miss Cochrane, was one of the heirs of entail whose consent was required. The value of her interest was fixed at £9250, but this sum was not paid or secured.

"In 1885 Lord Glasgow conveyed his whole estates to trustees for behoof of creditors. He was made notour bankrupt in 1886, but the creditors agreed that his estates should be realised by the trustees under the trust-deed.

"The entailed estates were accordingly realised by Lord Glasgow and his trustees, and the secured creditors paid in full. There remained a balance of Lord Glasgow's means, which it was estimated would be sufficient to pay to his unsecured creditors, including Miss Cochrane, a dividend of 7s. 6d. in the pound.

"The petitioner and his wife, Lady Gertrude Cochrane, Lord Glasgow's eldest daughter, settled with the unsecured creditors, with the exception of Miss Cochrane and Lady Muriel Boyle, Lord Glasgow's second daughter, to whom a similar debt is due. Mr Cochrane and Lady Gertrude Cochrane obtained assignations to the claims of the creditors, with whom they settled, and thus acquired right to the reversion of Lord Glasgow's estates, subject to the debts due to their daughter and Lady Muriel Boyle.

"Lord Glasgow's trustees were willing to pay to Miss Cochrane a dividend of 7s. 6d. in the pound in full of her claim, but as she was a pupil, having been born in 1882, they were not satisfied that they would be in safety to take a discharge from the petitioner, who, having acquired the reversion of Lord Glasgow's estate, had an interest adverse to that of his daughter.

"The petitioner accordingly applied for the appointment of a factor loco tutoris to his daughter, for the purpose of uplifting, discharging, and applying for her behoof the said debt of £9250, and Mr James Auldjo Jamieson was appointed to the office.

"Mr Jamieson after his appointment found that William Smith, LL.D., Edinburgh, had been Miss Cochrane's curator ad litem in the entail proceedings, in which she had been found entitled to £9250 as the value of her consent. He therefore raised an action against Dr Smith to compel the latter to make good any loss sustained by Miss Cochrane from his having failed to see that the sum of £9250 was paid or secured.

"The action came before Lord Kyllachy, who dismissed it on the ground that Mr Jamieson's title was limited to uplifting and discharging the debt."

The prayer of the present petition was (1) to recall Mr Jamieson's appointment; (2) to nominate another person to be factor loco tutoris to Miss Cochrane "as and in respect of the said debt of £9250 . . . and on and in respect of all claims of damages for loss arising to the pupil through the failure to pay or secure the said sum, with power to the said factor to sue for, uplift, and recover the said sum, of £9250 from such persons or estates as may be legally liable therefor, or to discharge or assign the said claim, and also to prosecute and follow forth all actions of damages competent against any person or persons who may be liable in respect of the failure aforesaid, and to apply the sums uplifted and recovered for the pupil's behoof, with the usual powers," &c.*

* The NOTE of the Lord Ordinary, after the narrative above given, proceeded thus,—"The primary, and so far as the statements in the petition go, the only object for asking that extended powers should be given to the new factor is, that he may have a title to prosecute the action against Dr Smith. I doubt if this is a sufficient reason for granting the powers craved, because I do not think

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Argued for the petitioner;—It was desirable, and indeed necessary, to have a factor loco tutoris. The Court would appoint one though a pupil's father were alive and otherwise fit to act if there were strong reasons for it in the pupil's interest.[1] Here the petitioner's interest might conflict with his duty as the pupil's administrator-in-law. If he sued Dr Smith to recover damages for loss by his alleged failure to see that the £925 was paid or secured by Lord Glasgow, a defence might be stated against him as assignee of the debts, which would not be available against the factor, if appointed. Dr Smith's defence was understood to be that if the estate had been wound up in a different manner there would, or might have been no loss. But the petitioner was a party to the way it had been wound up, and had paid 7s. 6d. per pound for an assignation to claims. His interest was to shew that was a fair thing; his daughter's might be that it was not. A factor loco tutoris should therefore be appointed for the limited purpose craved in the petition.

It was stated at the bar that the petitioner had bought up the claims of unsecured creditors (except those of his daughter and Lady Muriel Boyle) at the rate of 7s. 6d. per pound, and in lieu of a dividend of 7s. 6d. per pound had, by arrangement with the trustees, got a conveyance from them of the estate of Crawford Priory at a valuation, reserving his claim for the balance of the debt if the bankrupt estate should yield more.

Lord Young.—I do not mean to say anything to the effect that the Court may not protect a pupil child in a question in which his or her father has a adverse interest. The Court in the exercise of its *nobile officium* may appoint an officer to protect the pupil against the father, and to see that the interest the former is duly attended to, if there is any reasonable ground to fear that might be in danger if the father were left in charge of it. But subject to this exception, the rule of law is that a father is the proper tutor of his pupil child and cannot divest himself or avoid discharging the duties attaching thereto

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the Court has been in use to supersede the father of a pupil, or to relieve him of the tutorial duties involved in his position, unless there is a conflict of interest between him and his child, or unless the circumstances of the father as, for example, from insolvency, are such that it is apparent that the child's interest would not be safe in his hands.

"As regards the claim against Dr Smith, I do not think that there is any conflict of interest between the petitioner and his daughter, and I observe that Lord Kyllachy in his judgment in the action to which I have referred takes the same view. As to the title of Mr Cochrane to make the claim as administrator-in-law to his daughter, I do not think there can be any doubt.

"It is, however, right to say that it was stated at the bar that the claim against Dr Smith is not the only matter with which the factor, if appointed, may have to deal, but that he may have to raise questions with Lord Glasgow's trustees, and with the petitioner himself. I can understand that this may be the case. If, for example, the reversion of Lord Glasgow's estate acquired by the petitioner greatly exceeds in value the amount for which he settled with the creditors, Miss Cochrane may be entitled to demand payment of her debt in full either from the trustees or from the petitioner.

"In the whole circumstances I should hesitate to refuse the petition, but it seems to me to raise a question of novelty in regard to a jurisdiction which the Court have always exercised with caution, I have thought it right to report it. I may add that I think it better not to deal with the recall of Mr Jamieson's appointment until it is settled whether a new factor with additional powers is to be appointed."

[1] Mars v. Riley, March 9, 1848, 20 Scot. Jur. 308; Mann, July 19, 1851, 14 D. 12; Robertson, July 12, 1865, 3 Macph. 1077, 37 Scot. Jur. 568; Sawers, March 9, 1850, 12 D. 905.

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And the law permits him to name a tutor, who is to take his place if he die during his child's pupillarity.

Now, this young lady has a father who is a wealthy and intelligent man so far as we know, and he is capable of performing to her the father's duty as tutor and guardian.

The circumstances of the case are very intelligible. A debt is due to her by the trustees of the late Lord Glasgow. It is a debt of about £9000, and is payable out of his estate so far as it will go. It represents the value of her consent as one of the heirs of entail to a disentail of certain entailed land. That value was ascertained, but the consent is said to have been given without the money having been paid or secured, and her claim is now against Lord Glasgow's trustees for the debt. Unfortunately for her, and for the other unsecured creditors, the estate of Lord Glasgow is believed only to be worth about 7s. 6d. per pound. That is the opinion of the trustees, and also of those who applied for and obtained the previous appointment of a factor loco tutoris. If so, the young lady will get no more from that source than 7s. 6d. in the pound. Her father, Mr Cochrane, on the ground that the estate was reasonably expected to be worth 7s. 6d., bargained with the unsecured creditors (excepting his daughter and Lady Muriel Boyle) to buy their debts at 7s. 6d. per pound. They did not discharge them, but assigned them to him, and he thereafter became creditor in them. He arranged with the trustees that the estate of Crawford Priory should be valued and conveyed to him as payment, to the extent of the valuation, of a dividend of 7s. 6d. on the debts which he had acquired. We were informed that he holds that as a payment to account only, and that if the estate of Lord Glasgow should yield more than 7s. 6d. per pound, his claim remains for any surplus there may be.

The fairness of that transaction there seems to be no ground to impugn. There is no idea of indirect or improper motive. Now, he, as tutor of the young lady, thought that her claim would only be worth 7s. 6d. per pound. The trustees thought that an independent tutor should be appointed. Then it was pointed out to their tutor that Dr Smith had been curator ad litem in the disentail proceedings in which Miss Cochrane's consent had been valued at £9000, and it was thought that a claim arose against him on Miss Cochrane's part because he put Lord Glasgow in the position of getting the consent without the purchase money being first secured, and therefore that the difference between the price of the consent and a dividend of 7s. 6d. per pound ought to be claimed from him. I see no reason why Miss Cochrane, and her father as her tutor, should not prosecute this claim against Dr Smith. His defence will be the same as if the action was raised by someone else, both as to the liability and as to the amount. If he thinks that more than 7s. 6d. per pound should be yielded by the estate, that is a question for him to try with the trustees, and it is Mr Cochrane's interest also to try it. Or Dr Smith might suggest that Crawford Priory had collusively been given at less than its value. The most proper action in which to try that would be one in which Mr Cochrane was a party. Is it intended to be said that Miss Cochrane has an interest to prevent that being tried? I do not think that the Court on such a suggestion will dream of interfering and appointing another officer in lieu of the father, the existing tutor.

I am of opinion that the petition should be refused.

LORD TRAYNER.—The purpose for which the appointment of a new factor loco tutoris is now sought is that he may proceed with an action for damages against

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Dr Smith. In ordinary circumstances such an action would be raised on behalf of a child at the instance of the tutor-at-law, though circumstances might emerge to make it expedient that an appointment of an officer should be made by the Court. If it appears that there are such, we are ready to grant such an application. But I agree that we should refuse this application, because such a case has not been shewn. I do not consider that the father has any conflicting interest which renders it inexpedient that he should execute his office as tutor of his child, and sue this action.

LORD JUSTICE-CLERK.—I agree that up to this stage nothing has been shewn to indicate that Mr Cochrane is precluded from acting as his child's tutor. Such a case may yet be shewn to us. But there is nothing at present to justify our granting the petition.

LORD RUTHERFURD CLARK was absent.

THE COURT remitted to the Lord Ordinary to refuse the petition.

MACKENZIE, INNES, & LOGAN, W.S., Agents.

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Jan. 27, 1891.
North of Scotland Bank, Limited.
1st DIVISION.
C.

THE NORTH OF SCOTLAND BANK, LIMITED, Petitioners.—*Ure.*

Diligence—Messenger-at-arms—Sheriff-officer—Nobile Officium.—The North of Scotland Bank, Limited, presented this petition stating that they had obtained decree in an action at their instance before the Court of Session against Gilbert Gavin Harrison, merchant, Lerwick, for payment of the sum sued for, with expenses, which they extracted in due course; that there was no messenger-at-arms in Shetland, and that the nearest messenger-at-arms was in Wick, a distance of 150 miles. Under the Court of Session Act, 1868, section 19, service of summonses and citations of witnesses may be made by sheriff-officers in counties or districts of counties where there is no resident messenger-at-arms, but no provision is made for the execution of diligence in similar circumstances. The petitioners therefore craved the Court for a warrant to sheriff-officers to charge, arrest, and poind in terms of the extract decree.[1]

THE COURT granted the prayer of the petition.

ALEX. MORISON, S.S.C., Agent.

No. 99.
Jan. 29, 1891.
Cunningham v. Maclachlan & Stewart's Trustee.

DANIEL JOHN CUNNINGHAM, Pursuer (Reclaimer).—*D.-F. Balfour—W. Campbell.*

RICHARD BROWN (Maclachlan & Stewart's Trustee), Defender (Respondent).—*Murray—Ure.*

Contract—Sale—Author and publisher—Bankruptcy.—Held (*per* Lord Young, Lord Rutherfurd Clark, and Lord Trayner) that the contract between an author and a publisher, by which the publisher takes the risk, and the profits are halved, is a contract of sale of the right to publish the edition of the book to which the contract refers.

An author and a publisher entered into an agreement "regarding the publication" of an edition of a book. The publisher agreed to relieve the author of the expenses of publication. The author agreed to furnish the drawings for the wood-cuts. The expenses were to form a first charge against the book, the proceeds of sales to be divided equally, after these charges had been paid. Copies sold were to be accounted for "at the usual trade sale price." The publisher became bank-

[1] Kennedy, June 19, 1862, 24 D. 1131, 34 Scot. Jur. 564; Schweitzer, Oct. 27, 1868, 7 Macph. 24, 41 Scot. Jur. 18.

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rupt, and his trustee offered (1) to find another publisher to take the place of the bankrupt, or (2) to hand over the whole stock of books to the author at a valuation, or (3) to buy the author's interest at a valuation. All these offers were rejected, and the trustee sold the stock of books, after an interval of two months and a-half, to a bookseller considerably below the trade price. He tendered the whole of the price so received to the author. The author raised an action against the trustee for accounting and declarator that the defender must account to him for the books at the usual trade sale price. Action *dismissed*,—Lords Young, Rutherfurd Clark, and Trayner holding that the agreement constituted a sale of the right to publish the edition of the book in question, and that therefore the property in the books belonged to the trustee; the Lord Justice-Clerk holding that in the circumstances the pursuer was not entitled to require the trustee to do more than he had offered to do.

2D DIVISION. Ld. Trayner. M.

By agreement, dated 22d November 1878, Dr D. J. Cunningham, Professor of Anatomy in Trinity College, Dublin, entered into an agreement with Maclachlan & Stewart, publishers, Edinburgh, regarding the publication of a "Guide to the Dissecting-Room," to be published in parts.

The agreement bore:—"(1) We," the publishers, "agree to relieve you of all risk attending the expense of paper, printing, engraving woodcuts, and advertising, the drawings for the woodcuts to be furnished by you free of all expense. (2) The preceding expenses being paid by us, they are to be charged against the book, and the proceeds of sales in the first instance are to be placed to the credit of the aforesaid charges until liquidated, the surplus thereafter to be divided between the author and the publisher in equal proportions. (3) Paper, printing, and engraving are to be charged at the invoiced prices. (4) Statements of sales to be made up annually, and all copies sold are to be accounted for at the usual trade sale price, twenty-five copies to be reckoned as twenty-four. (5) The edition to consist of one thousand copies."

The book appeared in three parts. The first edition of the first part was sold out, and an agreement in substantially the same terms was entered into for a second edition. This agreement was dated 1st October 1888.

In November 1889 the estates of Maclachlan & Stewart were sequestrated.

A correspondence took place between the author's agent and the trustee in bankruptcy as regarded the disposal of the stock of books.

On 26th March 1890 the trustee wrote to the author's agent,—"I duly received your letter of 24th inst., with reference to the books published by this firm under agreements with Professor Cunningham, and regret that no proposal which I can make appears to meet with the approval of your client. I am unable to formulate any further proposal consistent with the equitable rights of parties; and, in order to obviate any possible misunderstanding in the future, I here repeat the various proposals I have made with a view to settlement, and intimate that I shall found upon these in any future proceedings which may take place. (1st) I offer Mr James Thin, bookseller and publisher, to take the place of Maclachlan & Stewart under the said agreements, leaving Professor Cunningham precisely in the same position with him as he was with Maclachlan & Stewart. If required, Mr Thin will find security; and, if Dr Cunningham has any reasonable objection to Mr Thin, I shall endeavour to find another publisher to suit him. (2d) I offer to hand over the whole stock of books to Dr Cunningham on receiving payment from him of the value which may be placed, by any practical valuator or valuators mutually chosen, upon the publishers' interest therein, as defined by the agreements and the course of dealing. (3d) I offer by the hands of Mr Thin to purchase Dr

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Cunningham's interest at a similar valuation, the only condition I attach to this offer being that Dr Cunningham shall not, in consequence of his interest in the future sale of the book being bought up, be thereby left free to bring out any subsequent edition or any work calculated to damage the sale of any of the parts of the book published by Maclachlan & Stewart until the copies of that part have been sold, or the sale thereof in the ordinary course of trade has practically ceased."

These offers were declined, and counter proposals by Dr Cunningham to purchase, under certain conditions, the stock of books were declined by the trustee.

On 10th June the trustee intimated that he had sold the remaining copies of the book to Mr Thin, a bookseller and publisher of the same character as Maclachlan & Stewart. Subsequently a statement of account between Dr Cunningham and the bankrupts was sent by the trustee bringing out a balance, after debiting Dr Cunningham with certain books sold to him, of £17, 10s. The trustee sent a cheque for this sum in full in place of ranking Cunningham on the estate.

From the statement it appeared that of Part ii. of the book 147 copies had been sold at 1s. 7d. to Mr Thin in place of 4s. 6d., the trade sale price; of Part iii. 264 copies at 2s. 2d., in place of 5s. 8d., and of the second edition of Part i., 1135 copies at 2s. 6d. in place of 6s. 5d.

Dr Cunningham then raised an action against the trustee for an account and reckoning of the sale of the books, and for declarator "that the defender is not entitled to take credit for expenses in connection with the said books which have not been paid by the said Maclachlan & Stewart or the defender."

He pleaded the agreements, and further (3) The said books sold by the defender being the property of the pursuer, or otherwise of the pursuer and the bankrupts jointly, the pursuer is entitled to decree as concluded to.

The defender pleaded;—(1) The pursuer's statements are irrelevant and insufficient to support his pleas. (2) The right of publication of the book in question having been sold by the pursuer to the bankrupts, his claims ought to be remitted to be adjudicated on in the sequestration. (3) The right of publication of the book in question having been sold by the pursuer to the bankrupts under the agreements libelled, and the pursuer having been paid the remuneration therein stipulated for, the defender is entitled to absolvitor, with expenses.

Lord Trayner (Ordinary), on 25th November 1890, sustained the defender's first and second pleas in law, and dismissed the action.*

* "OPINION.—The question in this case is, Whether the agreements entered into between the pursuer and Messrs Maclachlan & Stewart are contracts of sale or contracts of joint adventure? As the two agreements are practically the same in their terms, I take the one earliest in date as shewing what was agreed on between the parties. That agreement bears to be one 'regarding the publication of a "Guide to the Dissecting-Room"' (of which the pursuer is the author), and its import may be shortly stated. The pursuer undertook to provide the work and drawings for the woodcuts by which it was to be illustrated. This is his only obligation. On the other hand, the publishers agreed to relieve the pursuer of all risk attending the expense of paper, printing, engraving woodcuts, and advertising, the expense connected with which was to be charged against the book and discharged out of the proceeds of sales in the first instance; the balance or surplus of such proceeds, after payment of expenses, was to be divided equally between the author and publishers: the edition was to consist of 1000 copies. In a sentence, the contract was a familiar one, by which the publishers took all the risk of the publication, paying the author half the profits if the publication was successful.

"The parties are at one in saying that the agreement does not involve a

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The pursuer reclaimed, and argued;—This contract was not a sale. There was no note or mark of sale about the transaction, or if it was a sale it was a sale under specific conditions. If the bankrupt's trustee could not fulfil those conditions he must give up his contract. In answer to the reasons given by the Lord Ordinary for holding this not to be a contract of sale, it was contended (1) that the pursuer did contribute capital to the joint adventure, viz., the use of his manuscript and the woodcuts; (2) that the fact that a price was not fixed was a consideration rather on the side of joint adventure than on the side of sale, although if a sale was assumed—the point at issue—it was no doubt consistent with sale; (3) that the publishers' rights were not uncontrolled; before the agreement could have been arrived at it must have been settled what the size and shape of the book were to be, who was to print it, &c., and on all those points it

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question about the copyright of the work; that right remains with the author. But as regards the particular edition, the pursuer maintains that the contract was one of joint adventure, while the defender (the trustee on the publishers' sequestrated estates) contends that it was a sale. The question thus raised appears to me to be one of considerable nicety. Looked at from one point of view, the agreement in question presents many of the features of a joint adventure. The author contributes his work in manuscript, and the publisher contributes the necessary cash for paper, printing, binding, &c., so as to put that work upon the market. The whole expense incurred by the publisher is charged against the proceeds of the joint adventure; the profits of the joint adventure, after all expenses have been paid, are divided between the two contracting parties. Both parties, in the event of the joint adventure being successful, are equal gainers. They each get back their contributed capital, and each get half of the profits earned. On the other hand, the agreement is quite as suggestive of sale as joint adventure. The author sells one edition of his work, or the privilege of publishing one edition of his work, for a certain, or at all events an ascertainable price. He makes no contribution of capital to a partnership; he incurs no outlay or liability for outlay in connection with the publication; he bears no share of the loss if loss is incurred. The publisher has the uncontrolled power of determining the kind of paper, printing, binding, &c., which are to be adopted; he fixes the price at which the book is to be sold. The author's only obligation is to furnish the MS. and drawings for woodcuts; his only right is to payment of one-half of the profits, if profits ensue from the publication, as the price of the privilege he has granted.

"I have come to be of opinion that the contract was one of sale—(1) The pursuer cannot be said to contribute any capital as to a joint adventure. He lends his MS., but the work itself—the copyright—is not contributed. Whether the publication is successful or not, he loses no capital—he has adventured none. (2) If the author, instead of accepting what are called 'half-profits' for the privilege of publication, had stipulated for payment of a fixed sum—say £100—the character of the transaction would have been, I think, clearly a sale. But a sum that is ascertainable by a fixed or agreed on standard is not less a price than a fixed sum. (3) It strengthens the view that the publisher purchased the right to publish, that he is left with the uncontrolled right to determine the character and size of the book, so far as these are affected by paper, printing, binding, &c., and to fix the price at which the book shall be offered for sale.

"In *Venables & Co.* v. *Wood* (March 8, 1839, 1 D. 659, 11 Scot. Jur. 399), a contract in no material respect distinguishable from the agreement in the present case was held to be a contract of sale, and not a contract of joint adventure. It is said that the soundness of that decision has been doubted by Mr Ross—Leading Cases on Commercial Law, vol. iii. 531. But that fact does not entitle me to disregard the decision as an authority. The doubt, however, I think is balanced by the 'query' of Mr Justice Lindley (Lindley on Partnership (4th ed.), i. 21, footnote), who appears to me to approve of the decision—See also Coppinger on Copyright (2d ed.), 605. . . ."

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was clear that the author must have a voice. The contract then was a joint adventure, or a contract of agency, inferring liability by both partners for the cost of the production of the book. Independently of all right of property, if the trustee took up the contract, he must take it up with its conditions, and one of these was sale at the trade sale price and liability for half the profits. If the trustee took up the contract he became debtor under the contract, and his liability must be looked for within its four corners. In the case of *Venables*,[1] there were no doubt *obiter dicta* to the effect that the contract, admittedly the same as the present, was a sale, but the Judges said the result would have been the same if it had been joint adventure; it was not therefore necessary for that case to hold it to be a sale. In England it had been thought that the contract was a joint adventure.[2] Mr Ross,[3] too, doubted *Venables'* case, and suggested that the decision might be rested on the consideration that the author's credit was not pledged.

The defender argued;—The result at which the Lord Ordinary has arrived was just, whatever view might be taken as to the proper category of law in which to place the contract. The offers made by the trustee were entirely reasonable, and after rejecting them the pursuer could not expect the trustee to do anything but what he had done. But the contract was a contract of sale. The Court could not hold otherwise without overturning *Venables'* case, in which the contract was the same. No doubt the Judges intimated that the result would have been the same even if the contract was held to be joint adventure. But looking to the shape in which the case came up on a bill of exceptions, the point presented to the Court was whether the direction[4] that the contract was one of sale was right or wrong, and that question was fixed and decided. The decision was thought to be sound by Lindley,[5] and there was no decision the other way, for in the two English cases cited the alternative of a sale was not presented. Indeed, in *Stevens'* case[6] there was a dictum on which the defender here might found, for it was said that in bankruptcy the publisher's trustee might realise reasonably, which was all he had done here. In *Warren* v. *Routledge*[7] it was held that a bargain like this did not prevent the author from bringing out a second edition before the first was sold out. The inference from that was, that in such contracts there was no such continuing permanent interest in the publisher as would necessarily be found if the contract was a joint adventure. But let the contract be joint adventure. That did not imply a joint right of property in the assets of the joint adventure. There might be a joint adventure in the performances of a race-horse that belonged to one of the adventurers, or in the horsing of a coach where the relays of horses belonged to different persons.[8] The property of this edition belonged to the publisher. He was now bankrupt, and the book, *i.e.*, this edition of it, was a mere asset of the bankruptcy. It must be realised, for the trustee could not take up the contract without becoming a bookseller. The pursuer's demand was not for a half of what had been got, but for a half of what would have been

[1] Venables & Co. v. Wood, March 8, 1839, 1 D. 659, 11 Scot. Jur. 399.

[2] Stevens v. Benning, 1854, 1 K. and J. 168, on appeal, 1855, 6 De G. M. & G. 223; Reade v. Bentley, 1857, 3 K. and J. 271, and 1858, 4 K. and J. 656.

[3] Leading Cases, Comm. Law, iii. 531.

[4] See Macfarlane's Reports, pp. 44 and 50, for precise direction.

[5] See Lord Ordinary's note.

[6] 1 K. and J. at p. 177.

[7] 1874, L. R., 18 Eq. 497.

[8] See Cases in Lindley, p. 14.

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got under the prices agreed on. It was a claim of damages, and at the most could only give a ranking. It shewed the moderation of the views which the trustee held that he tendered full payment of the £17, 10s. in place of a ranking for that amount. To that offer he still adhered.

LORD JUSTICE-CLERK.—The arrangement between Cunningham and Maclachlan & Stewart, which has led to this complication, is not of an unusual description. But the transaction, though common, may be difficult to bring into an exact legal category. Lord Trayner was of opinion that it is a contract of sale. Although I do not express any dissent from that view, I am not clear at present that it must fall into that category.

But it is not necessary, in the view I take of it, to consider under what category it falls.

Maclachlan & Stewart, being bankrupt, could not fulfil any part of their contract. Their whole estate passed to their trustee. There were only three things that could possibly be done in that state of circumstances; first, the trustee might have taken the place of the bankrupts, *i.e.*, their place as regards their business, and, being in possession of the copies of the book, might have proceeded to carry on the sale of them. That could only be done by the trustee taking up the business as a bookseller, for with such a book as this, it will necessarily take a considerable tract of time to exhaust the edition. That course he was not only not bound to take, but, I think, he ought not to have taken it. His business was to realise the estate with reasonable speed, and not to go on with this speculation of the sale of this book.

The second thing he could have done was to come to an arrangement with Dr Cunningham, by which Dr Cunningham should relieve him of this book on such reasonable terms as might be best both for the creditors and the author. It is plain that the trustee made most reasonable and strenuous efforts to carry *out* such arrangements; but his proposals were rejected.

There remained then only one possible course for him to take, viz., to sell the book for what price he could get. And so he goes to Thin and sells the book, and he could not, I should think, have gone to a better man for his purpose. Then having got a price, he says to Dr Cunningham, "I am not going to raise any question as to whether the price is to be dealt with as falling within the sequestration or not." And accordingly he tenders him a cheque for £17, 10s., —as far as I am aware there is no dispute as to the accuracy of the accounts by which that is brought out. But that was rejected.

In disposing of the case now without further deliberation, I am not clear that the contract falls under the category of sale, but I am confident that the result at which the Lord Ordinary has arrived is the right result.

LORD YOUNG.—This is a question of importance and requires the best consideration we can give it. The question is as to the legal character of an agreement of very common occurrence between authors and publishers. It is implied in the contract that the publisher undertakes to produce the book in reasonable time, and that the author undertakes to give leave and licence to no others to do so. Now, to carry out his part of the contract the publisher must do a variety of things; he must buy paper, and that he does on a contract of his own, and so are the contracts for printing and binding. But before he incurs any of those expenses, he must get the author's leave to publish the book and to expose it for sale.

What then is the nature of the contract which he necessarily makes as a con-

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dition of the thing being accomplished at all, the contract with the author I see no objection to calling it a sale. It is quite clearly implied however that the publisher is under an obligation to produce the book, and he is not entitled to do with the manuscript what he pleases. That is a lawful condition, and I may sell under any lawful condition. But this condition does not interfere with the contract as a contract of sale. The price is one-half of the profits.

In that view, if this is a sale, the book, *i.e.*, the physical thing, becomes the property of the publisher, but I should arrive at the same conclusion even if the contract were called by another name.

Therefore, if Maclachlan & Stewart remained solvent, there could be no doubt as to the obligations of parties. On the occasion of the bankruptcy the trustee took the right *tantum et tale* which was in the bankrupts. If the whole edition had been sold out in a few days I do not doubt that the author would have been entitled to half of the clear profits, the condition on which alone the bankrupt had the book. That is my opinion.

But the edition could not be sold in a few days. What then were the rights of the trustee? What was he bound to do? Exactly what he proposed to do, to substitute another publisher in place of the bankrupts. That offer was made in March, but it was rejected, and after waiting some months the trustee sold the whole stock of books. The pursuer has been offered his share of the profits I think the action should be dismissed.

LORD RUTHERFURD CLARK.—I think I am bound to follow the case of *Venables* which I take to be a very clear authority that a contract of this kind is a contract of sale, and therefore I think that the Lord Ordinary's judgment is sound.

LORD TRAYNER.—It is, I think, a point of importance to determine, as the question has been raised, what is the legal category to which a contract such as this belongs, what is the true nature of the contract between an author and publisher conceived in the terms of the contract before us.

In the Outer-House it was represented in argument that it must be one or other of two contracts. There was no attempt to put it under any other category than that of sale on the one hand, or joint adventure on the other. It was recognised that the law would determine all the incidents of the contract whichever of these two categories it was pronounced to belong.

I think that this was a contract of sale, carrying with it these results as incidental to it, viz., the property passes to the buyer, leaving him debtor in the price, and, in the event of the buyer's bankruptcy, the seller's right is confined to a personal right for the price, or for the balance of the price that may be unpaid.

But, if the contract is a joint adventure, then, as an incident of that contract the book would not fall into the sequestration at all; all that would fall into the sequestration is the buyer's interest in the joint adventure. The result in the case would be that Cunningham would have retained at least half of the assets of the joint adventure as his own property.

It was suggested that the assets of the joint adventure were vested solely in one of the joint adventurers, and that the joint right was limited to the profits of the adventure. That might be so; there is no legal impossibility in that, but I do not think it is the state of the case here. I agree with the view of Lord Justice Lindley that this is a contract of sale, and I am supported by a decided judgment of this Court in *Venables* in that view.

All I desire to say is that this is a contract of sale, carrying with it all the incidents of that contract. No. 99.

THE COURT adhered.

LINDSAY MACKERSY, W.S.—JAMIESON & DONALDSON, S.S.C.—Agents.

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JOHN NORRIE ANDERSON, Pursuer (Respondent).—*M'Kechnie—A. Davidson.* No. 100.

ROBERT HUNTER, Defender (Appellant).—*J. Wilson.*

Jan. 30, 1891. Anderson v. Hunter.

Reparation—Slander—Privilege—Malice—Statement regarding candidate for county council by one not a voter in the district.—Where a parish was divided into two electoral divisions for county council purposes, and a voter in one division was sued by a candidate for the other for damages for falsely and calumniously stating that it would be useless to elect the pursuer as he would soon be bankrupt, *held* that the defender was not privileged, and that malice should not be put in the issue.

Issue—Slander.—Form of issue where slander is said to have been uttered in public.

JOHN NORRIE ANDERSON, coal-merchant in Stornoway, brought an action of damages for slander in the Sheriff Court at Stornoway against Robert Hunter, ground-officer and postmaster at Barvas.

1ST DIVISION. Sheriff of Ross, Cromarty, and Sutherland. C.

The pursuer averred that in December 1889 he agreed, upon the requisition of a number of the electors of the Ness Division of Lewis, to stand as a candidate for the county council for that division (that being one of the two divisions into which the parish of Barvas is divided); that shortly after he had so agreed he found that it was currently reported that he was about to become bankrupt; that on inquiry he found that the defender had on various occasions, during the month of January 1890, stated to different persons in the parish of Barvas that it was of no use to elect the pursuer as county councillor, as he would be bankrupt soon, or used words substantially to that effect. The words in question were spoken in Gaelic, and were quoted in that language on record.

After setting forth that the defender had on four different specified occasions made the above statement, the pursuer averred that it was false and calumnious, and made by the defender maliciously and without probable cause, with the object of injuring the pursuer and destroying his credit and ruining him; and that he had been seriously injured thereby.

The defender averred that he was a ratepayer in the parish of Barvas, and that he was also a member of the school board; "that in his capacity as ground-officer he frequently comes in contact with crofters, and the ratepayers of the district generally; that he is often applied to by them for information and advice regarding school board, county council, and other matters in the district; that on or about the dates mentioned in the condescendence the defender was applied to by several ratepayers for information and advice as to the then pending county council election; that upon these occasions it is possible that the defender may have referred to the current reports mentioned by the pursuer; that if the defender did so, it was without malice, with probable cause, and solely in the interests of the ratepayers; that the statements (if any) made by the defender on these occasions referred to, were not intended to convey, and did not convey, any imputation on the pursuer's character or financial position; that no such meaning was attached to them by those who heard them; and that the reference (if any) by the defender to the current reports concerning the pursuer's bankruptcy on the occasions referred to, were privileged in the circumstances."

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The defender pleaded, *inter alia*;—(3) Any reference made by the defender to the rumours concerning pursuer's bankruptcy having been made (*a*) without malice, (*b*) with probable cause, and (*c*) in privileged circumstances, he is not liable in reparation.

On 28th October 1890 the Sheriff-substitute (Davidson) allowed parties a proof.

The defender appealed for jury trial.

The pursuer proposed certain issues. The second issue was in the following terms:—"2. Whether in or about the month of January 1890, in or near the subpost-office of Barvas, the defender, in presence and hearing of Kenneth Murray, post-runner, Ness, did falsely and calumniously say in the Gaelic language, of and concerning the pursuer, 'Co tha sibh,' &c., which words being translated into English bear the following or similar meaning:—'Who are you going to put into the county council for you? If it be Mr Anderson, he will not be long with you, for it is not legal, as he will be bankrupt in a short time,' or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage?" The first, third, and fourth issues were in similar terms with reference to other occasions. The fifth issue was as follows:—"5. Whether in or about the month of January 1890, in various places in or about the parish of Barvas, the defender, in presence and hearing of John Gunn Macdonald, merchant, Stornoway, Kenneth Murray, post-runner, Ness, John Mackenzie, mason, Borve, and Donald Morison, blacksmith, Lionel, Barvas, or of one or more of them, did repeatedly falsely and calumniously say, in Gaelic or English, of and concerning the pursuer, that he was about to become bankrupt, or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage?"

At the discussion upon the issues, it was admitted at the bar that the defender, although a ratepayer in Barvas parish, was not an elector in the Ness Division.

Argued for the defender;—As a ratepayer in the parish he was entitled to discuss the qualifications of the pursuer, who was a candidate for the public post of county councillor in one of the divisions of the parish.[1] Bankruptcy disqualified a man for the position of county councillor, hence the defender's object in making the statements. He was clearly privileged, and malice and want of probable cause must therefore be inserted in the issue. The fifth issue was too vague, and should be disallowed.

Argued for the pursuer;—The defender was not an elector in the Ness Division. He was therefore in the position of any ordinary member of the public, and no duty lay upon him to make the statements complained of. It was, then, unnecessary to insert malice and want of probable cause in the issue.

At advising,—

LORD PRESIDENT.—In this case the Court is of opinion that the 5th issue is too vague, and cannot be allowed.

With regard to the matter of privilege, it appears that the defender is not an elector in the division of the county where the pursuer proposed to seek election as a county councillor. There are two divisions in the parish of Barvas. The defender is an elector in one of these, but the pursuer was seeking election in the other. We are all, I think, of opinion that there is no case of privilege, the defender not being a voter in the election with reference to which

[1] Brims v. Reid & Sons, March 28, 1885, 12 R. 1016, per Lord President, 1021; Coghill v. Docherty, Oct. 18, 1881, 19 S. L. R., 96; Croucher v. Inglis, June 14, 1889, 16 R. 774.

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he is said to have made the statements complained of. We therefore refuse to insert the word "maliciously" in the issues. The only observation we have to make in regard to the other issues is to put it to counsel whether it is necessary to have the Gaelic words in the issues.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

Counsel agreed that the Gaelic words should be taken out of the issues.

THE COURT approved of the following issues:—"(1) Whether in or about the beginning of January 1890, at or near the Barvas Inn, the defender, in presence and hearing of John Gunn Macdonald, merchant, Stornoway, did falsely and calumniously say of and concerning the pursuer 'that it would be of no use to take the pursuer as county councillor, for he would be bankrupt soon,' or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage? (2) Whether in or about the month of January 1890, in or near the subpost-office of Barvas, the defender, in presence and hearing of Kenneth Murray, post-runner, Ness, did falsely and calumniously say, in Gaelic, of and concerning the pursuer,—'Who are you going to put into the county council for you? If it be Mr Anderson, he will not be long with you, for it is not legal, as he will be bankrupt in a short time,' or did use words of the like import and effect, of and concerning the pursuer, to his loss, injury, and damage?" The third and fourth issues were in similar terms,—the *locus* being different and the phraseology slightly altered.

CARMENT, WEDDERBURN, & WATSON, W.S.—JOHN ELDER, S.S.C.—Agents.

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Jan. 31, 1891.
Whyte v. Whyte.

MRS MARY PHILIPS OR WHYTE, Pursuer (Respondent).—*Younger.*
GEORGE WHYTE, Defender (Reclaimer).—*Party.*

Process—Reponing—Decree in absence—Husband and Wife.—In an action of separation and aliment by a wife against her husband, the summons was served personally on the defender, and notice of the diet of proof was sent to him by registered letter. He did not lodge defences nor appear at the diet of proof, but decree having been pronounced against him, he lodged a reclaiming note. The pursuer objected to the competency of the reclaiming note and pleaded that the only competent course for the defender was to bring a reduction of the decree. The Court *remitted* to the Lord Ordinary to repone the defender upon such terms as to his Lordship should seem fit.

1ST DIVISION. Lord Trayner. C.

MRS MARY PHILIPS OR WHYTE raised an action of separation and aliment against her husband, George Whyte, Leslie Terrace, Aberdeen. The summons was served upon the defender personally. He did not enter appearance. After a proof, notice of which was sent by registered letter to the defender, who did not attend and was not represented at the diet of proof, the Lord Ordinary (Trayner) pronounced decree of separation and decerned for a sum in name of aliment. The defender reclaimed, and tendered defences. The pursuer objected to the competency of the reclaiming note.

Argued for the pursuer;—The reclaiming note was incompetent, for this was a decree in absence.[1] The defender's only course was to bring a reduction of the decree,[2] in which he would stand pursuer, whereas if this reclaiming note, which was virtually a reponing note, were allowed, the effect would be that the pursuer would have to begin all the proceed-

[1] Stewart v. Stewart, Feb. 27, 1863, 1 Macph. 449, 35 Scot. Jur. 272.
[2] Fraser, Husband and Wife, ii. p. 1238.

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ings *de novo*. That was a hardship to her and none to the defender, who, had been perfectly aware of all the proceedings, and had chosen to lie by. The defender was heard personally, and stated that he was unable to instruct counsel for the proof, and had not attended personally, being out of Scotland at the date of the proof.

THE COURT remitted to the Lord Ordinary to repone the defender upon such terms as to his Lordship should seem fit.

A. LAURIE KENNAWAY, W.S.—PARTY—Agents.

No. 102.
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MacRobbie v. M'Lellan's Trustees.

JAMES MACROBBIE, Pursuer (Reclaimer).—*Comrie Thomson—Dewar.*
LEWIS M'LELLAN AND OTHERS (M'Lellan's Trustees), Defenders (Respondents).—*Jameson—Salvesen.*
FORBES, BRYSON, & CARRICK, Defenders (Respondents).—*Jameson—Salvesen.*

Reparation—Wrongous use of diligence—Law-Agent—Malice—Issues.—In an action of maills and duties by heritable creditors against the proprietor and tenants of the subjects in which there was a conclusion for expenses only in the event of the defenders appearing and offering opposition thereto, appearance was entered for A, the proprietor, who wished to be kept informed of the proceedings. A took no further step. Decree was afterwards taken by the pursuers' agent against A for expenses without intimation being made to him. A charge was given upon the extract decree, and a petition for cessio threatened. A having taken objection to the proceedings as irregular, the chargers agreed to a suspension of the charge.

A then brought an action of damages against the chargers and their agent for wrongous use of diligence, but subsequently asked an issue against the agent only. *Held* (1) that the alleged use of diligence was wrongous, and (2) that the agent was liable in damages therefor, and that it was not necessary to prove malice and want of probable cause.

Issues—Wrongous use of diligence.—Form of issue adjusted for the trial of a case of wrongous use of diligence against an agent of the person in whose interest it was used.

1ST DIVISION. Lord Kincairney. C.

JAMES MACROBBIE, accountant, Glasgow, brought an action of damages against Lewis M'Lellan and others, trustees of the late Peter M'Lellan, iron merchant, Glasgow, and Messrs Forbes, Bryson, & Carrick, writers there, the agents in the trust, for illegally taking decree against him and doing diligence thereon in the following circumstances, as set forth by the pursuer.

On 17th February 1890, M'Lellan's trustees, who were bondholders over certain subjects in Glasgow, presented in the Sheriff Court at Glasgow a petition of maills and duties against MacRobbie, as trustee under the trust-deed granted by William Barrie, the proprietor of the subjects, and also against the tenants, the prayer of the petition concluding,—"And in the event of any of the defenders appearing and offering opposition hereto to find such appearing and opposing defenders liable jointly and severally in expenses."

The *inducice* expired on 24th February without appearance having been entered for the defenders, but in order to keep himself informed of the procedure in the action, although he had no interest to oppose the prayer MacRobbie upon that day posted an intimation to the Sheriff-clerk, written on a sheet of notepaper, in the following terms:—"23 Scott Street, Glasgow, 24 Feb. 1890.—Notice of appearance for James MacRobbie, accountant, Glasgow, in the action of maills and duties, at the instance of the trustees of the late Peter M'Lellan. JAMES MACROBBIE." This notice

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was not received by the Sheriff-clerk until the 25th, when the Clerk of Court called the attention of the petitioners' agent to the intimation, which had been received from MacRobbie, and the agent moved that it be received as a notice of appearance, and subsequently wrote upon it, "Glasgow, 24th February 1890.—I consent to the above being received. Signed for SAMUEL CARRICK, pursuers' agent, WM. GEMMELL, pror."

MacRobbie then averred in his condescendence as follows;—(Cond. 8) " . . . The consent on the intimation was not put on until after the 25th February 1890. The date on the same is untrue, and this consent was an attempt to validate an informal document so as to give it the effect of the statutory notice of appearance lodged within the proper time. No authority was given by the pursuer for this or for any of the subsequent procedure, and he did not authorise any motion to be made for or on his behalf, and the pursuers (the defenders in this action), so acting in writing this consent, and in making the motion, acted illegally and unwarrantably. These actings were approved of by the defenders, and were specially sanctioned and authorised by the defenders, Forbes, Bryson, & Carrick." (Cond. 9) "On 27th February 1890, the Sheriff-substitute (Murray) pronounced the following interlocutor:—' . . . The Sheriff-substitute, on the pursuer's motion, and of consent, allows the notice of appearance for James MacRobbie to be received, and in respect that he has failed to lodge defences, and the other defenders to lodge a notice of appearance, holds them all as confessed: Decerns in the maills and duties as craved: Finds the said James MacRobbie liable in expenses, allows an account thereof to be given in,' &c. This interlocutor was *ultra vires* of the Sheriff-substitute. The Sheriff-substitute had no power to receive such intimation as notice of appearance, even with consent. The intimation was not in the statutory form of a notice of appearance, nor lodged timeously, and was not intended as a notice of appearance for the purpose of opposing the action. . . . The writing of the consent on the intimation did not validate the irregularity, as all these consents are now abolished by the Sheriff Court Act of 1876."

MacRobbie then set forth that decree for the taxed amount of expenses, £14, 14s. 1d., was afterwards pronounced without intimation to him. (Cond. 11) "These decrees were duly extracted by the defenders, but, before the same were extracted, and while the process was still in the extractor's department, intimation was made to Messrs Forbes, Bryson, & Carrick, or Mr Samuel M Carrick, that the decrees appeared to have been taken in an irregular manner against the pursuer, and that the same might be suspended if decree were extracted and attempted to be enforced. . . . When the defenders obtained extracts the said defenders, Messrs Forbes, Bryson, & Carrick, wrote the pursuer on the 14th and 24th April 1890, demanding payment of the sums and threatening to charge unless payment made. The letter of the 14th April was the first intimation the pursuer received of the decrees against him. Immediately on receipt of this letter he called upon the law-agent of the trust, Mr John B. Aiken, of Messrs Burns, Aiken, & Company, who stated that, in his opinion, no further proceedings would follow, as obviously the decrees had been obtained in an irregular and illegal manner, and that the defenders would not attempt to enforce the same." (Cond. 12) "Payment of the sums was not made, and no steps were taken to suspend the decrees, as the pursuer and his law-agent believed that the defenders would not attempt to enforce decrees which had been irregularly and illegally obtained against the pursuer. On the 26th day of May 1890 the pursuer, however, was charged at the instance of the defenders. . . . This charge was

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instructed by the defenders or the said Samuel M Carrick, for whom they are responsible." (Cond. 13) "On the same date (26th May 1890) a notice was served upon the pursuer, 'that, failing payment of the sums mentioned in the foregoing charge of payment, a petition for cessio will be presented in the Sheriff Court of Lanarkshire at Glasgow, at the instance of the within designed pursuers, against you on the 4th day of June 1890 years.' . . . The service of this notice was also instructed by the defenders or the said Samuel M Carrick, for whom they are responsible." (Cond. 14) "The pursuer, on receiving said charge and notice of cessio, at once put the matter in the hands of the law-agent of the trust, and Mr Aiken at once waited upon the defenders, Messrs Forbes, Bryson, & Carrick, and saw Mr Samuel M Carrick, and pointed out to him the illegality and irregularity of the whole proceedings in obtaining the decrees and seeking to enforce them. This defender however, insisted upon payment of the sums in the decree. The pursuer, seeing that the defenders intended to enforce their diligence, at once instructed his Edinburgh agent, who presented a note of suspension of said charge and notice of cessio in the Bill-Chamber, on the 3d day of June 1890. The said note of suspension was duly served upon the defenders, the said trustees, and answers lodged on their behalf, and the Lord Ordinary on the Bills passed said note. But on the 1st day of July 1890, the said defenders, through their Edinburgh agents, lodged a note before the Lord Ordinary, agreeing to the said charge being suspended and to pay pursuer's judicial expenses in connection with said note of suspension. The charge was accordingly suspended by the Lord Ordinary on the 2d day of July 1890, and the pursuer's judicial expenses have since been paid." (Cond. 15) "By and through the above wrongous proceedings the pursuer has suffered in his credit and feelings, having been rendered notour bankrupt by said charge having been served upon him. He is a well-known accountant in Glasgow, and is well known to different members of the legal and mercantile professions, several of whom knew that decrees had been obtained against him, but not the circumstances under which they had been obtained. This has had the effect of considerably damaging his credit, because it is mainly through the recommendation of professional gentlemen the pursuer obtains employment as trustee, factor, &c., and these wrongous proceedings on behalf of the defenders have become extensively known in the circle in which he moves, and have had the effect of considerably damaging the pursuer's reputation. The pursuer, moreover, believes and avers that the said proceedings were taken against him by the defenders, Messrs Forbes, Bryson, & Carrick, or at least by Samuel M Carrick, who is a partner of said firm, recklessly and maliciously, and without probable cause, with the view of rendering him notour bankrupt, and so embarrassing him in his negotiations for the future arrangement of the management of the property belonging to the trust-estate of the said William Barrie. At all events the defenders, Forbes, Bryson, & Carrick well knew, or ought to have known, that the proceedings which they were taking against the pursuer were not only irregular but also illegal."

The pursuer pleaded;—(1) The defenders, having wrongfully obtained decrees against the pursuer and charged him on same, rendering him notour bankrupt, and served a notice of cessio upon him, all as condescended on, are liable to him in the amount of damages claimed, with expenses. (2) *Separatim*, The defenders, the said Forbes, Bryson, Carrick, and Samuel M Carrick, having obtained said decrees, and instructed said charge and notice of cessio wrongfully and maliciously

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and without probable cause, all as above narrated, are liable to him in the amount of damages sued for, with expenses.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action.

The Lord Ordinary (Kincairney), on 2d December 1890, approved of the following issue for the trial of the cause:—"Whether, in the Sheriff Court at Glasgow, the defenders, Forbes, Bryson, & Carrick, and Samuel M Carrick, on or about 7th day of March 1890, wrongfully, maliciously, and without probable cause, obtained decree against James MacRobbie for payment of £14, 14s. 1d., and on or about 26th day of May 1890 they charged him, or caused him to be charged on said decree; and on or about 26th day of May 1890 served notice of cessio upon him, or caused such notice to be served, all to his loss, injury, and damage? Damages laid at £250." His Lordship refused to allow an issue against M'Lellan's trustees.

The pursuer reclaimed, and moved the First Division to vary the terms of the issue by the deletion of the words "maliciously and without probable cause." He did not insist for an issue against M'Lellan's trustees.

Argued for him;—The words in question ought to be omitted from the issue. The word "wrongfully" was the appropriate word in an issue of the kind. It implied the existence of a legal wrong—such as the wrongous use of diligence—from which malice would be presumed.[1] This was not one of the class of cases where the diligence used had been incidental to legal proceedings. There had here been a manipulation of the forms of process. In the first place, a wholly informal document had been converted into a notice of appearance, and had been treated as such. The forms of process had been further tampered with, and an illegal decree had been taken, followed by a charge, and the threat of an application for cessio. A distinction was always drawn between a wrong done to a defender by a pursuer in the course of a litigation, and a case where diligence had been put in force. In the latter case, it was not necessary to aver malice. Want of probable cause was manifestly inappropriate in a case of the kind, as it properly was confined to cases of criminal prosecutions or judicial slanders. It was said that the pursuer ought to have suspended the decree, but that course was not taken because the agent for the defenders, Carrick, knew, and had been apprised, that he was proceeding irregularly, and it was not to be supposed that he would carry matters further.

Argued for the respondents;—The real objection was to the decree, and not to the diligence. The former was always obtained in open Court, but the latter was taken at a person's own hand. In the former case, malice and want of probable cause must be put into the issue.[1] When a defender entered appearance, it was presumed, by section 16 of the Sheriff Courts Act, 1876 (39 and 40 Vict. cap. 70), that he intended "to state a defence," and it was not the fault of the present respondents that appearance was not entered in the statutory form. As the defender had not appeared, he was not entitled to sue an action of damages for the alleged wrong done to him by the decree having been taken unless he put malice in issue. The case of *Bell*[2] illustrated the difference between an action founded upon an irregular decree, and one founded upon the illegal use of diligence.

[1] Davies & Co. v. Brown and Lyell, June 8, 1867, 5 Macph. 842, 39 Scot. Jur. 471; Ormiston v. Redpath, Brown, & Co., Feb. 24, 1866, 4 Macph. 488, 38 Scot. Jur. 225.

[2] Bell v. Gunn, June 21, 1889, 21 D. 1008, 31 Scot. Jur. 556.

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LORD PRESIDENT.—The trustees of the deceased Peter M'Lellan raised an action of maills and duties in the Sheriff Court of Lanarkshire, which was directed against various tenants in certain heritable subjects, and also against the present pursuer as proprietor of these tenements, the prayer of the petition concluding,—"And in the event of any of the defenders appearing and offering opposition hereto, to find such appearing and opposing defenders liable jointly and severally in expenses."

There was certainly no occasion for anyone to enter appearance in the action unless with the view of stating defences. At the same time, there was no irregularity or impropriety if the proprietor chose to enter appearance for the purpose of seeing what was being done in the process. Accordingly notice of appearance was entered for him in these terms:—"23 Scott Street, Glasgow 24 Feb. 1890.—Notice of appearance for James MacRobbie, accountant, Glasgow, in the action of maills and duties at the instance of the trustees of the late Peter M'Lellan. JAMES MACROBBIE." But it was not received by the clerk until after the expiration of the *inducice*, and no effect would therefore have been given to it if the agent for the pursuers had not, by minute on the interlocutor sheet, consented to the intimation being received. Having done so, the pursuers' agent then craved decree against the defender, and asked that the defender should be found liable in expenses, and decree was so pronounced.

There cannot be a doubt that that was a very wrongful and improper proceeding, because the pursuers' agent had asked for something which was beyond the prayer of the petition, and which the present pursuer had no reason to apprehend would be asked for. The prayer of the petition, so far as regarded expenses was only directed against those who might appear and offer opposition, which MacRobbie had not done, and accordingly a wrongful act was committed by the defender Carrick as agent for Peter M'Lellan's trustees.

But this action is not brought to recover damages for that wrong, for which indeed no action would lie, but for the wrongful use of diligence. The complaint is that diligence was used upon the decree which was thus improperly obtained. The allegation is that a charge was made upon the decree, and that notice of an application for cessio was served upon the pursuer, and these proceedings are complained of as amounting to a wrongous use of diligence. Upon the pursuer's averments upon record, I am of opinion that there was a wrongous use of diligence. Whether any great damage has been suffered by the pursuer is another matter.

The question now is, what is to be the form of issue? I think it must be for wrongous use of diligence, and it is not necessary that there should be any averment of malice to make such an action relevant. Accordingly, I am of opinion that the introduction of the words "maliciously and without probable cause" would be quite out of place. But, as I have said, I am not disposed to approve of the insertion in the issue, as a substantial ground of action, of the fact of the decree having been wrongfully obtained. The ground of the action is the wrongful use of diligence, and accordingly the issue which I think we should approve would run as follows:—[His Lordship read the issue as printed below.]

LORD ADAM concurred.

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LORD M'LAREN.—It is plain enough that there can be no action of damages at the instance of a person against whom a decree has been regularly obtained, on the ground that the decree was wrongful, or that the debt was not due, because no such decree can be obtained against a defender who has knowledge of the action and takes the proper steps to contest it. But there may be a claim of damages where a pursuer has entered into a contract not to take a decree in unqualified terms, or to delay taking the decree with a view to allow the defender an opportunity of making an extrajudicial settlement. In such cases, if the contract or undertaking is violated, the question between the parties is merely one of breach of contract, and there would be no propriety in holding that the person who sued for damages for the breach must prove that the defender acted maliciously. The present case affords an instance of such a case. The defender in the action of maills and duties in the Sheriff Court was not called upon to defend the action for the purpose of saving himself from liability, because decree was only sought against him for expenses in the event of his appearing and offering opposition. But what the pursuers of the inferior Court action did was to make MacRobbie a party to the action, and to take decree against him for expenses. This was clearly a breach of the conditions under which the process was instituted, and accordingly it appears to me that no question of malice enters into the case. If damage can be shewn to have resulted from the pursuers' un authorised act, the person who suffered must be entitled to compensation.

But I am not sure that we should have been able to send the case to a jury, if the proceedings to which I have referred had not been followed by the use of diligence. A very different question is thereby raised. In this case the present pursuer (the person against whom the decree was obtained) took care as soon as he saw it was to be enforced to have the diligence suspended. But in the meantime a legal wrong had been done by the use of diligence, and if the pursuer can satisfy a jury that he has suffered damage thereby, he will be entitled to compensation.

As regards the circumstances in which it may be necessary to give a defender the protection of putting malice and want of probable cause in the issue, it appears to me to be difficult, in view of the decisions, to lay down any precise rule. I should be very much disposed to reconsider the whole subject in a case fairly raising the question, for I agree with what fell from your Lordship in the chair in the course of the argument to the effect that probable cause is a defence which properly belongs to a person who is acting in the discharge of a public duty, *e.g.*, the Crown Agent or the Procurator-fiscal. Where the diligence or warrant is obtained not in the performance of a public duty, but in the exercise of a private right, the proper and sufficient protection to the defender is that he should not be responsible in damages unless he is proved to have acted maliciously. But, for the reasons which have been given, I do not think that in this case the defender was in the exercise of a right of any kind, and I agree with your Lordship as to the form of issue which you have suggested for the trial of the cause.

LORD KINNEAR concurred.

THE COURT approved of the following issue for the trial of the cause:—"Whether in the Sheriff Court at Glasgow the defenders Forbes, Bryson, & Carrick and Samuel M. Carrick, on or about the

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7th day of March 1890, having obtained decree against Jam MacRobbie for payment of £14, 14s. 1d. sterling, did, on or abo 26th day of May 1890, wrongfully charge him or cause him to charged on said decree; and on or about 26th May 1890, d wrongfully serve notice of cessio upon him, or cause such noti to be served, all to his loss, injury, and damage? Damages laid £250."

THOMAS M'NAUGHT, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

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THE COMMERCIAL BANK OF SCOTLAND, LIMITED, Pursuers (Reclaimers).—*Asher—C. K. Mackenzie.*

MARY E. PATTISON OR CUNNINGHAM CRAIG AND OTHERS (Pattison's Trustees) AND OTHERS, Defenders (Respondents).—*Murray—Dickson.*

HENRY CHRISTIE AND OTHERS (Robertson's Trustees), Defenders (Respondents).—*Comrie Thomson—Rhind.*

Bank—Cash-credit bond—Bank's claim in question with co-obligant—Accumulation of interest.—In December 1877 a limited company and five pers granted a cash-credit bond to a bank for £1500 in security of a cash account be operated on by the company. The obligants bound themselves to pa interest from the times of the respective advances at bank rates till repaym and it was provided that a stated account made out from the bank's boo should be a sufficient charge against the obligants. Subsequently the ba agreed to extend the credit by £1000 on receiving an additional obligation fr two of the obligants.

At the annual bank balance on 31st October in each year the bank debit the account with the amount of interest accrued during the year, and carri forward the total balance. At 31st October 1878 the balance due by the co pany was £2468. After October 1878 the account was not operated on by company, but at the balance in each year the bank continued to charge year's interest to the debit of the account, and to carry forward the balance. November 1881 the company resolved to go into voluntary liquidation. appointed a liquidator, but the business was carried on as before. In Octo 1884 the bank sent to the company a statement of the account shewing balance due of £3164, and the liquidator on behalf of the guarantors wrote the bank, on 15th October 1884, that they had some prospect of the compan properties being sold at a price which would be almost sufficient to meet liabilities, and that they "would desire that your bank should allow this acco to remain in the position it is at present" until the matter was settl adding,—"If the sale is not carried out, then the property would require to sold at the earliest opportunity, and the guarantors would require to make any deficiency in the price." The bank in reply wrote agreeing to take no st for payment in the meantime.

In 1888 the bank raised an action against the personal obligants in the ca account bond and the supplementary obligation for payment of principal su of £1500 and £968 respectively advanced to the company, with compe interest thereon from 31st October 1878, or, alternatively, from 31st Oct 1881, the last balance before the liquidation, or otherwise for simple inte from one or other of these dates.

After setting forth the deeds founded on the pursuers alleged that in 1 prior to the liquidation, they had requested payment of the interest accumula and that in 1884 an arrangement was made in writing between the liqui on behalf of the obligants and the bank by which the latter agreed to de enforcing payment on condition that the obligants acknowledged liability accumulations of interest as shewn in the account, and also for future accumu tions calculated in the same manner, and that the liquidator on behalf of

* Decided Jan. 30, 1891.

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whole obligants agreed to this. The pursuers further alleged that at the date of the liquidation the company was insolvent. The only evidence of the alleged agreement produced was the letter by the liquidator of 15th October 1884.

Held (1) (following *Reddie* v. *Williamson*, 1 Macph. 228) that the bank by debiting the account with the year's interest in each year extinguished the claim for that interest, and converted it into an advance of principal; and therefore (2) that the personal obligants were only liable under the cash-credit obligations for the £1500 and £1000 of principal, with interest thereon from 31st October 1887, the date of the last balance; (3) that the obligations were not extended by the letter of 15th October 1884; and (4) that the voluntary liquidation had not the effect of closing the account.

1st Division. Lord Trayner. B.

On 27th December 1877 the Moel Tryfan Crown Slate Company, Limited, which was formed for the purpose of working certain slate quarries in Wales, and George Handasyde Pattison, Thomas Field, James Somerville, Henry Christie, and Daniel Robertson, granted a cash-credit bond to the Commercial Bank of Scotland, binding each as full debtor, and all conjunctly and severally, to make payment to the bank at any time when the same should be demanded after three months from the last date thereof, of the sum of £1500 sterling, or such part or parts thereof as should at any time be due to the bank upon a cash-credit account to be kept in the books of the bank in name of the company, and to be operated upon by the company. The clause stipulating for interest was,—"Together also with interest of the said sum or sums which may be due on said account from the time or times of the respective advances till the same be repaid, and that at the rate of £5 per centum per annum, or at such other higher rates as may be charged by the bank on cash-credit accounts for the time, the bank having at all times power to fix and alter the rates of interest to be charged on said account without notice given to us, the parties hereto, or any of us, or our foresaids." There was further this clause,—"And it is hereby specially provided and declared that a stated account made out from the books of the said bank, and signed by its accountant, shall be sufficient to constitute a charge or balance against us, and each of us, and our foresaids, whereof no suspension shall at any time pass or be presented at the instance of us, or any of us, except on consignation only of the sum appearing to be due thereon; and further, declaring that all communications regarding the said account, or the management thereof, shall, or may, be made to us, the other parties hereto, through the chairman or secretary of the said company for the time being, until the bank shall consider it necessary to demand a final settlement of the balance due."

By letter of obligation, dated 9th and 10th May 1878, Mr Pattison and Mr Somerville, in consideration of the bank having agreed to allow the company an additional credit of £1000 by way of overdraft on the cash-credit account kept in name of the company with the bank, bound not only the company but themselves as directors, and as individuals, to pay the bank the sum of £1000, or whatever smaller sum might be overdrawn on the account.

An account was opened under the cash-credit, which was operated on by the company.

At the bank's annual balance on 31st October in each year the amount of interest accrued during the past year was entered on the debit side of the account, and the total balance carried forward to the next account.

On 31st October 1878 the balance due to the bank was £2468, 14s. 7d. Subsequent to that date there were no operations by the company, but in each year down to October 1887 the bank at the annual balance debited the account with the year's interest, and carried forward the balance.

On 8th March 1881, Mr Somerville wrote to the bank;—"I have yours

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of the 3d. On behalf of the directors and other obligants, I have to acknowledge the kindly forbearance of your bank in regard to our account to which, I presume, more special attention has been called through the present position of Mr Field's affairs. . . . Until the end of March the property of the company is under offer for sale. It was valued in 1879 by the Surveyor of Crown Property in North Wales at upwards of £60,800. If no sale is effected by private contract under the offer referred to, measures are to be immediately taken to realise the whole property, and the directors expect to be in a position to pay off our debt to the bank by the ensuing term of Martinmas. . . ."

On 15th October 1881, the bank wrote to Mr Somerville;—"Our annual balance takes place on the 31st inst., and we are very anxious before then of having the accounts of the Moel Tryfan Crown Slate Co put upon a regular footing. We shall therefore feel obliged by your arranging before that date to pay us the interest which has accumulated to the extent of £215, 9s. 10d., and we shall also be glad to hear what prospect there is now of the principal being shortly paid up."

On 10th November 1881, the company resolved to wind up voluntarily and appointed Mr Thomas Bennet Clark liquidator.

On 9th October 1884, the bank wrote to Mr Clark;—"Referring to your call to-day, we enclose a statement of the account for the three years to 31st October last, shewing the sum then due to be £3164, 9s. 2d. and another year's interest will soon be due."

On 15th October 1884, Mr Clark wrote to the bank;—"With reference to your letter to me of 9th instant, and to my interview with you yesterday, I now write to explain the present position of the affairs of this company, and the wishes of the guarantors of the account with the Commercial Bank. . . . After the company went into voluntary liquidation, various efforts were made to reconstruct the company on lines which would save the shareholders the total loss of their capital but these efforts were not attended with success. Thereafter the properties were attempted to be sold, both publicly and privately; but although substantial offers were received, a disposal of the properties on the terms offered would have involved the guarantors in a certain amount of loss. They have accordingly entered into an agreement of lease for three years from 1st March last with Messrs Leeming & Wilson, with an option to these gentlemen to purchase the whole properties at the end of any one year, at the prices named in this agreement. I enclose an excerpt from this document narrating the terms. The quarries are being energetically worked, and Mr Leeming, the senior lessee, is a man of considerable means and influence. He has already laid out a large sum in working the place, and is arranging a joint stock company to take over the properties. If this be eventually carried out, the price received will be almost if not quite sufficient to meet all liabilities. The guarantors have every hope that it will be carried out, looking to the money that has already been spent by the lessees on the place, and they accordingly would desire that your bank should allow this account to remain in the position it is at present until the result of this agreement of lease and sale is settled. If the sale be not carried out, then the property would require to be sold at the earliest opportunity, and the guarantors would require to make up any deficiency in the price."

On 16th October 1884 the bank wrote to Mr Clark in reply,—"Dear Sir,—We are favoured with your letter of yesterday. The position of the account is not such as we care about, but as we regard ourselves as fully secured, the various obligants for the debt to us may hold, unless anything shall emerge rendering in our opinion the adoption of a different

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course necessary, that we will accede to their request to take no steps for payment in the meantime, nor until the result of the agreement of lease and sale to Messrs Leeming & Wilson is seen. This should be not later than 30 Sep. 1886. Of course it is understood that if nothing comes out of that agreement we are not to be bound to wait until a sale is effected before getting payment of the amount due to us. We presume the representatives of the late Mr Daniel Robertson are fully cognisant of their liability in this matter, and that they and all the others are agreeable to the proposed delay. . . ."

At 31st October 1887 the bank account stood thus:—

1886.	Nov. 1. To balance, . .	£3666	18 5
1887.	Oct. 31. Interest, . . .	189	13 4
		£3856	11 9

The company's property having subsequently been realised at a price insufficient to pay certain mortgages over it, the bank brought an action against the co-obligants under the cash-credit bond and the supplementary obligation for recovery of that sum, of which they alleged that £2343, 5s. 3d.—viz., £1500 of principal and £843, 5s. 3d. of interest—was secured by the cash-credit bond, and £1513, 6s. 6d.—viz., £968, 14s. 7d. of principal and £544, 11s. 11d. of interest—by the letter of obligation. The summons concluded against the obligants in the cash-credit bond for payment "of £1500 of principal, together with (1) the sum of £843, 5s. 3d., being compound interest upon said sum of principal from 31st October 1878 until 31st October 1887; or (2) the sum of £598, 6s. 8d., being simple interest at cash-account rates upon the said sum of principal from 31st October 1878 until 31st October 1887; or (3) the sum of £419, 11s. 7d., being compound interest at cash-account rates upon the said sum of principal from 31st October 1881 until 31st October 1887; or (4) the sum of £379, 4s. 4d., being simple interest at cash-account rates on the said sum of principal from 31st October 1881 until 31st October 1887; together with interest at cash-account rates upon such sum of principal and interest as may be found due from 31st October 1887 until paid." There was a further conclusion against Mr Pattison's executors and the trustee upon Mr Somerville's trust-estate for payment of the principal sum of £968, 14s. 7d., with the same alternative demand for interest as under the cash-credit bond, subject to deduction of two sums of £500 and £134, 18s. 5d., already paid by the two parties respectively.

The pursuer averred;—(Cond. 4) "In 1881, prior to the liquidation, the attention of Mr Somerville, who represented the whole co-obligants, was called to the state of the cash-credit account, and a request was then made for payment of the interest which had accumulated, which, however, was not complied with. After the company went into liquidation, endeavours were made by the liquidator to realise the property of the company to the best advantage in order, if possible, to save the obligants for the cash-credit account from loss; and accordingly, in 1883, the liquidator entered into an agreement with certain parties to let to them the company's slate quarries in Wales, with an option to the lessees to purchase at any time up to 31st December 1886. In order to facilitate these negotiations, and at the request of Mr Bennet Clark, the liquidator of the company, who acted with the authority and on behalf of the whole obligants for the cash-credit account, the bank did not proceed at once to enforce payment of the sums due upon said account. A copy of the account, shewing the accumulations of interest as at 31st October 1883, was sent to Mr Bennet Clark in October 1884. Thereafter an arrangement was made in writing between the bank and Mr Bennet Clark, by

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which the former consented to delay making an immediate demand for payment on condition that the obligants acknowledged liability for the accumulations of interest, *as shewn on the said account*, upon the sums of principal for which they were respectively liable, and also for the interest *calculated in the same manner*, which would thereafter become due during the extended period for which the bank consented to delay enforcing payment. To this condition Mr Bennet Clark, who throughout acted with the authority and on behalf of the *whole parties liable* for the cash credit account, assented. The bank only granted the very exceptional delay asked for in reliance on the knowledge which the obligants had of the state of the account, and of their liability for the interest accumulated and accumulating thereon, admitted or undertaken as above mentioned. Subsequently to October 1884 the bank have each year sent to Mr Bennet Clark, at his written request, a copy of the account, shewing the accumulations of interest upon it. *It was resolved, in November 1887, that the Moel Tryfan Company should be voluntarily wound up. At the date the company had not available assets for the payment of its debts, and was insolvent. It is averred that, according to the law of England, the effect of a resolution to wind up voluntarily, when the company is insolvent, is to stop the running of interest against the company, as at the date of the winding up, upon all debts due by the company.* In December 1887 Mr Bennet Clark intimated to the bank that he had sold the company's property at a price insufficient to meet even the first mortgage, and that the guarantors would therefore have to pay the debt due to the bank."*

It was averred that the liability under the letter of obligation was joint and several, and not *pro rata*.

There were separate defences for Mr Pattison's executors and the trustee on Mr Somerville's sequestrated estate, and for Mr Robertson's trustee—Mr Robertson having died prior to the date of the agreement founded on. The other parties called did not appear to defend the action.

Pattison's executors admitted liability for the £1500, with interest at 5 per cent from 31st October 1887, and for £17, 10s., being interest on the £500 from the same date to the date of payment on 26th July 1888.

Robertson's trustees admitted liability for the £1500, with interest from October 1887, which they had accordingly consigned.

They both denied further liability.

The pursuers pleaded, *inter alia*;—(1) The pursuers are entitled, in terms of the said cash-credit bond, and in virtue of the agreement condescended upon, to decree for the principal sum of £1500, with interest as concluded for, in terms of one or other of the alternative conclusions in the summons. (There was a similar plea against the estates of Mr Somerville and Mr Field.) (3) The pursuers are entitled, in terms of the said obligation, dated 9th and 10th May 1878, and in virtue of the agreement condescended on, to decree against the representatives of the deceased Mr Pattison for the principal sum of £968, 14s. 7d., with interest as concluded for, in terms of one or other of the alternative conclusions in the summons, under deduction, as at 26th July 1888, of the sum of £500 mentioned in the summons. (There was a similar plea against the estate of Mr Somerville.)

Pattison's executors and Somerville's trustee pleaded;—(3) The pursuers' averments can only be proved by writ or oath. (5) The pursuers having accumulated principal and interest from year to year, they are not entitled to reopen the account in order to separate the amount as finally stated into principal and interest. (8) The defenders having tendered

* The italicised portions of the article were added in the Inner-House.

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payment and made consignation of the principal sum of £1500, and interest thereon from the date of the bank's immediately preceding balance, are entitled to be assoilzied from the conclusions relative to the sums due under the bond of cash-credit. (9) The defenders Pattison's trustees having paid or consigned the sum of £500, and having tendered interest thereon from the date of the bank's last balance to date of payment or consignation, and the defender Mr Bennet Clark (Somerville's trustee) having ranked the pursuers upon the trust-estate under his charge for £500, and interest thereon from 31st October 1886, the present defenders are entitled to absolvitor, with expenses.

Robertson's trustees stated the same pleas so far as applicable to the cash-credit bond.

The Lord Ordinary (Trayner), on 13th March 1889, found that the defenders, obligants or representatives of obligants under the cash-credit bond, were bound to make payment to the pursuers of the sum of £1500, with interest at 5 per cent from 31st October 1887, and that the defenders Pattison's executors and Somerville's trustee were jointly and severally liable to make payment to the pursuers of the sum of £1000, with interest from 31st October 1887.*

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* "OPINION.—So far as concerns the defenders' obligations under the cash-credit bond, I cannot distinguish this case from *Reddie* v. *Williamson* (1 Macph. 228). Applying the principle laid down in that case, I think the defenders are only liable (under the cash-credit bond) for £1500, with interest from 31st October 1887.

"The pursuers do not distinguish this case from *Reddie* v. *Williamson*, but they maintain that the obligants in the bond are liable for accumulated interest as well as principal, in respect they agreed through their agent to pay it, as averred in cond. 4. Such an averment (if remitted to probation at all) could only be proved by the writ or oath of the obligants, as it amounts to this, that the obligants, whose obligation was defined in writing, had agreed to an extension of or addition to the obligation so defined. But I have not allowed any proof of that averment, because I think it is not sufficiently specific. It is said that the pursuers delayed enforcing payment of their claim because the obligants, through their authorised agent, 'assented' to the condition proposed by the pursuers, that in respect of such delay they (the obligants) should acknowledge liability 'for the accumulation of interest upon the sums of principal for which they were respectively liable.' Assuming that the obligants assented to a proposal so expressed, it does not follow that they consented to enlarge their existing obligation. They acknowledged liability for accumulations of interest no doubt, but they were already liable for these as principal, if the pursuers, according to the custom of bankers, accumulated principal and interest each year. It was not an express undertaking that notwithstanding of such accumulation the obligants would be bound for £1500 of principal and interest, although accumulated as well. I allowed the pursuers an opportunity of amending their record, to the effect of averring such an express undertaking, but they declined to avail themselves of this opportunity, I presume because they cannot make such an averment, or cannot prove it.

"I have fixed the date from which interest is to run as from 31st October 1887, because that was the last balance of the account in which interest and principal were accumulated before the action was raised. I was referred to the case of *Gilmour* (7 R. 734) as an authority for holding that interest should be allowed from 31st October 1881, being the balance immediately preceding the date when the Moel Tryfan Company went into liquidation. In *Gilmour's* case interest was allowed from the balance preceding the date of the principal debtor's insolvency, because on the occurrence of that event 'the account became inoperative.' The same reason does not apply here. There was no insolvency or bankruptcy, or anything else to render the account in question inoperative.

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On 19th March following the Lord Ordinary pronounced another interlocutor with findings, bringing out the specific pecuniary results in each case.

The pursuers reclaimed, and after counsel had been heard in January 1890, the Lord Ordinary's interlocutor was recalled *hoc statu*, the amendment on article 4 of the condescendence (as noted above in italics) was allowed, and a proof of the averments contained in that article (except the amendment as to the law of England) allowed.

The letters above quoted were produced at the proof.

Argued for the reclaimers;—The two conclusions they pressed were the first and fourth. (1) From the terms of the letter quoted above, it was evident that the liquidator as at its date admitted a balance of £3164, and that the inducement which led the bank to delay enforcing their obligation was to give the guarantors a chance of selling the property. It amounted to an express arrangement which ought to receive effect. (2) Assuming that this arrangement was not proved, the effect of the voluntary winding-up of the company, coupled with the fact which must now be admitted that it was insolvent at the time, was to stop the account, and the bank was entitled to interest from 31st October 1881, being the date of the immediately preceding balance. The bank was not bound to accumulate the interest, or make any new balance after that date. The account stopped then, and subsequent accumulations, although they appeared in the accounts stated by the bank, fell to be treated as mere book entries. No doubt in *Reddie's* case it was the death of the holder of the credit which operated the stoppage, and in *Gilmour's* case it was the granting of a trust-deed for creditors.[1] But although the facts of the present case were not the same, the legal consequences of a voluntary winding-up were the same, and the duty of the liquidator was to attend to the realisation and distribution of the company property.[2] He could not have touched any unexhausted balance of the cash-credit. There could not be *pari passu* distribution consistently with a continued drawing on the cash-credit account, which would increase the liability of the cautioners. If the company had been solvent,—which events had established it was not,—no question of the present kind could have arisen.

The company went into liquidation, not because it was insolvent (it is not, as far as I know, insolvent now), but because it was not successful. The liquidation was merely a winding up of a business, and there was nothing in that fact such as is afforded by bankruptcy, to prevent further operations on the account. The appointment of a liquidator was the act of the company itself, who might have appointed one of their own number to wind up the business if they had pleased. It was not a liquidation under the authority or supervision of the Court.

"As regards the additional obligation for £1000 granted by Messrs Pattison and Somerville, I am of opinion that it imposes a joint and several, and not merely a *pro rata* liability. It is a cautionary obligation, and each cautioner is directly liable for the whole debt guaranteed. Further, the obligants in the cautionary obligation are liable, in my opinion, for interest. The obligation was granted (as it bears) to enable the principal debtor to obtain money advances, and on such advances interest is due and exigible without special stipulation. This obligation was really an addendum to the cash-credit bond, binding the granters of it to make payment of the debt under that bond to the extent of £1000. One account was kept for the advances made both on the bond and obligation, and I treat them as practically one, and therefore allow interest on this £1000 from 31st October 1887."

[1] Gilmour v. Bank of Scotland, March 19, 1880, 7 R. 734; Reddie v. Williamson, Jan. 9, 1863, 1 Macph. 228, 35 Scot. Jur. 170.

[2] Companies Act, 1862 (25 and 26 Vict. cap. 89), secs. 131 and 133.

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(3) The point specially urged by Robertson's Trustees was that by giving time to the principal debtor the bank had relieved them. But the bank had not undertaken any such obligation as would prejudice the cautioners' rights, and had not tied their hands in any way.[1]

Argued for the respondents Pattison's Trustees and others;—It was conceded that the company must now be held to have been insolvent as at 31st October 1881, but under this reservation that insolvency was not in view of the parties to the cash-credit transaction at that date. Such an agreement as the pursuers averred was constituted by the letters founded on must be express, and was not to be spelt out of a correspondence. Further, no authority to the liquidator to conclude it was proved, and even although he may have had a general authority to represent the company, that would not entitle him to alter the terms of the cash-credit. The fact was that the bank resolved to take its chance of the company being able to effect a sale, and to pay the whole debt. In a voluntary liquidation, such as the present, the running of interest did not stop. A compulsory liquidation, which was a statutory proceeding, was different.[2] The circumstances in the cases of *Reddie* and *Gilmour*, so far as regarded the stopping of the running of interest, were not in point here, although the principle of these cases applied.

Argued for Robertson's Trustees;—They adopted the argument for Pattison's Trustees. As Mr Robertson had died prior to the date of the alleged agreement, they could not be affected by it. Further, the bank had given time to the principal debtor, and had thus relieved them.

At advising,—

LORD ADAM.—The only question submitted for our consideration under this claiming note was the amount of interest which should be charged upon a principal sum of £1500, for which all the defenders are liable, conjunctly and severally, and upon a principal sum of £1000, for which the representatives of the late George Handasyde Pattison and James Somerville are alone liable.

The facts which raise the question are these. On 27th December 1877 the Moel Tryfan Crown Slate Company, Limited, George Handasyde Pattison, Thomas Field, James Somerville, Henry Christie, and Daniel Robertson, granted a cash-credit bond to the pursuers, the Commercial Bank, by which, on the narrative that the bank had allowed them a standing credit to the extent of £1500 sterling upon a cash-credit account to be kept in the books of the bank, in the name of the Moel Tryfan Company, and to be operated upon by that company, or by any person having their written authority, they bound themselves and their successors, each as full debtors, and conjunctly and severally, to pay to the bank the said sum of £1500, or such part thereof as should at any time be resting to the bank on said cash-credit account, with interest at 5 per cent or at such rates. It was further stipulated in the usual way that a stated account made out from the books of the bank should be sufficient to constitute a charge of balance against the granters.

Further, by a letter of obligation, dated 9th and 10th May 1878, Mr Pattison and Mr Somerville, in consideration of the bank having agreed to allow the Moel Tryfan Company an additional credit of £1000 by way of overdraft on the cash-credit account kept in name of the company with the bank, bound not only the company, but themselves, as directors and as individuals, to pay the

[1] Muir v. Crawford, May 4, 1875, 2 R. (H. of L.) 148.
[2] Bell's Comm. i. 695 (7th edn.), p. 651 (5th edn.); *Ex parte* Coulbourn, L. R., Equity, 478.

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bank the said sum of £1000, or whatever smaller sum might be overdrawn on said cash-credit account.

A cash-credit account was opened in the books of the bank in name of the Moel Tryfan Company, and was operated upon by that company. A copy of that account as appearing in the books of the bank has been produced, and, so far as I can see, it has been kept in the usual way. It is balanced on the 31st October of each year. The interest is periodically added to the principal, and the accumulated sum appears as the balance due on next year's account, with the result that it discloses a balance of £3856, 11s. 9d. of principal due by the Moel Tryfan Company at its close on 31st October 1887.

Applying the principles recognised in the case of *Reddie* v. *Williamson*, as the Lord Ordinary has done, the result is that those defenders who represent obligants under the cash-credit bond are liable for £1500 of that sum, and the defenders who represent the granters of the letter of obligation are liable for £1000, with interest on these sums respectively from the date of closing the account.

The pursuers do not dispute that the Lord Ordinary is right, if the case of *Reddie* v. *Williamson* applies, but they aver a special agreement, which, they say, renders that case inapplicable. When the case was before the Lord Ordinary, he refused to allow a proof of this alleged agreement, thinking that the pursuers' averments were not sufficiently specific; but when the case was before the Inner-House the pursuers were allowed to amend the record in this respect. A proof was allowed, and the case is now to be disposed of on the conclusion proof.

It appears from the cash-credit account that the balance due thereon at 31st October 1878 was £2468, 14s. 7d., and that the account was not further operated on, except that there was annually added by the bank the accruing interest. Upon the 10th November 1881 the company went into voluntary liquidation, and Mr Bennet Clark was appointed liquidator.

On 9th October 1884 the bank sent to Mr Bennet Clark, at his request, a statement of the account to 31st October 1883, shewing the sum then due by the company to be £3164, 9s. 2d. "Thereafter," it is said (and this is the special agreement averred), "an arrangement was made in writing between the bank and Mr Bennet Clark, by which the former consented to delay making an immediate demand for payment, on condition that the obligants acknowledged liability for the accumulations of interest, as shewn on the said account, upon the sums of principal for which they were respectively liable, and also for the interest calculated in the same manner, which would thereafter become due, during the extended period for which the bank consented to delay enforcing payment. On this condition Mr Bennet Clark, who throughout acted with the authority and on behalf of the whole parties liable for the cash-credit account, assented."

The "writing" by which this agreement is said to have been made consists of a letter by Mr Bennet Clark to the bank, of date 15th October 1884, and the bank's answer, of date 16th October 1884.

In his letter Mr Bennet Clark says that he writes to explain the present position of the affairs of the company, and the wishes of the guarantors of the account with the bank. He then states that efforts had been made to reconstruct the company and to sell the properties, and that the company had entered into an agreement of lease for three years, from 1st March last, with Messrs Leeming and Wilson, with an option to these gentlemen to purchase the whole properties

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ne end of any one year, at the price named in the agreement, a copy of which e sends; that the quarries were being energetically worked, that a large sum money had been laid out in working the place, and that a joint stock company as being arranged to take over the properties.

Then he writes as follows,—"If this be eventually carried out, the price re- ived will be almost, if not quite, sufficient to meet all liabilities. The guarantors ve every hope that it will be carried out, looking to the money that has already en spent by the lessees on the place, and they accordingly would desire that ur bank should allow this account to remain in the position it is at present til the result of this agreement of lease and sale is settled. If the sale is not ried out, then the property would require to be sold at the earliest opportunity, d the guarantors would require to make up any deficiency in the price."

Now, this letter appears to me to express nothing more than a request that the nk would allow the account to remain in the position in which it then was at is, that they should not enforce payment of it), and to set forth the reasons y that request was made. It sets forth no terms or conditions on which the arantors were willing to purchase the delay requested. It says nothing about ir agreeing to become liable for accumulations of interest, for which up to t time they were not liable. No doubt it says, but only *narrative*, and as a son for requesting delay, that if the sale to the lessees was not carried out, the perties would require to be sold, and the guarantors would require to make any deficiency in the price. But it does not say that in the event of the delay ired being granted they would bind themselves to make up any deficiency the price beyond the amount of their existing liabilities, and this no doubt uld have been said if any such obligation had been intended.

I think, therefore, that this letter simply contained a request, unaccompanied th any conditions, that the bank would allow the account to remain in the ition in which it then was.

It seems to me that the letter of the bank carries the matter no further. What bank says is this,—"We are favoured with your letter of yesterday. The ition of the account is not such as we care about, but, as we regard ourselves fully secured, the various obligants for the debt to us may hold, unless any- ng shall emerge rendering, in our opinion, the adoption of a different course essary, that we will accede to their request to take no steps for payment in meantime, nor until the result of the agreement of lease and sale to Messrs eming & Wilson is seen."

I think that the bank thereby simply granted Mr Bennet Clark's request for ay. They couple their consent with no conditions, except that they reserve ver to act if circumstances should change.

I am therefore clearly of opinion that the pursuers have failed to prove the cial agreement libelled.

Assuming that Mr Bennet Clark had entered into the agreement libelled, the fenders deny that he was authorised by them to do so. In the view I take of case it is unnecessary to determine that question. I have only to say that an find no evidence that the guarantors gave Mr Bennet Clark any authority commit them to any further liability than they were already under.

The pursuers have further amended their record by averring that it was olved in November 1881 that the company should be voluntarily wound-up, at at this date the company had not available assets for the payment of its bts, and was insolvent, that the effect of the winding-up, coupled with

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insolvency, was to stop the running of interest against the company, as at the date of the winding-up, upon all debts due by the company. From this they argue that the cash-credit account became, at that date, a closed account, and that consequently they are entitled to interest on the principal sums due, from the date of the immediately preceding balance, 31st October 1881, till payment.

I do not think that the liquidation, seeing that it was a voluntary liquidation for the purpose of winding-up and reconstruction, would have any effect *per se* in closing the cash-credit account. As regards the alleged insolvency, the company was in this position, that it had difficulty in meeting its current expenses and that if it had been called upon at once to realise all its properties by forced sale, and to pay all its debts, its funds might possibly have proved insufficient for the purpose. But it continued for years afterwards to be a going company, and nobody appears to have then thought that its assets, if realised, would be insufficient to pay its debts. In that state of matters it does not occur to me that there was anything necessarily to close the cash-credit account.

In any view, I think the bank would have great difficulty in successfully maintaining this plea. They did not in point of fact close the account at the date of the liquidation. They continued to treat it as an open account down to 31st October 1887, and periodically accumulated interest thereon, as it was to their advantage to do in the event of the company having a surplus of assets, as they are in this action claiming payment of such interest from the defenders.

I do not think, accordingly, that this contention of the bank is well founded, and on the whole matter I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Lord Kinnear.—I am of the same opinion. I think the cautioners are liable for the amount of the principal sum standing at the debit of the cash-credit account as shewn by the books of the bank at the date of the last balance on 31st October 1887, and for interest from that date, and not, as the bank contends, from November 1881, when the company went into liquidation.

The material consideration appears to me to be that it was matter of agreement between the parties that there was to be a single account as against the co-obligants, for which they were all to be jointly and severally liable, and there is a special provision in the agreement that "a stated account made out from the books of the bank, and signed by its accountant, shall be sufficient to constitute a charge or balance against us and each of us, and our foresaids whereof no suspension shall at any time pass or be presented at the instance of us or any of us, except on consignation only of the sum appearing to be due thereon." Of course, that does not mean that the account may be kept in any way that the bank may think fit. It must be kept in the ordinary way, and if there were any doubt as to what that was before the case of *Reddie* v. *Williamson*, there can be none since that decision. The account must be kept by the bank in the usual way in which a cash-credit account is kept, the interest upon the debit balance being always added at the close of each year, and so converted into principal. That is a mode of stating the account which may be in favour of the bank if the principal debtor remains solvent. If he becomes insolvent, it will be in favour of the bank only so long as the whole amount of the debit balance is within the limit of the cash-credit

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here is a difference of liability only in this respect that the obligant who operates on the account will be liable to the whole extent of his operations, the obligants who do not operate only to the extent of their obligation under the ish-credit bond. But within the limits of the stipulated credit they are all able jointly and severally, and there can be only one account stated in one way ainst all.

The result in this case would thus be perfectly clear, if it were not for the leged agreement between the bank and the liquidator of the company, by hich it is said to have been arranged in October 1884 that the accounts should fter that date be otherwise stated. I agree with Lord Adam, for the reasons e has given, that there is no evidence of such an agreement. It is material, in eading the correspondence, to keep in view that the agreement alleged by the ank is a contract restricting their claims against the principal debtors, so that fter the date of the agreement interest could no longer be accumulated as gainst them for however long a time the debt might remain unpaid. Now, in tating the account against them the bank still continued to accumulate interest n the ordinary way, and if the company had remained solvent, it would have een for the interest of the bank to maintain that this was the proper way of tating the account. If that had happened, and the company had been charged or payment of the principal and accumulation, they could not, in my opinion, have resisted the demand. I see no ground for maintaining that the bank had given up their right to accumulate interest with principal. They had agreed to *nothing*, except that they would delay making an immediate demand for payment, and leave the account in the meantime in its actual position as an open account. The account was accordingly treated as an open account down to October *1887*.

For the reasons already given, I think it clear that if the bank were entitled o state the account in this way against the company, they are bound to state it n the same way against the defenders.

On all the other points I agree with Lord Adam, and have nothing to add.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor:—"Find that the reclaimers have failed to establish the agreement between themselves and Mr Bennet Clark alleged upon the record as amended: Therefore find and decern in terms of the interlocutors of 13th and 19th March 1889: Find the defenders and respondents entitled to expenses, except in so far as the same have been already disposed of," &c.

MELVILLE & LINDESAY, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

No. 104.

Feb. 6, 1891.
Inglis' Trustees v. Breen.

J. S. NAPIER AND OTHERS (Inglis' Trustees), Pursuers and Nominal Raisers.

JOHN INGLIS Junior, Claimant (Respondent).—*Murray—Ure.*

MRS MARGARET INGLIS OR BREEN AND HUSBAND, Claimants (Reclaimers).—*Asher—C. J. Guthrie—Salvesen.*

Interest—Succession—Legacy.—Where the payment of a legacy was postponed for several years owing to the delay of the beneficiary to elect between her legal rights and the provisions under the trust-settlement, *held* that the legatee could

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not claim a higher rate of interest than had been actually received by the trustees down to the date of her election.

Per the Lord President and Lord M'Laren, that there is no general rule that the rate of interest payable on legacies is 5 per cent where the trustees are not *in mora*.

1st Division.
Lord Trayner.
C.

(Vide *ante*, May 31, 1887, 14 R. 740.)

This case raised several questions in the multiplepoinding relating to the distribution of the estate of the late Mr Anthony Inglis, previously reported, 14 R. 740, 17 R. (H. L.) 76.

The only point which now calls for notice was in regard to the interest due upon the legacy of £20,000 which the truster had directed to be paid to his daughter, Mrs Breen, "on the lapse of three months" after his death. The legacy would therefore have been payable on 10th April 1884, Mr Inglis having died on 10th January 1884, had Mrs Breen been then prepared to accept the provisions of her father's settlement. But on 28th January 1885 Mrs Breen's agent wrote to the trustees that he was instructed by her to claim legitim. On 5th February 1885 this election was recalled, and on 9th February 1886 her agents wrote intimating that Mrs Breen claimed her provisions under her father's settlement. On 31st May 1887 the Court held that Mrs Breen had not made her election. On 15th June 1887 she declared her election to take the settlement provisions by lodging a minute to that effect in the process of multiplepoinding.

Mrs Breen now claimed interest at 5 per cent on the legacy from 10th April 1884.

The Lord Ordinary (Trayner), on 25th June 1890, found, *inter alia*, that Mrs Breen was entitled "to payment as at 10th April 1884 of the sum of £20,000 sterling, free from legacy duty, together with interest thereon at such rate per cent per annum as may have been received by the trustees, from the said 10th day of April 1884 until 15th June 1887, and at the rate of 5 per cent per annum from that date, and until paid."*

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* "Opinion.—The late Mr Inglis by his settlement directed his trustees *inter alia*, to make payment to his daughter, the claimant Mrs Breen, of the sum of £20,000, 'on the lapse of three months' after his death. Mr Inglis died on 10th January 1884, and the foresaid legacy would have been payable on 10th April 1884, provided Mrs Breen had been then prepared to accept the provisions of her father's settlement, instead of claiming her legal rights as one of his children. She was not then prepared to do so; and in fact did not elect to accept the provisions of her father's settlement until 15th June 1887, when she declared her election by a minute lodged in this process. It is maintained for her now that she had made this election by a letter dated 9th February 1885, addressed by her agents to the agents of her father's trustees; but I think Mrs Breen is barred from saying that her election was made or intimated by that letter, because she afterwards, in this process, maintained, and maintained successfully, that she had not made any election, but was still entitled to insist, as she did, in a claim in which she claimed alternatively her legal rights or the provisions under her father's settlement.

"The effect of Mrs Breen's election when made was to entitle her to the provisions which her father had made in her favour. She was therefore entitled to £20,000 as at 10th April 1884, being three months after her father's death. But she now claims interest on that sum at five per cent from 10th April 1884, and to this I think she is not entitled. The trustees of the late Mr Inglis could not pay Mrs Breen her legacy until her election was declared, and required to hold the funds in their hands until that was done. Accordingly, in my view, the full extent of Mrs Breen's right under this branch of her claim is to £20,000 as at 10th April 1884, with such interest thereon from that date till 15th June 1887 as the trustees had received on it, and five per cent from 15th June 1887 till paid, as on a specific legacy then due. . . ."

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een reclaimed, and argued that she was entitled to interest at five from 10th April 1884 to 9th September 1884, her brother and e having received five per cent on his legacy up to that date. From ember 1884 to 9th February 1886, when Mrs Breen's agents ad- letter to the agents of her father's trustees making her election, it tted that she could not claim a higher rate of interest than the as yielding. But she contended that from that date, when she d payment under the settlement, she was entitled to five per o the date of payment.

l for Mr John Inglis junior, as a residuary legatee;—In allowing pon legacies the Court was always guided as to the rate by the nces of the case. There was no inflexible rule. In the pre- the trustees could not be held to have done wrong in not paying th June 1887. The blot in the argument of the reclaimer was ssumed that the trustees were guilty of the delay which had It was Mrs Breen who had prevented the earlier distribution tate, and she could not therefore claim a higher rate of interest been earned.[1]

ising,—

KINNEAR.—The first question in this case is, whether Mrs Breen is a certain amount of interest which she claims upon a legacy. By 's will she was to receive a legacy of £20,000, and she now claims entitled to have that legacy paid to her, with interest at five per cent 0th of April 1884. The Lord Ordinary has found that she is entitled terest as may have been received by the trustees between the 10th of 4 and the 15th of June 1887, and to five per cent from that last date There is no objection to his Lordship's finding, in so far as it gives nt five per cent from 15th June 1887, but she says that she ought to est at the same rate during the period between 1884 and 1887. In hat point is concerned, I entirely agree with the Lord Ordinary, for that his Lordship has assigned. The delay of payment between these was occasioned entirely by Mrs Breen's own delay in making up her whether she should claim or whether she should insist upon one or wo alternative claims, and I can see no principle in law, as there is no ground in equity, to entitle her to insist upon a larger amount of han was actually earned by her money in the hands of the trustees e period when they were compelled to retain it in consequence of her on upon that question.

ADAM concurred.

M'LAREN.—I entirely concur in the opinion delivered by Lord Kinnear. sh to add a word upon the subject of the rate of interest. I do not question could have arisen with regard to interest but for a decision a misunderstanding of the meaning of a decision—in the House of the case of *Sharpe's Trustees*, where in the circumstances of that case ent was held to be due to the general legatees as distinguished from were participant in the residue.

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pe's Trustees v. Kirkpatrick, Dec. 20, 1877, 5 R. 380, affd. 6 R. (H. L.) Trustees v. Society of Scripture Readers, Feb. 19, 1862, 24 D. 552, Jur. 250; Bell's Principles, sec. 1885; M'Innes v. M'Allister, June 29, . 362.

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Now, the judgment in that case was delivered by Lord Cairns, and on th matter of interest his Lordship merely said that it was conceded at the bar th the rate payable to legatees in Scotland was five per cent, and his Lordsh adds that the rule in that respect differs from the rule in England. If Lo Cairns had expressed any opinion upon that subject I should have hesitat even to entertain, much less to express, a doubt regarding the conclusion whi had been arrived at by a Judge so eminent as Lord Cairns, but I do not unde stand that his Lordship had applied his mind at all to this question, nor wou we expect that an English Chancellor, however successful in his dealing wi the principles of our law, should have that minute acquaintance with the rul of practice which is only to be found amongst those who are engaged in t practice of the profession at home. And it is also to be observed that th opinion was given upon the concession of members of the English bar—t doubt highly qualified to assist the House in argument, but who on this poi had not contributed anything in the shape of argument, but merely had made concession, probably upon the instructions which they may have received fro the parties interested.

The Lord Ordinary, in coming to consider the question of interest here, ha I think, taken a very just distinction between the rate of interest payable b trustees or representatives who are *in mora*,—who are withholding from legatee a fund which they have the means to pay, and which it is their du to pay,—and the right which arises to every beneficiary in a settlement to recei such share of the produce of the estate as the trustees have been able to obta by investment; and I understand that all your Lordships are agreed in suppor ing that distinction.

I cannot help adding that to give any wider extension of the rule, or th supposed rule, that interest is payable at five per cent on legacies, might i many cases operate with great hardship, because it may very well happen tha on the death of a testator his means turned out to be much smaller than h supposed, and that the addition of five per cent on legacies would of cour still further reduce the share going to the residuary legatees. That will especially be the case where the testator had been engaged in commerce, i might be abroad, where his affairs could not be wound up and his mone realised for a considerable period after his death. I must say that the rule—t which Lord Cairns referred as the rule of the Court of Chancery—was what had always supposed to be the rule of the law of Scotland, and I do not unde stand that any absolute opinion contrary to that rule has yet been expresse by higher authority. But no doubt, if this case goes further, the question wi be fully considered, and I should not wish it to be thought that in my vie there is any general rule in the law of Scotland that interest is payable at fiv per cent on legacies where the trustees are not *in mora*, and where they hav not in their own hands the funds to pay at an early period.

LORD PRESIDENT.—I concur in the opinion of Lord Kinnear, and also in th observations Lord M'Laren has made upon the dictum of Lord Cairns in th case of *Sharpe's Trustees*.

THE COURT adhered.

MACONOCHIE & HARE, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—H. B. & F. J. DEWAR, W.S.—Agents.

XANDER WALKINSHAW AND OTHERS (M'Donald's Trustees), Applicants.—*W. C. Smith.*
ELSIE STEWART, Respondent.—*Rhind.*

No. 105.
Feb. 6, 1891.
M'Donald's Trustees v. Stewart.

-Mandatary.—Circumstances in which a defender, appellant, who broad, was not required to sist a mandatary *in hoc statu.*

TEWART, a farm servant, obtained decree of filiation and aliment d, against a farmer named M'Donald. On her proceeding to r decree by poinding, trustees for creditors acting under a deed by M'Donald obtained interdict in the Sheriff Court against so.

1ST DIVISION. Sheriff of Banff. C.

pealed, and the case was sent to the Summar Roll on 30th 891. The respondents in the appeal then presented a note to President craving the Court to ordain the appellant to sist a r.

stated at the bar in support of the application that the respon- left this country on 12th December for America, and had no of returning, and that she had no residence or property in this The applicants founded on *Taylor* v. *Kerr*.[1]

stated for the respondent that she had left this country on the uest of a sister, who was lying ill in America, and that she urn so soon as the sister could spare her.

RESIDENT.—I am for refusing this motion *in hoc statu.* We know about the matter. What we shall eventually do depends a good deal his woman does in the way of returning, or what we hear of her .

DAM.—If this motion is renewed, and no further information is given, repared to say what the result will be.

'LAREN.—If this woman has merely gone to America to nurse a sister it is probable that she will be home again before the case comes on, herefore premature to sist a mandatary now. I think it will be proper ther information before the case comes out for hearing.

INNEAR.—I agree that this motion should be refused, but I also agree l be the duty of the woman's representatives to make a more specific than they have been able to make to-day if the motion is renewed.

MOTION refused *in hoc statu.*

ALEX. MORISON, S.S.C.—WILLIAM OFFICER, S.S.C.—Agents.

DAVID PEDDIE, First Party.—*Kennedy.*
WILLIAMINA GIBB OR PEDDIE, Second Party.—*Kennedy.*
LIAMINA GIBB OR PEDDIE AND OTHERS (Mr and Mrs Peddie's Trustees), Third Parties.—*John Wilson.*

No. 106.
Feb. 6, 1891.
Peddie v. Peddie's Trustees.

ge-contract—Postnuptial contract—Revocation.—A husband and wife few weeks after their marriage executed a postnuptial marriage- n which the husband conveyed to the trustees under the contract estate which should belong to him at his death, directing them g to the wife, if she survived, £50 for mournings and his furniture,

[1] Dec. 1, 1829, 8 S. 151, 2 Scot. Jur. 52.

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to hold the residue for her in liferent (but with power, if they should consid the income insufficient, to pay to her the whole or part of the capital), and t the children of the marriage in fee. In the event of the dissolution of the m riage by his predecease without issue the trustees were to convey the resid absolutely to the wife.

The wife on her part conveyed to the trustees the estate then belonging her, being an interest in her deceased father's estate, and all estate which m come to belong to her during the subsistence of the marriage. The purpo were that the trustees should hold the estate for behoof of herself in lifer and for her children in fee. She reserved, however, full power at any time dispose of the whole or any part of the trust-funds by any *mortis c* deed.

The trustees under the deed received payment of the funds belonging to t wife at the date of the marriage. Within six months after the marriage t husband and wife became desirous to revoke the postnuptial contract, and call upon the trustees to reconvey the trust-estate in their hands to the wife.

Held (1) that the husband's conveyance being a reasonable provision for t wife and children could not be revoked by him or surrendered by his wife; (2 that the wife's conveyance being part of a contract whereby reasonable pro sions were made for behoof of herself and the children, if any, she was n entitled to revoke it.

2D DIVISION. I.

DAVID PEDDIE, a commercial traveller, Dundee, and Williamina Gibb Peddie were married in December 1889. On 4th and 5th Febru 1890 they entered into a postnuptial contract of marriage. By th contract the husband conveyed to trustees the whole heritable and mov able estate which should belong to him at the time of his decease, for th following purposes, *inter alia*;—(2) That the trustees should pay to th wife, if the survivor, £50 for mournings; (3) should convey to her abso utely all his household furniture and plenishing; and (4) should hold th residue of his estates and pay over the whole free income to the wi from and after his death, with the fullest discretionary powers to t trustees should they consider the annual income insufficient for her mai tenance, to encroach upon the capital and pay the whole or any pa thereof to her, but declaring that she should be bound to educate an maintain the children of the marriage out of the income. In the fir place the trustees were directed to hold the residue after the wife death till the youngest child should attain majority, and on that event t divide it equally among the children. In the event of the dissolution o the marriage by the husband's death without issue, the trustees were t convey the residue absolutely to the wife.

On the other part the wife conveyed to the trustees her whole interes under the settlement of her deceased father, George Gibb, and the whol estate, heritable and moveable, then belonging or which should belong t her during the marriage.

The purposes of her conveyance were that the trustees should pay t her, exclusive of the *jus mariti*, the income of the trust-funds,—"(2) An in the event of a dissolution of the said marriage by the death of the sai David Peddie, and of there being a child or children, or the issue of a child or children of the marriage, as after mentioned, that the sai trustees shall account for and pay over to the said Williamina Gardine Gibb, during the remaining days of her life, the free interest or annua proceeds aforesaid; but if there be no such child or children or issue, the the said trustees or their foresaids shall, immediately after the death o the said David Peddie, account for and pay over the whole capital or principal of the said trust-funds to the said Williamina Gardiner Gibb her heirs, executors, or assignees: (3) And in the event of the dissolu tion of the said marriage by the death of the said Williamina Gardiner

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ng issue, the said trustees shall pay to the said David Peddie the days of his life, under restriction as after mentioned, the st or annual proceeds of the whole property and estate hereby . . . Further, declaring that in the event of there being he said marriage who shall attain majority, such child or hall, unless otherwise directed by any *mortis causa* deed which anted by the said Williamina Gardiner Gibb, be entitled to be alf of his or her share of the capital funds, according to the hereof to be made by the trustees, and which they are hereby d to make in such an event; and the liferent interest of the d Peddie shall be restricted accordingly to the funds which ill intact in the hands of the trustees: Declaring always, as it pecially provided and declared, that the foresaid provisions in he said children of the said marriage shall be divisible among en thereof in such shares or portions as shall be appointed by or *mortis causa* deed under the hand of the said Williamina Gibb, and in case of her death without making such division, avid Peddie, if he shall survive her, shall have the same power emains unmarried, and until the child or any of the children of arriage shall attain majority; and failing of any such division rovisions shall belong to and be divided among the said children . . . (4) and in the event of the dissolution of the said mar- he death of the said Williamina Gardiner Gibb without leaving estate hereby conveyed shall be divided into two equal halves, f which shall be subject to the directions by any *mortis causa* h the said Williamina Gardiner Gibb shall grant, and the other id trustees shall pay to the said David Peddie absolutely, at rm of Whitsunday or Martinmas after her death." She reserved full power to herself at any time alone to dispose of the whole he trust funds and estate hereby conveyed by her by any *mortis* she may execute."

stees under the contract received and invested a sum of £1317, eing Mrs Peddie's share of her father's estate. They had no e in their hands.

1890, a special case was presented to the Court by the husband), the wife (second party), and the trustees under the post- ntract (third parties), for decision of a question which had arisen her the spouses could revoke the postnuptial contract. The second parties maintained that it was revocable and had been y them, and that the third parties were bound to convey the e in their hands to the second party.

stees maintained that the contract was not revocable, and that not bound to denude and reconvey.

questions were stated for the opinion of the Court:—"(1) the said first and second parties can validly revoke the said th and 5th February 1890? (2) Whether the third parties l or in safety, on a deed of revocation as aforesaid being uted, to reconvey the trust-estate absolutely to the second

for the first and second parties;—The provisions of the contract, for children, were only testamentary. The deed could not be as irrevocable, for, if so, the husband would be deprived of ny of his means on the children of a second marriage. *Quoad* the result of the contract was a voluntary interdiction. There was g person for whose benefit the trustees were to hold the fee of estate and none might ever exist. She was therefore not

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denuded of it.[1] Such cases as *Torry Anderson* and *Menzies* were therefo not in point.[2]

Argued for the third parties;—The husband's conveyance was not revo able. It was not more than a reasonable provision for the wife a children, and the wife could not surrender that provision which was ma for her protection.[3] As to the wife's provisions, it did not matter, t question not being with creditors, that the conveyance was postnupti It was still an onerous contract of a reasonable nature and to secure t truster herself and her children. The wife did not remain unlimit fiar. The children, if any, had an interest, and the wife only reserved right of testing.

At advising,—

LORD RUTHERFURD CLARK.—The question is whether the spouses can w joint consent revoke a postnuptial marriage-contract into which they entered February 1890. But it presents itself in two aspects—first as it relates to t husband, and second as it relates to the wife.

By this marriage-contract the husband conveyed to trustees the whole est which should belong to him at his death. The purposes of the trust were th the trustees should pay £50 to the wife for mournings; that they should hand over to her the furniture and plenishing of the truster; that they should hold th residue for her in liferent, but with a discretionary power, should they consid the annual income insufficient for her maintenance, of paying to her the whol or any part of the capital; and lastly, that they should hold the residue for t children of the marriage.

It is plain that by this trust the husband was making a provision for his wi and for the children of the marriage. It is not said that the provisions are n fair and reasonable provisions, nor is there any ground for thinking that they not possess that character. In these circumstances, the case of *Low*, 5 R. 1 seems to me to be directly in point. There it was held that a trust created b a husband with the view of making a suitable provision for his wife and childr could not be revoked by the joint consent of the spouses, even though the d did not take the form of a postnuptial marriage-contract, and although th had been no children born of the marriage. The Court held that the wife must protected against herself; that she could not surrender provisions made by h husband in her favour; and that the trust must continue to subsist in ord secure for such children as might be born the benefits thereby conferred them. I think we must follow the rule of this case, and hold that the husba cannot revoke the trust which he has created, even with the consent of h wife.

By the same marriage-contract, the wife conveyed to trustees her interest und her father's trust-settlement. The purposes are that the trustees shall hold th trust-estate for the liferent of the truster, and for her children in fee, but un the reservation and declaration that she shall have the full power of disposa of the trust-estate by any *mortis causa* deed which she may execute. It is clea that a full fee is not reserved to the truster, and that the children of the marri age will take the fee if she does not exercise the reserved power.

[1] Melville v. Melville's Trustees, July 15, 1879, 6 R. 1286.

[2] Anderson v. Buchanan, June 2, 1837, 15 S. 1073, 9 Scot. Jur. 509; Menzies v. Murray, March 5, 1875, 2 R. 507.

[3] Low v. Low's Trustees, Nov. 20, 1877, 5 R. 185.

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had been children alive at the date of the trust, it is, I think, plain st could not have been revoked. The difficulty arises from the fact date there were no persons in existence for whose benefit the trustees the eventual fee, and it is possible that no such persons may ever re is room therefore for the plea that the truster has not been denuded e, inasmuch as the fee was not devolved even conditionally on any n.

est case to the present is that of *Murison*, 16 D. 529, where it was trust by which a lady conveyed her whole estate for the issue of a d marriage, into which she afterwards entered, might be revoked by Lord Ordinary decided the case on the ground that there were no , and therefore that the truster was not denuded of her estate. s view was adopted by the Court is not certain. It would seem f the Judges were of opinion that it was not a deliberate deed, and evocable on that ground.

however, here dealing with a deed of a different class—not with a ed—but with a marriage-contract. If it had been antenuptial, there doubt that it could not have been revoked. But though postnuptial, less a contract intended to subserve the interests of the spouses and of an existing marriage. In a question with creditors a postnuptial ntract may not have the same power as an antenuptial marriage-contract. *miliam* I think that it has. This, as I think, was the opinion of ale and Lord Gifford in the case of *Low*. Marriage-contracts, whether or postnuptial, are entered into for the same purposes and ends, and ink, have the same legal effect, when the interest of third parties ved.

act with which we are dealing was entered into on the part of the e purpose of securing her own estate to herself and her children. ons of it are natural and reasonable. It was thereby intended to wife against herself, and to ensure that her estate, if she so willed it, end to her children. If she had remained absolute fiar of her estate, ght have fallen under the rule of *Ramsay*, 10 R. 120, on the ground annot be controlled in the use or possession of what is absolutely her it has been seen that in this case the wife has not a fee, but only a wer of testamentary disposition. She cannot, I am inclined to think, rriage-contract into which she entered for her own protection. But could, she cannot withdraw the benefit which she thereby conferred lren of the marriage if any should be born. It is true that none are at xistence. But however important this consideration may be as applic- ilateral deed, I think, for the reasons which I have already assigned, material in the case of a contract of marriage, even though postnuptial. olding, I am only following the authority of the case of *Low*.

Justice-Clerk and Lord Young concurred.

interlocutor was pronounced:—"Find that the first and second ties cannot revoke the deed of 4th and 5th July 1890: Therefore answer the first question in the negative; find it unnecessary answer the second question."

Macpherson & Mackay, W.S., Agents.

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Feb. 6, 1891.

Liquidator of Scottish Assurance Corporation v. Miller.

ADAM DAVIDSON SMITH (Liquidator of Scottish Assurance Corporation), Pursuer (Reclaimer).—*Asher—Lorimer.*

THOMAS L. M. MILLER, Defender (Respondent).—*Murray—A. S. D. Thomson.*

Company—Winding-up—Expenses of endeavour to form new company—Liquidator—Companies Act, 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 161.—By special resolutions of 10th June 1889 a limited company resolved to wind up voluntarily, and appointed a liquidator, with full powers under section 161 of the Companies Act 1862,* to accept shares or other like interests in any other joint stock company in payment or part payment for the company's assets, and appointed a committee to confer with him as to a proposed reconstruction or amalgamation scheme. The liquidator incurred considerable outlay in endeavouring to form a new company to take over the company's business. These endeavours proved unsuccessful. The funds of the company proved insufficient to pay all its debts, and on 15th March 1890 a creditor obtained an order placing the liquidation under the supervision of the Court, removing the liquidator, and appointing another in his place. The sanction of the Court to the resolution of 10th June was not applied for.

Held that the liquidator who had been removed was not entitled in accounting for his intromissions to credit for his outlay in endeavouring to form a new company.

Opinion (*per* Lord Trayner) that the outlay could not have been allowed even if it had fallen within the section, because the liquidation had been placed under supervision in less than a year after the resolution, and the sanction of the Court had not been obtained to the resolution.

2D DIVISION. Lord Kincairney. I.

ADAM DAVIDSON SMITH, C.A., liquidator in a voluntary liquidation under supervision of the Court of the Scottish Assurance Corporation Limited, raised an action against Thomas Leander Moyaart Miller, who had been voluntary liquidator of that company prior to the supervision order, for an accounting for his intromissions with the funds of the company.

The action was raised in the following circumstances. On 10th June 1889 the Scottish Assurance Corporation resolved to wind up voluntarily, and the defender, who had for a short time been manager, was appointed liquidator. He continued liquidator until 15th March 1890, when

* The Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 161, enacts—"Where any company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of the special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale, shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company, and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up. . . . No special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court."

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a petition by a creditor, pronounced an order continuing the liquidation under supervision of the Court, removing the de- om being voluntary liquidator, and appointing the pursuer volun- idator in his place.

efender on being called upon to account by the pursuer furnished inary statement" of his accounts as liquidator from 10th June 15th March 1890. The pursuer objected thereto. It was ulti- dmitted by minute that the question between the parties related cular item of £280, 19s. 7d. With regard to this sum it appeared minutes of the company that on 10th June 1889, when voluntary on was resolved upon, the defender was appointed voluntary r, with full powers under section 161 of the Companies Act, o accept shares or other like interests in any other joint stock , in payment or part payment of the business assets or property rporation, and that the remuneration of said liquidator for his e fixed at the rate per annum of his present salary, in addition t-of-pocket expenses." It was also resolved that if possible a f reconstruction or amalgamation should be carried through, and tee was appointed to confer with the liquidator in carrying out heme.

fender, with a view to carrying out the scheme, went to London, endeavoured to form a new company, to which the current f the company should be transferred. A meeting of the com- liquidation was held upon 16th September 1889, when the de- ought before the shareholders the question of guaranteeing some f the preliminary expenses to be incurred in floating the new The shareholders were unwilling to do this as a body, but some lers subscribed for the purpose. The defender requested the o empower him to return to London to resume his efforts to get company started. No further minute was passed, but the minute ng bore that it was the opinion of the meeting that the powers onferred covered this object. The negotiations for forming a new proved unsuccessful.

m of £280, 19s. 7d. was thus entered in the defender's account:— in London for eight months, with railway fares, connected with ing of new company, liquidator's out-of-pocket expenses, £265, Printing for above scheme, £15, 17s. 6d.

ursuer stated that "an examination of the company's affairs at losed to the defender and others that the liquidation was a credi- idation, and that the defender had no right to incur expenses in another company without the authority or concurrence of the "

rsuer pleaded;—(3) The defender is not entitled to credit for the in London incurred in endeavouring to float a new company, in he same are not legitimate expenses in the liquidation.

efender stated that in going to London and taking the measures ing a new company which were necessary there, he necessarily the expenses charged.

ord Ordinary (Kincairney), on 14th November 1890, repelled the third plea in law, and appointed parties to be heard *quoad* d granted leave to reclaim.*

INION.— . . . I was asked by the parties to decide the question by this [the pursuer's third] plea, and that on the assumption (1) that utions of 10th June 1889 are not challenged on the ground of infor- ut are to be taken as special resolutions of the corporation such as are

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The pursuer reclaimed, and argued;—The proceedings for which the defender sought to charge the expense against the company were not required to sanction procedure under the 161st section of the statute; (2) that the creditors of the corporation have not been paid in full; and (3) that the sum in question was wholly expended by the defender in an endeavour to carry out the above resolutions of the company, by floating or constituting a new company in order to make over to it the interests of the old.*

"I rather think that the question thus raised may be decided now, and that the parties may probably be able to avoid the expense of a proof.

"The sum claimed was an outlay made by the defender on behalf of the corporation, and it would, it must be admitted, be a very hard case if he were required to pay it himself.

"The argument of the pursuer was that the sum should be disallowed because section 161 was applicable only to the case of a liquidation where all the creditors had been paid, and not applicable to this case where the creditors had not been paid. The argument, therefore, was that the resolution to proceed under section 161 was *ultra vires*, and that, therefore, outlay by the liquidator in endeavouring to carry out that invalid resolution could not be allowed. It was pointed out that the section contained provisions to secure the interests of dissentient members, but none in reference to the interests of dissentient creditors.

"I am of opinion that this contention is ill founded. The section is expressed as applicable to all cases of voluntary winding up, and I find no warrant for restricting it to that very limited number of cases where all the debts of the company are paid. The powers in the section have apparently been frequently put into operation in England in liquidations where the debts had not been paid. Several such cases are referred to in Mr Buckley's note on section 161, and mention may be made in particular of the case of the *City and County Investment Company*, 19th November 1879, 13 Ch. Div. 47, where the point was, I think, decided, and where it was said that the remedy of a dissentient creditor was to take advantage of the provision in the last clause of the section, and by obtaining an order for winding up by the Court or a supervision order to make the validity of the resolution dependent on the sanction of the Court.

"The case of the *Wreck Recovery Company*, 15 Ch. Div. 363, referred to by the pursuer, raised a question under section 95, not section 161, and does not, in my opinion, support the pursuer's contention. I think, therefore, that the resolution in question was not *ultra vires*, on the ground that the debts of the company were unpaid.

"It was further contended that the 161st section contemplated the transfer of the assets to an existing company, and not a transfer to a company to be brought into existence for the purpose of taking over the assets. No authority for that proposition was quoted, and the section has not been so understood in the English Courts.

"In the *Imperial Mercantile Credit Association*, 1871, 12 Equity, 504, it was decided that the 161st section applied to a liquidation under supervision, and a resolution to transfer to a company to be formed for the purpose of taking the assets was supported.

"In the *Irrigation Company of France*, 1872, 6 Ch. 176, a resolution authorising a transfer to a French company, to be formed, was regarded as not *ultra vires*, and, although in that case irregular, capable of confirmation.

"In *Bird* v. *Bird's Patent Deodorising and Utilising Sewage Company*, 7th March 1874, 9 Ch. 358, an agreement to sell the assets of the company to an individual on certain special terms was held to be *ultra vires*, and not sanctioned by the 161st section.

"But in the case of *Hester & Company, Limited*, 4th August 1875, 44 L

* The parties subsequently admitted these points by joint minute.

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within section 161, and even if they were, they had not been sanctioned by the Court. A new company could not be promoted with the creditors' money, where the liquidation was a creditors' liquidation, without their consent. The creditors were said not to have interfered. But they were not bound to do so. They were entitled to suppose that the liquidation was being properly carried through, and were not bound to know that their money was being used to benefit the shareholders of the old company. Apart from that, the attempt had been unsuccessful. The principle upon which such expenses were allowed in any case was that the benefit derived from the formation of the new company could not be taken without taking also the detriment in the shape of the expense of promoting it. That principle did not apply to an abortive attempt. The cases cited by the Lord Ordinary shewed only what was not disputed—that the effects of the company in liquidation could be transferred either to a new company or to an already existing company. But they did not give any countenance to the defender's contention. Even if the defender's proceedings could be brought under section 161, they had not been sanctioned by the Court. In the case of the *Callao Bis. Company*[1] it was held that a resolution under the 161st section was binding on shareholders, but that the rights of creditors were reserved. The liquidation having within a year been put under the supervision of the Court, it was incumbent on the defender to shew that the resolution he appealed to had been sanctioned by the Court. But this had not been done.

Argued for the defender;—The expense claimed was incurred in a legitimate and *bona fide* endeavour to get the assets and business of the old company taken over by a new one. The creditors must have known that this attempt was being made, and that they would be bound by it if they took steps to prevent it. They would have got the benefit if the attempt had succeeded. The principle of implied mandate was applicable. The English cases shewed that it was quite consistent with section 161 that the company which took over the assets should be one formed for that very purpose. The creditors, if they disapproved of the defender's proceedings,

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1757, James, L. J., pointed out that in the case of *Bird* the sale was to individual, but that in the case of *Hester* the sale was to an agent for the pany to be formed, and was 'therefore within the terms of the section.' is an opinion of great weight, expressly opposed to the contention of the ner.

"I see no reason to question the correctness of the view taken in the English rts of this section, and therefore I think that the resolution in question ld not be regarded as *ultra vires*, on the ground that it may have contemted the formation of a new company, and that the defender, in endeavouring float a new company, was engaged in an attempt by which, had he sucded in it, the resolution of the company might have been validly carried effect.

"If, then, there be no other reason for disallowing this outlay, I think the on that it was an outlay expended in the endeavour to float a new company ot a sufficient reason for disallowing it. It was an outlay made in a legitite attempt to carry out the resolutions of the company.

"No other reasons were offered in support of the contention of the pursuer. was not suggested that the outlay should be disallowed because the defender's tempt had failed, nor that the resolutions were *ultra vires* for any other reasons an those which have been mentioned.

"I think, therefore, that the pursuer's third plea in law has not been supported, and is bad in law. I therefore repel it, and will hear the parties further, they wish it, on the effect of that judgment."

[1] *In re Callao Bis. Co.*, 1889, L. R., 42 Ch. Div. 169.

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should have earlier applied for a supervision order.[1] It was unfair to wait to see whether the defender's efforts in the interest of all should succeed. It was said that the resolution that the defender should endeavour to form a new company required the sanction of the Court. But that could be obtained even now that the question had been raised. It was an established doctrine that the Court would sanction an act done, though without authority, if, had such authority been applied for before the act was done, the authority would have been given.[2]

At advising,—

LORD JUSTICE-CLERK.—The Scottish Assurance Corporation, which was incorporated in 1888, seems not long thereafter to have got into financial difficulties. The defender, Mr Miller, was appointed voluntary liquidator. After the liquidation had proceeded to some extent an application was made for Mr Miller's removal, and eventually he was removed and another liquidator was appointed.

The question which is now before us is raised in an action by the new liquidator, Mr Smith, against Mr Miller for the purpose of having an accounting with him and obtaining decree for payment of the balance, if any, arising on his accounts. The point we have to decide is whether the expenses which Mr Miller incurred in endeavouring, in London, to form a new company to take over the business and the assets of the Scottish Assurance Corporation form a charge for which he is entitled to take credit in his accounting with Mr Smith. Both parties are agreed that that point falls to be determined according to the sound construction of the Companies Act, 1862, and that the only section which bears upon it is the 161st section.

It is important therefore to consider the exact terms of that section. It provides—(His Lordship here quoted the section, quoted *supra*, p. 496, note). It is plain from that clause that power is given to shareholders to carry out negotiations for the sale of assets of a company in liquidation and for the transference of its business to a new company. As to that, indeed, the parties are not in dispute. I do not think that it is important whether the company to which the property and assets are conveyed is an existing company or one which is then formed for the first time. The Lord Ordinary remarks that the resolution of the shareholders could not be *ultra vires* merely because it contemplated the formation of a new company, and that the fact that the outlay in question was expended in endeavouring to float a new company is not a reason for disallowing it. Now, while I think it immaterial whether the company which is to take over the assets of the company which is in voluntary liquidation is a new one or not, I think that that in no way settles the question whether the voluntary liquidator is entitled to spend funds in the promotion of and making efforts to form such new company. The cases cited in his Lordship's note are to the effect that it is quite competent to transfer the property and assets to a new company as much as to an existing one, but they do not at all establish or imply that it is legitimate for the liquidator to use the funds of the company in liquidation in endeavouring to form a new company. And I think there is nothing in section 161 to justify such an idea. It gives no hint that the shareholders are entitled to spend the remaining funds of their company—which

[1] *In re* City and County Investment Co., 1880, L. R., 13 Ch. Div. 475; *In re* Imperial Land Co. of Marseilles (Vining's case), 1870, L. R., 6 Ch. Ap. 96.

[2] Andrews v. Ewart's Trustees, May 27, 1885, 12 R. 1001, rev. June 29, 1885, 13 R. (H. L.) 69.

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are the funds for meeting the claims of creditors—in getting up a new one to take over their business and assets.

I am of opinion that the Lord Ordinary has erred, and that this claim by the defender to charge against the new liquidator, Mr Smith, the expense incurred in endeavouring to form a new company ought to be disallowed. I therefore move your Lordships to recall the interlocutor of the Lord Ordinary and sustain the pursuer's third plea in law.

LORD YOUNG.—I am sorry to say that I feel constrained to concur in the judgment proposed. I could willingly have come to the same result as the Lord Ordinary. I hope that those whose instructions the defender appears to have followed in good faith, and for the benefit of all concerned, will not suffer him to lose thereby. However that may be, I am constrained to conclude that the expense of an ineffectual attempt to establish a new company is not a legitimate charge in this liquidation. If it had been successful there is provision made for the expense attending it. But there was here only an ineffectual attempt to promote a new company, and I think that those who made it must provide the expense of it, and that it cannot be charged in the liquidation. I concur in thinking that the pursuer's third plea must be sustained.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I am of the same opinion. I think that there is an additional ground for holding as your Lordships propose to do that these expenses cannot be sustained as a charge in the defender's accounts. I think that if they were chargeable at all it could only be because of the resolution of the shareholders in the course of the voluntary liquidation. But that resolution fell and became of no effect in respect that the company went into liquidation under supervision within twelve months of its date, and that the Court was never asked to sanction or confirm it. We must therefore deal with the case as if without any resolution at all the liquidator in the voluntary liquidation had simply been requested to undertake the work for which he wishes to charge, and to incur the expenses which he incurred in performing it.

It was suggested in the defender's argument that if the incurring of these expenses is a thing which the Court, if asked, would have sanctioned, our sanction, if we now approved, might be held as having been formerly given. But I doubt whether such a principle is applicable to the case, or if by any *post facto* approval of ours we could validate the charge which the defender seeks to make.

Apart from that I am not prepared to say that the Court, if asked at the proper time, would have given its sanction to the resolution as it stands.

I therefore agree that the interlocutor of the Lord Ordinary must be recalled, and that the pursuer's third plea in law must be sustained.

THE COURT recalled the interlocutor of the Lord Ordinary, sustained the pursuer's third plea in law, and gave decree for the sum of £280, 19s. 7d.

A. C. D. VERT, S.S.C.—A. B. CARTWRIGHT WOOD, W.S.—Agents.

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Feb. 6, 1891. M'Donald v. Mackenzie.

JAMES M'DONALD (Inspector of Dumbarton), Pursuer (Respondent).—*Comrie Thomson—W. Campbell.*

WILLIAM FRASER MACKENZIE (Inspector of Old Kilpatrick), Defender (Appellant).—*Cheyne—J. A. Reid.*

Sheriff—Jurisdiction—Proof of irregular marriage incidental to civil action.—In an ordinary civil action it is competent for a Sheriff to decide incidentally, for the purposes of the action, whether two persons, not parties to the action, have been irregularly married.

Poor—Settlement—Deserted wife of person having no settlement in Scotland.—A widow, who had at one time acquired by her marriage a derivative residential settlement in the parish of D. and had not lost it by absence, obtained parochial relief in that parish. In an action of relief raised by D. against K., the parish of her birth, the pursuer averred that the pauper had lost her derivative settlement in D. by an irregular marriage *per verba de presenti* with an Englishman who had no settlement in Scotland, that she had been deserted by him, and that she was therefore chargeable to K. as her parish of birth. It was proved that she had gone through an irregular marriage *per verba de presenti* with a person having no settlement in Scotland, and that subsequently she had left him owing to his carrying on improper intercourse with another woman, and further that he denied that he had ever married her. *Held* (1) that it was competent for the Sheriff to decide, for the purposes of the action, the question as to the constitution of the irregular marriage; (2) that that marriage being proved, the derivative settlement in D. was lost; (3) that the circumstances of the separation and the denial by the husband that the irregular marriage had been constituted were equivalent to desertion by him; and therefore (4) that the pauper, as the deserted wife of a person having no settlement in Scotland was chargeable to K., as the parish of her birth.

2D DIVISION. Sheriff of Stirling and Dumbarton. I.

ON 10th September 1889 Elizabeth M'Phedran or Jenkins or White was found destitute in Dumbuck Wood, in the parish of Old Kilpatrick. She was conveyed by the police to Dumbarton Poorhouse, in the parish of Dumbarton, as the nearest place of succour, and was admitted there. She was then, and continued to be, a proper object of parochial relief.

In May 1890 the inspector of Dumbarton raised against the inspector of Old Kilpatrick an action for payment of advances made and relief of all advances to be made on the pauper's behalf.

The grounds of the alleged liability of Old Kilpatrick were (1) that the pauper was born in Old Kilpatrick, and had no other settlement than that of birth; (2) that she had been found destitute in Old Kilpatrick.

The inspector of Old Kilpatrick admitted that the pauper was born in that parish, but alleged that she had a settlement in Dumbarton at the date of chargeability, and, at all events, had not retained her birth settlement in the circumstances of the case.

It was admitted that the pauper was married to the late Joseph Jenkins who was chief-constable of Dumbarton, and that for many years she resided in that parish with him. Jenkins died in December 1885 at Coldingham, Berwickshire, to which he had removed (after resigning his office) in the same year.

The pursuer stated that the pauper contracted at Flemington Toll Berwickshire, on 24th January 1887, an irregular marriage *per verba de presenti* with William White, a travelling basketmaker, or otherwise that she and White were habit and repute married, and resided as husband and wife at Coldingham and at Chirnside for several months after that date; that White was born in England, had no fixed residence, and had acquired no settlement in Scotland, and "has deserted" the pauper "who was born

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rish of Old Kilpatrick, and her settlement is accordingly in that eing the parish of her birth."

efender admitted that White was born in England. He denied ed marriage between White and the pauper.

ted this preliminary plea, which the Sheriff-substitute (Gebbie)

"The present action being in effect a declarator of marriage is the jurisdiction of the Sheriff Court."

e merits he pleaded, *inter alia*;—(1) The applications for relief by or on behalf of pauper having been first made to pur- was the proper officer to grant relief, and has no special recourse defender apart from establishing the pauper's settlement in 's parish. (2) The pauper having a derivative residential settle- pursuer's parish, the pursuer has no recourse against defender. ursuer's statements of the pauper contracting an irregular mar- h William White, and of habit and repute marriage, and cohabita- g unfounded in fact, the defender is entitled to decree of absolvi- expenses.

was led. It appeared that after the death of Jenkins in 1885 er, his widow, fell into drunken habits. White was at that ng in the neighbourhood, and an illicit intercourse took place him and the pauper about the end of 1886 and the beginning of On 24th January 1887 they went to Berwick in company with a nd sister of White. At Berwick they sent for a man named , who was in the custom of performing irregular marriages on ish side of the Border, and with him and another man the party an inn at Flemington Toll in Berwickshire, where Ferguson d an irregular marriage by reading over part of the marriage rom the Church of England Prayer Book, and White and the accepted each other as husband and wife. The defender's the proof was that there was no serious intention to marry, the proceedings of the 24th January were simply a mock , which a party of drunken people had joined in as a jest. w was supported by the evidence of White, who being called ness for the defender deponed that he was never married, and as well as the rest of the party, was drunk on the occasion in

the 24th January White and the pauper lived together for some But within a very short time after 24th January White into the house a cousin of his, a woman named Kennedy, with e continued thereafter to carry on improper intercourse. Most oney which had belonged to the pauper was expended by White. October 1887, apparently in consequence of the continued relations between White and Kennedy, the pauper left White in return to Dumbarton. She left him with his knowledge and Thereafter, and up till the date of the action, he continued to with Kennedy. The pauper lodged in Dumbarton for about two She failed to get employment, and the remainder of her money exhausted, so that she fell into great poverty. Eventually she by the woman with whom she lodged that she must leave, and ortly after that she was, on 10th September 1889, found lying buck Wood, which, though in Old Kilpatrick, is close to the Dumbarton. She had taken poison with the object of killing

e was not a party to the action. He was discovered to be living hire with the woman Kennedy, and was called by the defender ness as already stated.

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On 18th October 1890 the Sheriff (Gebbie) pronounced this interlocutor (after findings in fact to the effect before stated):—"Finds that after the death of Jenkins the pauper, about 24th January 1887, entered into an irregular marriage *per verba de presenti* with William White, a travelling basketmaker, at Flemington Inn, in the county of Berwick, in Scotland; that William White was born in England, and has not, so far as shewn, acquired any settlement in Scotland, and that the pauper and White continued to cohabit as husband and wife down to the end of September or beginning of October 1887, when she left him and returned to Dumbarton, where she resided until she was discovered in Dumbuck Wood—at least it is not proved she had abandoned her residence in Dumbarton prior thereto; and that the pauper was born in Old Kilpatrick, the defender's parish: Finds in law that the pauper falls to be maintained by the parish of her birth: Therefore decerns against the defender as prayed for."

Old Kilpatrick appealed to the Court of Session, and argued;—(1) The alleged marriage could not competently be proved. White was no party to the action, and it was an action in a Sheriff Court. It was incompetent for the Sheriff to determine such a question. Assuming the competency of the inquiry, marriage was not proved. The conduct of the parties before and at the time of the alleged ceremony, and the conduct of White ever since, shewed that there was no real intention to marry. If then there was no marriage, the pauper was chargeable to Dumbarton, in which, through her husband Jenkins, she had a derivative settlement. But even if there was a marriage there was no desertion. The conduct of White (apart from the supposed adultery with Kennedy) was not cruel to the pauper. Nor did he leave her. She left him voluntarily. (3) Old Kilpatrick could not be liable as the settlement of birth, if there was no desertion and merely because White had no Scottish settlement. In this view, Dumbarton as the parish which in fact gave relief had no recourse on another parish.[1] The parish which gave relief was entitled under sec. 71 of the Poor-Law Act, 1845,* to recover the sum expended "from any parish . . . . . to which he may be ultimately found to belong, or from his parents or other persons who may be legally bound to maintain him," but it was its duty to discover such parish or such person. If then Dumbarton was right in maintaining that a marriage was proved, it lay on Dumbarton to oblige White to maintain his wife.

Argued for Dumbarton;—(1) The marriage could competently be proved incidentally.[2] Any other rule would be very inconvenient. On the evidence the marriage was proved. (2) The desertion was also proved. It was shewn that White refused to maintain the pauper, because he denied that she was his wife. The pauper could not live with him in consequence of his conduct with another woman. (3) It was not the duty of Dumbarton to oblige White to support his wife. It need only go to the parish of settlement, whose agent it was in giving relief,[3] and fix the liability there, leaving that parish to work out its claim against any individual who might be legally liable. If there was a marriage and the wife was deserted, the wife's birth parish was the parish of settlement.

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[1] M'Crorie v. Cowan, March 7, 1862, 24 D. 723, 34 Scot. Jur. 365; Murray March 20, 1867, 9 P. L. M. 401.

* 8 and 9 Vict. cap. 83.

[2] Wright v. Sharp, Jan. 16, 1880, 7 R. 460.

[3] Wallace v. Turnbull, 10 Macph. 675, 44 Scot. Jur. 373; Austin v. Shenn Oct. 30, 1874, 2 R. 68.

dvising,—

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YOUNG.—This question relates to the settlement of a pauper—a woman now said to be somewhat imbecile. She was once the wife of a Mr the chief-constable of Dumbartonshire. She lived with him in Dumill 1885 when he retired, and they went to live in Berwickshire. In e year he died. She was, or became, of dissipated habits, and she intimate with a travelling basketmaker named White. After living n for a short time in illicit intercourse, apparently, she is said to have him. Their cohabitation subsequently was very short, and in 1887 arated, he having formed illicit relations with another woman. After arated she went to Dumbarton, where she had spent her former married he was then impecunious, and indeed it appears that White's object in g her, if he did so, was to get his hands upon her money, and that, having it, he did not desire to cohabit with her any more. She returned poverty to Dumbarton. In the autumn of 1889, about two years after rn, she was unable to pay the rent of her lodging, and the landlady to let her remain. She seems to have sought to get employment, but dissipated habits she did not obtain employment, and in the month of er 1889 she was found lying helpless in a plantation near Dumbarton, ies in the adjacent parish of Old Kilpatrick, which parish happens at in which she was born. She had attempted to commit suicide by oison. Those who found her very properly took her to Dumbarton to ed and attended to. As she was destitute, and it was necessary that ld live by alms, the question arose, What is her settlement? *Prima* d assuming her to be still the widow of the chief-constable of Dumand not to have married again, Dumbarton was her settlement, a ve settlement. Admittedly, if her settlement, it had not been lost nce, for the period of absence from Dumbarton was only from 1885

he parochial authorities of Dumbarton considered that this derivative nt derived through her marriage to the chief-constable had been lost by quent marriage to White, and therefore that another parish must be or to which she was chargeable. Looking for such a parish they ascerhat Old Kilpatrick was her parish of birth, and on that ground this vas raised against Old Kilpatrick. That parish disputes the alleged with White, by which the *prima facie* derivative settlement in Dums said to be destroyed. That has led to the issue being raised whether s any real marriage with White. On that issue proof has been led, and riff has held that the marriage is established, and therefore that the ve settlement in Dumbarton is destroyed. White, the alleged husband, disappeared, but before the proof it was discovered that he was residing carrying on his trade as a basketmaker. He was examined as a witHe denied the marriage, and says he never married the woman, and that lations were illicit. The parish of Old Kilpatrick maintains that if rton has proved that White was the pauper's husband, it is for Dumthe relieving parish, to proceed against White to force him to maintain ile Dumbarton maintains that it is not the parish of settlement, and if ried White (who has no settlement in Scotland), she must be supported birth parish, because he has deserted her,—that is, in my view, because

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he is refusing to maintain her, but in any view of desertion, because he has in fact deserted her.

Now, upon the evidence, I am of opinion that the marriage is proved. I cannot find any good reason for differing upon that point from the Sheriff. I have felt some misgiving as to whether the evidence to establish such a marriage ought to have been taken in an action to which White is not a party, and in which therefore the marriage cannot be found proved against him, or for any purpose but that of this individual case. But these scruples have disappeared in consequence of the consideration that for the purposes of this case the evidence may be taken as between those parties alone who are interested in this case. I have illustrated the matter to myself by considering the case of an admission by Old Kilpatrick. If that parish admitted that the pauper was married to White that would be sufficient, and would be conclusive between the parishes although the marriage would not be established against White, and so the parishes having joined issue on the matter, and having led proof as to it, we must decide upon it for the purposes of the case.

I am prepared to affirm that there was a marriage with White, and also that White has no settlement in Scotland and has deserted the pauper. I think that a man who has married a woman, and who then denies that the woman is his wife, and says that the relation between them was one of illicit intercourse, and that he has nothing to do with her maintenance, is in desertion.

I am therefore for affirming the desertion as well as the marriage, and the result is that the parish of Dumbarton is not, and that the parish of Old Kilpatrick is, the parish of settlement.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I agree in the result at which your Lordships have arrived. The primary question is whether there was a marriage between the pauper and White, and I think the evidence establishes that such a marriage took place.

It is quite true that our finding that such a marriage is established would have no effect in a question with White, who is not a party to this action. The evidence of marriage was led in this case as incidental to the question of the defender's liability, and it was so led in accordance with the practice of this Court. I do not doubt the competency or propriety of leading such evidence for such a purpose, and in questions like the present the balance of convenience is in favour of such a course, rather than in saying that a separate declarator of marriage should be brought against the alleged husband.

I have also come to the conclusion, although with difficulty, that the pauper has been deserted by her husband. Taking the pauper therefore as a deserted wife whose husband has no settlement in Scotland, the liability for her support falls upon the parish of her own birth, as the Sheriff-substitute has found.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute appealed against: Find that the pauper, after the death of her first husband, Joseph Jenkins, was married to William White, a travelling basketmaker, at Flemington Inn Berwickshire, on or about 24th January 1887: Find that the said William White is a native of England, and has no settlement in Scotland: Find that he deserted his wife, and that she, having fallen into destitution, became a proper object of parochial relief

and has been maintained by the parish of Dumbarton: Find that the pauper has no settlement in the parish of Dumbarton, but that she has a settlement in the parish of Old Kilpatrick, where she was born: . . . Find in law that the pauper falls to be maintained by the parish of Old Kilpatrick: Therefore decern against the defender in terms of the conclusions of the petition: Find the pursuer entitled to expenses," &c.

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W. S. HARRIS, L.A.—WILLIAM OFFICER, S.S.C.—Agents.

MARY M'DADE OR M'COLL AND OTHERS, Pursuers (Appellants).—*J. Wilson.*
BLACK & EADIE, Defenders (Respondents).—*Ure—Salvesen.*

No. 109.

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M'Coll v. Black & Eadie.

Reparation—Master and Servant—Employers Liability Act, 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1.—In an action of damages against a firm of contractors by the representatives of a labourer who had been killed in the course of his employment, the pursuers averred that the deceased had, along with other labourers, and "under instructions and superintendence of one of the defenders' foremen," been engaged in working in or about a large drain, that the said foreman was a person whose orders the deceased was bound to obey, and for whom the defenders were responsible under the Employers Liability Act, 1880; that the drain was from 7 to 10 feet in depth, and that while the deceased was working at the foot of it, ten feet of the side fell in, and injured him so that he died; that the accident was due to the fault of the defenders or of their foreman in causing the deceased to work in the drain without first sufficiently propping its sides with wood; that the duty of seeing that the sides of the drain were sufficiently propped lay with the defenders or their foreman and not with the deceased or his fellow-workmen, and that the deceased relied, and was entitled to rely, on the defenders or their foreman attending to this duty. The pursuer pleaded the common law and sec. 1, subsecs. 1, 2, and 3 of the Employers Liability Act, 1880.*

Held that the pursuer was entitled to an issue,—Lord Young *diss.* holding (1) that the pursuer had not set forth a relevant case at common law, the foreman being a fellow-workman of the deceased; (2) that there was no relevant case under sec. 1, subsec. 2 of the Act, as it was not stated that the foreman had the superintendence of the work; and (3) that there was no relevant case under subsec. 3, as it was not stated that the deceased was executing any particular order of the foreman when he met with the accident.

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* The Employers Liability Act, 1880 (43 and 44 Vict. c. 42), sec. 1, enacts,—"Where after the commencement of this Act personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer, or (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him † whilst in the exercise of such superintendence, or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed . . . the workman, or in case the injury results in death, the legal personal representatives of the workman and any persons entitled in case of death shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

† By section 8 the expression "'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labour."

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2D DIVISION.
Sheriff of Renfrew and Bute.

I.

MARY M'DADE OR M'COLL AND OTHERS, the widow and children of James M'Coll, labourer, Paisley, raised in the Sheriff Court at Paisley an action against Black & Eadie, contractors there, to recover damages for the death of M'Coll through the alleged fault of the defenders.

The pursuers averred;—(Cond. 3) "That on 7th October 1890 the deceased, along with a number of other labourers, and under instruction and superintendence of one of the defenders' foremen named Philip Molloy, was engaged working in or about a large drain which was being made for the purpose of taking away the water from the cemetery. The said Philip Molloy was a person whose orders the deceased was bound to obey, and for whom the defenders are responsible under the Employers' Liability Act, 1880." (Cond. 4) "Said drain would be about 60 to 100 yards in length, and would vary from 7 to 10 feet in depth. The breadth of the top of the drain would be about 2 or 3 feet, and of the bottom about 1 foot, there being scarcely room to turn at the bottom." (Cond. 5) "Shortly after three o'clock on the afternoon of said date, while the said James M'Coll was working at the foot of the drain laying 9 inch fire-clay pipes, part of the sides of the drain, extending to about 10 feet in length, suddenly gave way, falling in upon him and almost burying him. . . ." (Cond. 6) " . . . . The part of the drain at which he was working in at the time would be about 10 feet in depth." (Cond. 7) "Drains of the same description should be propped all along the sides with wood, unless where the earth is very firm, and then it may be sufficient to prop the sides every 2 or 3 feet, and it is absolutely necessary that they should be propped all along, or at all events, every 2 or 3 feet, in order to make them safe and secure for anyone to work in." (Cond. 8) "The drain in which the said James M'Coll was working was insufficiently propped, being only done here and there. Notwithstanding that the bit that gave way was about 10 feet in length, yet there was none of it propped, and there was no propping even within a few feet of either side of the bit that gave way. The earth which the sides of the drain were composed of was not very firm, and consequently should have been propped all along the sides, or at all events, spaces of not more than a foot or two should have been left unpropped. Had this been done, the sides of the drain never would have fallen in, and consequently the accident never would have occurred. . . ." (Cond. 12) "The accident, which resulted in the death of the said James M'Coll, was caused through the fault or negligence of the defenders, or of their foreman, for whom they are responsible under the Employers Liability Act, 1880, in causing the deceased to work in said drain without first sufficiently propping the sides of the drain with wood, so as to make it safe and secure for anyone to work in. To omit doing this was an unskilful and unworkmanlike proceeding, and exhibited gross and culpable negligence on the part of the defenders, or of their foreman, for whom they are responsible as aforesaid."

The pursuers pleaded;—(1) The pursuers having suffered loss, injury and damage through the fault and negligence of the defenders, or of those for whom they are responsible, are entitled to reparation therefor. Or otherwise, the death of the said James M'Coll having resulted from injuries sustained by him when in the employment of the defenders as a workman through the fault and negligence of the defenders, or of their foreman, for whom they are responsible, the pursuers are entitled to reparation therefor under section 1, subsections 1, 2, and 3, of the Employers' Liability Act, 1880.

The defenders pleaded;—(1) The pursuers' statements are not relevant or sufficient to support the conclusions of the summons. (3) *Esto* that the drain was not shored up, or not sufficiently shored up, the deceased having

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wledge thereof, worked in the said drain, the defenders are not the action should be dismissed.

eriff-substitute (Cowan) having allowed a proof, the pursuers or jury trial, and proposed an issue.

for the defenders;—The action was irrelevant. It was not he deceased did not know of the alleged lack of propping, or d asked for further props.[1] The case was in contrast to *Pollock*[2] where it appeared that the employer had not provided skilled attend to a dangerous piece of work in sloping an embankment.

for the pursuers;—It was not necessary to state on record that ed was unaware of the danger.[3] The deceased had no duty to e drain was propped. It was, as they averred, a large and deep required that persons of skill should see it rightly sloped and A labourer such as the deceased had no such duty. The case was in point. At all events, the pursuers had a relevant case Employers Liability Act, sec. 1. The deceased was under the foreman, whose business it was to see that the work was safe, e foreman was careless in that matter the statute made the responsible.

rgument the pursuers obtained leave to add to the condescen- 12) the following statement, viz.:—"The duty of seeing that f the drain were sufficiently propped lay with the defenders or foreman, and not with the deceased or his fellow-workmen, and sed relied, and was entitled to rely, on the defenders or their an attending to his safety by sufficiently propping the sides of rain."

sing,—

STICE-CLERK.—The circumstances in which this question of relevancy r as set forth in the record, are these: The deceased man M'Coll was th certain others upon a piece of work—digging a drain in a cemetery. was of considerable depth,—seven to ten feet,—and the allegation is doing his work of laying pipes in the bottom of this deep drain the n and buried him. Now, it is also alleged that the drain was of such on that it required to be propped, and that though it was propped to xtent it was not sufficiently propped, and that through the fault of ers or of their foreman.

stion arises in such a case, whether the workmen in such a drain are eld to know what they are about, and should look after themselves. commends itself to common sense, but there is a difficulty in holding scendence irrelevant, seeing that it presents to my mind an exact circumstances in which the Court has held in past years that an issue llowed. These cases refer to drains, embankments, and numerous nat sort giving way and falling in. It has been held in the past that must go to a jury, and I am not prepared to depart from that course ther, when we get to a drain of the depth of the one here, different nay arise from those in the case of a drain two or three feet deep, erious injury could happen, and where there is no likelihood of the

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1s v. London and St Katherine's Docks Co., 1884, L. R., 13 Q. B. D.
rnan v. White & Bee, Jan. 25, 1890, 17 R. 368.
x v. Cassidy, Feb. 26, 1870, 8 Macph. 615, 42 Scot. Jur. 303; *cf.* King, Oct. 27, 1886, 14 R. 8.
d v. Caledonian Railway Co., Oct. 31, 1885, 23 S. L. R. 68.

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sides falling in. When you come to a drain of seven to ten feet you at on come to circumstances where a certain amount of skill is necessary—for exampl skill to determine the proper width at the top, and how such high sides are t be supported. I think the question relating to such matters is one for a jur The pursuer can only make general averments. It will depend upon the speci circumstances appearing at the trial whether the danger is to be regarded as o observable by any ordinary workman as well as by anyone else, and in guardin against which the workman should have relied upon his own skill, or wheth it was such that he was entitled to rely upon the care of the master or his fo man, the question as regards the latter most probably turning upon the appli ability of the Employers Liability Act.

Here the averment is that there was propping, but not at sufficiently sho intervals, and that depends upon the exact circumstances of the case and upo the evidence as to the skill required in the particular case. In this case we a dealing with a set of averments such as have often been made the basis of a issue in the past. I am not for altering the practice, and accordingly I think we should approve of the issue proposed.

LORD YOUNG.—I am of a different opinion. I do not think the case w argued as relevant at common law, nor indeed arguable, for if any proposition in law is well established it is this—that no master is at common law liable t one servant for the fault of another servant, whosoever that other servant may be

It was held in this Court and in the House of Lords in the case of *Wilson v. Merry & Cuninghame* that a master is not liable to an employee for the fau of another in his employment, even if that other be of a different and very hig class. The general rule is that by the contract of service the servant takes upo himself the risk of the negligence of his fellow-servants, and that the master i only responsible for his own fault. Now, is there any fault imputed here t the master? None whatever. It is said there was fault on the part of the fo man, but it is not said that the master did not appoint a proper foreman, and master is not responsible at common law for his foreman not doing somethi which he ought to have done.

But under the statute a question may arise, and that is the question whi was really argued to us. Now, there are two subdivisions of the first clause the Act of 1880 which may here be referred to—the second and the third The second provides for injury done to workmen "by reason of the negligen of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence," and the expr sion "person who has superintendence entrusted to him" is defined in the inte pretation clause. Is there any averment in this record to bring the case under th subsection. None whatever. There is no case here of superintendence—n suggestion of there being any person entrusted with such a duty. Therefo the case cannot be held as relevant under that clause. But the third subsec tion deals with injuries sustained "by reason of the negligence of any perso in the service of the employer to whose orders or directions the workman at th time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed." Is there any averment here to bring the case within that category? Again I say none whatever. The nearest approach to it—though it stops a long way off—is the third article of the condescendence. There it is stated that the deceased was working under the instruc

superintendence of one of the defenders' foremen, and that the said was a person whose orders the deceased was bound to obey. I suppose ractors have got a foreman, and in the sense of the language used here orkmen of such contractors work under a foreman. According to the n of the pursuer, as that contention strikes me, wherever there is a fore- there is liability on the part of the master. That view is extravagant. ot the case provided for by the statute, which contemplates a particular en by a foreman, and injury resulting from a workman's having con- o such particular order. It is not said here that there was any par- der given. It is only said that the deceased was working in a drain had dug down to a certain depth, and that he and all the others in that work were acting under a foreman. No order is said to have en. To whose order did the pursuer conform and in conforming was It would be altogether a misapplication of ingenuity to try to argue, words of the statute before one, the case of workmen working under a in a drain to the safe state of which they should *prima facie* have them- ended. Even supposing the foreman had directly superintended this —which is not said—I think that the case would not have been relevant e Act unless it had been alleged that a special order was given. I am f opinion that the case is irrelevant at common law—I did not think disputed—and also that it is as irrelevant a case under the statute as could igured. There have been previous cases of embankments coming down commonly, no doubt, upon strangers—but I know of no case which has tained as relevant where it was alleged that the embankment came down the fault of the foreman.

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RUTHERFURD CLARK.—I think the pursuers should be allowed an issue. I y they have any case at common law, but they may prevail under the Act.

TRAYNER, not having heard the argument, gave no opinion.

E COURT approved the following issue:—"Whether, on or about 7th October 1890, James M'Coll, while working in the employ- ment of the defenders at or near Hawkhead Cemetery, Paisley, was so seriously injured that he died in the Paisley Infirmary on the 30th of October from the effect of the injuries sustained on the before-mentioned date, which injuries were caused through the fault of the defenders, or of those for whom they are responsible, to the loss, injury, and damage of the pursuers?"

. B. CARTWRIGHT WOOD, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

No. 110.

ND POTTER & COMPANY, Complainers (Respondents).—*Murray—Dickson.*

E BRAÇO DE PRATA PRINTING COMPANY, LIMITED, Respondents (Reclaimers).—*D.-F. Balfour—C. J. Guthrie—Sir Ludovic Grant.*

Feb. 6, 1891. Potter & Co. v. Braço de Prata Printing Co., Limited.

right—Copyright of design—Patents, Designs, and Trade-Marks Act, 6 and 47 Vict. c. 57)—Extraterritorial effect—Infringement.—Held that yright of design, which is protected under the Patents, Designs, and Marks Act, 1883, has no extraterritorial effect, and that the manufacture by British subjects in a foreign country of goods, the design of which cted under the statute, is not an infringement of that copyright.

action for infringement of a copyright of design the complainer alleged goods—to which the design in question had been applied—had been for sale in Portugal and elsewhere abroad, but it was not stated on

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record that the design had been applied to the goods in this country, or that the goods had been sold here. *Held* that there was no relevant averment of infringement, and action *dismissed* accordingly.

Messrs Edmund Potter & Company, calico printers, Manchester, were proprietors of certain designs, which they had registered under the Patents Designs, and Trade-Marks Act, 1883, as applicable to articles in class 13.

As such proprietors they presented a note of suspension and interdict against the Braço de Prata Printing Company, Limited, having its registered office in Glasgow, and also carrying on the business of calico printing and dyeing near Lisbon, and prayed the Court to interdict the respondents from infringing their rights in sixteen such designs, which they enumerated, and further "from applying or causing to be applied the said registered designs, or any of them, or any fraudulent or obvious imitation of them, or any of them, to goods in the foresaid class 13 for the purposes of sale, and from selling, publishing, or exposing for sale any article in the foresaid class to which such designs, or any one or more of them, or any fraudulent or obvious imitation thereof, shall have been applied, other than goods manufactured by the complainers, and that during the existence of the complainers' copyright of said designs."

They averred;—(Stat. 3) "The complainers have recently ascertained, and they aver, that . . . the respondents have applied, or caused to be applied, to goods in the said class 13, the said registered designs, or fraudulent or colourable imitations thereof, and have manufactured such goods bearing said designs, and have exposed for sale and sold in Lisbon and other markets in Portugal, Brazil, and elsewhere goods in the said class 13, to which the said registered designs, or fraudulent or obvious imitations thereof, have been applied, knowing that the same have been applied without the consent of the complainers. The complainers produce herewith a sheet containing a specimen of each of the said sixteen registered designs and sixteen specimens of the goods which the respondents have printed, or caused to be printed, and sold, in infringement of the complainers' rights as proprietors of these designs. The said goods, bearing the complainers' said designs so wrongfully and illegally applied, have been publicly offered for sale, and sold, and are now being sold by the respondents by themselves directly, and through William Graham junior & Company (who were merchants in Glasgow carrying on business at the same address as the registered office of the respondents) in Portugal, Brazil, and elsewhere; and the respondents have also carried on a considerable trade in this country for the sale and disposal of goods to which the complainers' said designs have been illegally and wrongfully applied as aforesaid. In this way the respondents undersell the complainers, so that there has been an almost total stoppage of orders from the Portuguese market, and from other markets supplied therefrom, for the complainers' goods, printed with their said sixteen registered designs, which, prior to the infringement thereof by the respondents, sold well in Portugal, Brazil, and other markets supplied from Portugal. In so using the said designs both the respondents and Messrs William Graham junior & Company well knew that they were using the complainers' designs and that the same were registered. The respondents, in order to enable them to copy the complainers' goods, ordered, either by themselves or through Messrs William Graham junior & Company, or through Messrs William Graham & Company, the grey cloth required, and had the same manufactured and bleached in this country, and also had the necessary rollers engraved with the complainers' designs in this country, this being also ordered either by the respondents themselves or through one or other of said firms of the Grahams for the respondents, in breach of the complainers' rights in said designs, the said rollers being used by the respondents

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the purpose of printing the said cloth with the complainers' said
spondents admitted that they had printed what were in fact
the complainers' designs, although they did not know that they
ies, but stated that they had done so only in their works
on, and in no place or country subject to the operation of the
Designs, and Trade-Marks Act of 1883. They further stated,—
ents deny the right of the complainers to seek the present inter-
reserve their whole pleas. But as they wish to avoid litigation
complainers in a matter of this nature, the respondents hereby,
ut prejudice to any of their pleas, undertake that neither they,
s William Graham junior & Company will print, or in any way
e designs complained of."
nplainers pleaded;—The respondents having infringed the com-
registered designs as condescended on, the complainers are
interdict as craved, with expenses.
pondents pleaded, *inter alia*;—(1) The complainers' averments
ant, and insufficient to support the prayer of the note. (2) The
t to be dismissed, in view of the undertaking not to print nor
ay utilise the designs complained of. (3) In respect that the
ns are printed and applied to the goods only in Portugal, and
themselves sold only in Portugal, the respondents are entitled
or.
te was passed on caution, interim interdict was granted, and
a record having been made up, the Lord Ordinary (Kyllachy)
proof.
pondents reclaimed, and argued that, in respect of their second
w, no proof ought to have been allowed, and the action ought to
dismissed.
he case had been argued and taken to avizandum, the Court
that they desired to hear argument upon the respondents' first

for the respondents;—(1) The Patents, Designs, and Trade-
t of 1883 did not extend to acts done in Portugal, and it was
d that it so extended. There was a presumption that Acts of
h Parliament had only a territorial effect. As regarded patents,
ecially provided in the Act (sec. 16) that they should have
he United Kingdom and in the Isle of Man, their further opera-
g therefore impliedly excluded. This exclusion was intel-
m the consideration that in foreign countries there would be no
ascertaining what the rights of a patentee in this country were.
consideration applied to the case of designs. If the provisions
these extended to foreign countries, the result would be that
aders in these countries would labour under disabilities as com-
h the traders of other nationalities. It was said that but for
age of the 3d section of the Copyright of Designs Act, 1842 (5
t. c. 100), restricting the right of the proprietor of designs to the
ingdom of Great Britain and Ireland, that statute would have
extraterritorial effect, and that these restrictive words were
by the later Act of 1861 (24 and 25 Vict. cap. 73). But the
on was that in the earlier Act of 1842 the piracy which was
was "the doing or causing to be done" certain acts. The words
to be done or applied" were omitted in the Act of 1883, but
serted under the 7th section of the Patents, Designs, and Trade-
ct, 1888, the reason being that they were appropriate to the
gy of a penal enactment. It was clear that there was no inten-

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tion to deal differently with foreigners and with subjects. The legal wrong and the remedy for it were dealt with in the 58th section of the Act of 1883. A "Court of competent jurisdiction" could only refer to a Court in the United Kingdom. There was nothing in the Act to distinguish the case of a British subject from that of a foreigner, and the inference was that the Legislature intended to put both on the same footing. In regard therefore to anything done outside of British territory which was the case here, there was nothing to indicate that the foreigner and the British subject were to be treated differently. Further, provision was made by the 103d section of the Act of 1883 for giving the Act an extraterritorial effect through an international arrangement for the purpose being made by the Government.[1] (2) But at the same time, in order to entitle to the remedy for an act done elsewhere, the act must be a wrong both in the country where it was done and in the country where the action was brought. There must be a concurrence of illegality both according to the *lex fori* and according to the *lex loci delicti commissi*. This design was not protected by the law of Portugal, and it was not alleged that any offence had been committed by the law of Portugal. The cases of *M'Larty* and *Scott*[3] which had been cited on the other side really illustrated this doctrine, because there what was complained of was a wrong in both countries,—but there was a difference as to the remedy in the one country and in the other. In the case of *Witherington*[4] there was nothing in the judgment of the Court against the view now contended for,—because it was admitted here that the application of the designs to the goods had not taken place in this country. No relevant case has been set out on record, and the action ought therefore to be dismissed. (3) Interdict should be refused, as the respondents offered on record not to repeat the acts complained of.

Argued for the complainers;—(1) The rights given to the proprietor of a registered design by the Act of 1883 were expressed in absolute terms and any infringement would be prevented by the Court,—where two of Her Majesty's subjects were concerned. The infringement here was committed in Great Britain. Had it not been for the restrictive provision contained in the 3d section of the Act, 5 and 6 Vict. c. 100, that Act would have been of universal application. The phraseology of the 1st section of the Act 24 and 25 Vict. c. 73, where there was no such limitation, led to that result. Sections 47-61 of the Act of 1883 dealt with the copyright of designs. It was admitted that in regard to patents which were dealt with in a previous portion of that Act, the Act had extraterritorial operation. If it had been intended that the same rule should apply to designs, the Act would have said so, but there was no such provision. The question was made more clear when the provision of the 7th section of the Act of 1888 (51 and 52 Vict. cap. 50), reading into the 58th section of the Act of 1883 the words "or cause to be applied" were taken into consideration. The infringement really took place upon this side of the Channel, although the actual application of the design to the cloth was carried out in Portugal. It was the obvious intention of

[1] See Gillespie's Bar's International Law, 363; Maxwell on Statutes (2d ed.) 168 and 169.

[2] Westlake's Private International Law (3d edn.), 236; Philipps v. Eyre, Oct. 29, 1869, L. R., 4 Q. B. 225; Goodman v. London and North-Western Railway Co., March 6, 1877, 14 S. L. R. 449; The "Halley," 1868, L. R., 2 P. C. App. Ca. 193.

[3] M'Larty v. Steele, Jan. 22, 1881, 8 R. 435; Scott v. Lord Seymour, July 28, 1862, 1 Hurl. and Colt. 219.

[4] H. M. Advocate v. Witherington, June 17, 1881, 8 R. (Just. Ca.) 41.

alteration made by the Act of 1888 to strike at an operation of the nature here alleged, so soon as it was completed in the foreign country. It was sufficient if the complainers were able to shew that the action of the pirating firm in this country was the *causa causans* of the alleged infringement. It was not the less an offence which was struck at by the Acts in question that it was a *crimen continuum, i.e.*, an offence committed partly here and partly in Portugal.[1] The Lord Ordinary had therefore done rightly in allowing a proof, and the interim interdict ought to be continued.

At advising,—

LORD PRESIDENT.—The complainers, Messrs Edmund Potter & Company, have secured rights in certain designs which they have registered in pursuance of the Patents, Designs, and Trade-Marks Act of 1883, and the object of the present suspension and interdict is to prevent an infringement by the respondents of the rights thus secured to them for five years.

The prayer of the note of suspension and interdict is twofold. In the first place, interdict is sought against the respondents infringing the complainers' rights in certain designs, which are specified and described by their registered numbers; and there is a further prayer to this effect—"to interdict, prohibit, and discharge the respondents, by themselves or others acting for them, without the licence or written consent of the complainers, from applying or causing to be applied the said registered designs or any of them, or any fraudulent or obvious imitation of them or any of them, to goods in the foresaid class 13 for the purposes of sale, and from selling, publishing, or exposing for sale any article in the foresaid class to which such designs, or any one or more of them, or any fraudulent or obvious imitation thereof, shall have been applied, other than goods manufactured by the complainers, and that during the existence of the complainers' copyright of said designs."

Now, the two parts of the prayer raise quite different questions. The first raises the question, what constitutes an infringement of a copyright of design? and the second raises this further question, whether the rights secured to the complainers under the registration of their designs may be infringed by the production abroad of goods bearing the designs secured by the registration, or any imitation of them. What is it then that constitutes an infringement of a copyright of design? The registration of a design in this country must be to a certain extent of a limited kind. It is impossible to say that a registration under a British Act of Parliament is to have effect all the world over, and that the manufacture of goods in a foreign country, although identical in pattern and design with those that are registered by the complainers, necessarily constitutes an infringement of their rights, because a British statute cannot have such an effect *extra territorium*. Suppose that in a foreign country such as Brazil, which is one of the countries mentioned here, a commercial firm manufactures goods which are identical in design with those that are registered under the complainers' copyright in design, it could never be said that that was illegal because it would be illegal in this country to do it. No doubt it would be illegal in this country in that way to infringe the rights secured by the law of this country, but it does by no means follow—on the contrary, it is quite obvious that it cannot follow—that the manufacture of goods of the same kind in a foreign country is therefore illegal

[1] H. M. Advocate v. Witherington, June 17, 1881, 8 R. (Just. Ca.) 41; Scott v. Lord Seymour, May 28, 1862, 1 Hurl. and Colt. 219; M'Larty v. Steele, Jan. 22, 1881, 8 R. 435; Mallet v. Howitt, Weekly Notes, 1879, p. 107.

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—illegal either in that country or here. I say illegal either in the foreign country or here for the purpose of making this distinction. Of course it could not be illegal in the foreign country, because there is no right secured to the registered design in the foreign country, and therefore there can be no illegality in using or copying it. But I mean further to say that the manufacture by British subjects of goods in imitation of the design registered in this country cannot be illegal abroad, for the very plain reason that the infringement of a design of this kind consists in production of goods in this country, where they are protected, and nowhere else. The design is a thing that may be conveyed from the mind of one man to another—from a person in this country to a person abroad—without any illegality, and the person who has received that idea either from the original designer or from anybody else may in a foreign country legally manufacture goods of that description if there is no law in that country to forbid him; and there is no law directed against the person of a British subject for doing anything excepting infringing copyright of design as registered in this country—that is, manufacturing goods in this country in fraudulent imitation of a design which has been secured.

It therefore appears to me that infringement of a copyright of design must consist in the production in this country of goods made according to the design —no doubt either for sale or use in this country or for exportation; but the goods which are under the statute forbidden to be manufactured are goods made in this country and nowhere else; and therefore my conclusion is, that to make this a relevant complaint in either of its branches you must have goods manufactured in this country by the alleged infringer. The point is very well brought out by the third plea in law for the respondents, which is in these terms,—"In respect that the said designs are printed and applied to the goods only in Portugal and the goods themselves sold only in Portugal, the respondents are entitled to absolvitor." That was the foundation of the opening argument of Sir Ludovic Grant, and I confess I have never heard any good answer made to it; and therefore I am disposed to examine this record with a view to its relevancy for the purpose of seeing whether there is any allegation that comes up to this, that the designs were used in this country, or, in other words, that the goods printed in this country and manufactured for the purpose of sale, were in a complete state either to be sold in this country, or to be exported for purposes of sale.

Now, keeping that in view, the important averment of the complainers is in the third article of their statement of facts, and what they say is this,—"The respondents have applied or caused to be applied to goods in the said class 13 the said registered designs, or fraudulent or colourable imitations thereof, and have manufactured such goods bearing said designs, and have exposed for sale and sold in Lisbon, and other markets in Portugal, Brazil, and elsewhere, goods in the said class 13, to which the said registered designs, or fraudulent or colourable imitations thereof, have been applied, knowing that the same have been applied without the consent of the complainers." Now, in so far as that averment is concerned, we have no allegation that the goods were made in this country—that is to say, that goods were made in this country in conformity with the protected design for the purpose of sale here or elsewhere. The article goes on to say,—"The said goods, bearing the complainers' said designs so wrongfully and illegally applied, have been publicly offered for sale and sold, and are now being sold by the respondents by themselves directly, and through William Graham junior & Company in Portugal, Brazil, and elsewhere, and the respondents have also carried

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lerable trade in this country for the sale and disposal of goods to which iners' said designs have been illegally and wrongfully applied as afore- w, that is a somewhat ingeniously stated averment, because it leaves l to inference. It leaves one to infer that the goods were made in this d then were sold abroad, but it is not distinctly alleged that they were his country and sold abroad, and that averment the complainers were ake, especially in the face of the answer which is made to this statement, is admitted that Graham & Company have printed what now appear were not then known to have been, copies of the complainers' designs, t their works near Lisbon, and in no place or country subject to the f the Patents, Designs, and Trade-Marks Act of 1883. In the face swer it was the undoubted duty of the complainers to make their erfectly distinct, and to say whether they meant to allege that the actually made in this country in order to be sold abroad. I do not l the complainers to make that allegation. There has been no proposal he record for that purpose, and it seems pretty clear on the face of the stands that they have no case of that kind. I am therefore of opinion is here no relevant allegation of an infringement by the respondents ght design registered in name of the complainers under the Patents l Trade Marks Act of 1883; and I am for recalling the Lord Ordi- rlocutor and dismissing the action.

DAM.—It appears to me that in order to entitle the complainers to hey are bound to prove that the parties complained against have in- eir just rights or have threatened to infringe their just rights, and in e entitled to such a proof they must aver acts in breach of the com- ghts, either actually done or threatened, and that raises the question r no there is any relevant case set forth on the record. That, again, n this other question, viz., whether or no the Patents, Designs, and ks Act of 1883 has any application beyond the territory of the United and whether it is effectual to prevent, or does prevent, acts of alleged nt committed, not in this country at all, but in foreign countries. t propose to go through this record again, as your Lordship has already ut it is clear that the only allegations of infringement made are applic- s done in Portugal and Brazil alone. As your Lordship has pointed ot said that the application of the design to the cloth was carried out in ry—in other words, that the manufactured article was produced in this There is no averment to that effect in this record, and accordingly it ppears to me that, both as regards the averment of the application of to the goods in class 13, and as regards the sale of the goods to which d designs have been applied, there is no allegation here that that was his country. Therefore the question which arises, as your Lordship is whether or no the acts, which the respondents do not deny they did, he applying the design to the goods in question in Portugal and selling ls in Portugal, are struck at by any of the Patent or Trade-Marks and Acts. Now, I should say that *prima facie* there can be no doubt of the rinciple that an Act, passed in this kingdom, is only intended to have n within the territory over which the Legislature of this kingdom has on. It is not to be presumed that an Act passed in this country is to prohibit something being done in a foreign country where this king-

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dom has no jurisdiction. It would require very strong evidence to satisfy my mind that, notwithstanding that principle, this particular Act was meant to apply to acts of British subjects *extra territorium*, and the question appears to me to be very much whether or no there is anything to take the Patents, Designs, and Trade-Marks Act of 1883 out of the common case, that an Act passed by the Legislature of this kingdom is intended only to affect acts done in this kingdom. Now, I can find nothing in that Act indicating that there was any such intention on the part of the Legislature. On the contrary, I think everything points the other way. The clauses, which bear upon this more particularly, begin at the 47th section of the Act, which provides for the keeping of a register. Where is the register to be kept? The party who wishes a design registered sends it to the Comptroller of the Patent Office; and where is the Patent Office situated? It is situated in London, and nowhere else. That points, it humbly appears to me, to local action, and nothing else. A person in this kingdom can apply at the register very easily to ascertain whether a particular design is a registered design or not, but how can a British subject in Portugal, in Brazil, or anywhere else acquire that knowledge? That was an illustration that was put with great force by the Dean of Faculty. Suppose a party brings a design to a manufacturer of cloth in Brazil—a British subject—and asks him to manufacture cloth embracing that design. If he had access to the register in this country he could easily satisfy himself whether that design was protected or not,—he would obtain the necessary information under the Act and under the Board of Trade rules, because the Comptroller is bound to give him the necessary information. But how can a British subject abroad acquire that knowledge? He might, in the most innocent way possible, infringe a design, if the Act is to have application to every British subject wherever he is. Then, if the nature of the right which registration gives is looked at, the same indication will, I think, be found. By the 50th section, when a design is registered, the registered proprietor of the design is, subject to the provisions of the Act, have copyright in the design for five years from the date of registration.

We are familiar with copyright in books—perhaps more so than in anything else—but I never heard that the copyright which a man has in a book in this country extended beyond this kingdom. I never heard that a British subject who happened to be resident in the United States of America could not publish as many copies as he pleased of the work of a British author. It has no privilege there. It is copyright here, but not in the United States. Now, such right being a right of copyright also indicates to me very clearly that the privilege so given was not meant to extend, and does not extend, beyond the limits of this country—beyond the jurisdiction of the Legislature. Then in regard to the 58th clause, under which more particularly these proceedings were taken, the first part of that clause is evidently directed against the application of a registered design to any article of manufacture, and the second part against the sale of any article to which such design has been applied. But what is the object of these two provisions? It is this, that "any person who acts in contravention of this section shall be liable to forfeit a sum not exceeding £50 to the registered proprietor of the design, who may recover such sum as a simple contract debt by action in any Court of competent jurisdiction." Is that intended to be a direction to a person—a native of this country—that he may go to Portugal and sue in a Portuguese Court for a penalty? I do not say that excludes such a thing, but I can only say that it points very clearly to

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on—namely, application to a competent Court in this country to penalty for such unlawful proceedings. That also appears to me indicate that this is a local Act, in the sense of being confined to erritory, and not universal as was contended for.

ot know that anything was said which would lead us to put another ion than that upon this Act. It was contended that the Copy-Designs Act, 1842 (5 and 6 Vict. c. 100), sec. 3, specially provided proprietor should have the sole right to apply his design within the Kingdom, shewing, as it was argued, that this particular Act was o the United Kingdom, and that as the provision confirming the n of the Act to the United Kingdom was not repeated in the t of Designs Act of 1861 (24 and 25 Vict. c. 73), it must be held to abolished, and that the right conferred by the latter Act must be rsal application. But, as the Dean of Faculty pointed out, a very ntion to the terms of these Acts shews the reason of the difference hem. The Act 5 and 6 Victoria, c. 100, which enacted that the pro- hould only be privileged provided he applied his design within the Kingdom, left it open to people who wished to pirate the design simply ross to the Continent, have the design manufactured there, and then goods here and sell them. It was to put a stop to that practice, and tice only, that the subsequent Act declared that the application of the hould be prohibited whether done in the United Kingdom or done That is to say, no one was in future to carry the design with him country and pirate it abroad, have the goods manufactured abroad, them here and sell them with impunity. It was to put a stop to that and for no other reason, that the restrictive words of the Act of 1842 ted, and it appears to me very properly deleted, and therefore I think r removal gives us no indication that the Act of 1883 was meant to versal application.

only further to say that it does appear to me that it would be a very le and improper position in which to place British subjects if the pur- gument were sound, because it comes to this, that every person in Brazil, or anywhere over the world, provided he was not a British night manufacture and sell these goods *ad libitum*, wherever he might ed, but if he has the misfortune to be a British subject he must stand ake no share in the enterprise of producing or selling such goods, and ntirely at a disadvantage as compared with the natives of every foreign It may have been a probable or possible intention on the part of the re to do so, but I certainly am far from thinking it is so; and I am of upon the whole matter that there can be no doubt that the acts set on record, which to my mind are averred to have been done in Portugal il, and not within this kingdom, are not unlawful acts. Accordingly, y view the respondents are not averred to have done anything, or ed to do anything, in breach of the complainers' rights, I think this on ought to be refused.

M'LAREN.—I am of opinion that the exclusive privilege given under e of copyright in designs has no extraterritorial operation except what eceive from the agreement of parties, and in that respect it is a privilege analogous in its extent and operation to the cognate privilege given to

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patentees of inventions and dealt with in the same statute. If a party should in exchange for some advantage or concession, offer not to make use of the other party's design abroad, and if that offer is accepted, of course the law will enforce it, but beyond that I do not think there is any right given to a proprietor of a registered design to complain of an imitation abroad.

I have really nothing to add to your Lordship's explanation of the law and the additional observations of Lord Adam, unless to call attention to the 54th section of the statute, which I do not think was referred to in argument although I may be mistaken. It is in these terms,—"If a registered design is used in manufacture in any foreign country, and is not used in this country within six months from its registration in this country, the copyright in the design shall cease." Now, that section seems rather to point to its being lawful to copy a design in a foreign country, because the owner of the design would not be likely to make use of it abroad and at the same time refrain from producing it in this country in the knowledge that he was thereby defeating the copyright given to him by the Act of Parliament. But the provision seems to be that if the owner has not thought his invention so good as to use it for manufacture and sale in this country, and if it has been in public use elsewhere, then the public of this country are to be entitled to compete with the foreign maker. I do not attach much importance to the clause, but it does appear to me in some degree to strengthen the argument derived from the general scope of the statute, and the evident limitation of its effect contained in the clauses your Lordships have referred to.

Lord Kinnear.—I am of the same opinion. The right which the statute confers upon the proprietor of a registered design is a right of copyright, and that is defined by statute to mean "the exclusive right to apply a design" to certain articles of manufacture. It is a very well settled rule of international law, as we administer it in this Court, that an exclusive right of this kind does not extend beyond the territory of the sovereign by whom it is granted. I think that general rule is very clearly recognised in this statute, because there is a provision (sec. 103) under which foreigners may have the benefit of the statute, and under which British subjects may have the benefit of similar provisions abroad in the event of Her Majesty being pleased to make arrangements with the governments of foreign states for mutual protection of inventions, designs, and trade-marks. It is not alleged that any such treaty has been made with Portugal, and therefore I am of opinion with all your Lordships that the right conferred by this statute extends to Portugal. Where there is no right there can of course be no infringement.

No doubt it may be competent for the Legislature to prohibit British subjects from using inventions registered here, even in countries where no exclusive right would be conferred by our Legislature. The reasons in policy why such legislation should be considered improbable were pressed upon us very strongly by the Dean of Faculty, but the material consideration is that there is no such prohibition in this statute, because, as your Lordship has pointed out, the statute does not operate by prohibition *in personam* but by conferring a right *in rem*, and where the right does not extend the consequent prohibitions against infringement cannot extend either.

I am therefore of opinion with your Lordship that the complainers have no exclusive right to use their designs in Portugal which we can protect by inter-

nst either British subjects or anybody else, and therefore that there is nt allegation of infringement.

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E COURT accordingly recalled the Lord Ordinary's interlocutors, sustained the first and third pleas in law for the respondents, repelled the reasons of suspension, and refused the note.

R, WILL, & RITCHIE, S.S.C.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

AM M'QUAKER, Pursuer (Reclaimer).—*D.-F. Balfour—Jameson.*
OVERNORS OF THE BALLANTRAE EDUCATIONAL TRUST AND OTHERS, Defenders (Respondents).—*Johnston—Macphail.*

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M'Quaker v. Governors of the Ballantrae Educational Trust.

—School Bursary—Qualification of candidate—Discretion of School rs—Educational Endowments Commissioners—Scheme.—By a scheme by the Commissioners appointed under the Educational Endowments 2, it was, *inter alia*, provided that a bursary should be awarded by ive examination "among those who have been pupils in public or state-hools in the parish of B. for at least six months before the date of tion, and whose parents or guardians require aid for giving them higher n. It shall be tenable for such period, not exceeding four years, as the rs may determine, at a university or school for higher or technical, or nal education, to be approved by the Governors."

an examination, held on 25th April 1889, the Governors awarded the to W., and declared that M. was second in the examination.

ather, as his administrator-in-law, brought an action against the Gover- W. to have the award of the bursary to W. reduced and to have it ad- to M., on the ground that W. was disqualified in terms of the above on, in respect (1) that he had left the school on 26th October 1888, and ot been for the six months immediately preceding the examination a the school, and (2) that W.'s father did not require aid in giving his er education.

defenders did not dispute that W. had left the school as stated, but ed that he was not thereby disqualified, in respect that the regulation require that the qualifying six months should have been those imme- before the date of examination. They further maintained that, on uer's reading of the regulation, his son also was disqualified, in respect had been absent from the school from 7th August till 19th November It appeared that this absence was with the sanction of the schoolmaster, his name was retained for the whole period on the school roll. The rs further maintained that W.'s father required aid in giving his son a ducation.

Court (*rev.* judgment of Lord Wellwood, *diss.* Lord M'Laren) granted s concluded for, holding that M.'s absence from the school was not such squalify him from competing for the bursary, but that W. having left ol was no longer entitled to compete.

ved that the Court would have been slow to interfere with the award of vernors on the ground that the successful pupil's father did not require iving his son higher education.

1ST DIVISION. Ld. Wellwood. C.

irtue of a scheme made by the Commissioners appointed under ucational Endowments (Scotland) Act, 1882, and approved by in Council, date 23d April 1886, a governing body, entitled "The ors of the Ballantrae Educational Trust," was incorporated for, *inter* he administration of an endowment in the parish of Ballantrae unty of Ayr, so far as applicable to educational purposes, known Caddall Endowment.

section 25 of this scheme it was provided,—"The Governors shall the annual sum of not less than £20, nor more than £25, in estab-

* Decided Feb. 5, 1891.

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lishing a bursary for university or technical education, which shall be called the Caddall Bursary. This bursary shall be awarded by competitive examination among those who have been pupils in public or state-aided schools in the parish of Ballantrae for at least six months before the date of examination, and whose parents or guardians require aid for giving them higher education. It shall be tenable for such period, not exceeding four years, as the Governors may determine, at a university or school for higher or technical or professional education, to be approved by the Governors. In the event of equality in examination between candidates, a preference shall be given to those resident in the *quoad sacra* parish of Glenapp."

On 25th April 1889 a competitive examination was held for the purpose of determining who should be the Caddall Bursar for the ensuing four years. As the result of the examination the Governors awarded the bursary to Hugh Wason, and declared John M'Quaker to be the second in the examination.

On 2d December 1889 William M'Quaker, crofter and labourer, Ballantrae, as father and administrator-in-law of his son, the aforesaid John M'Quaker, who was in pupillarity, and for his own right and interest, raised an action against the Governors of the Ballantrae Educational Trust, and also against Hugh Wason and his father, James Wason, concluding for reduction of the minute of the Governors awarding the Caddall Bursary to Wason, for declarator that the said bursary ought to have been awarded to M'Quaker, and that he was now in right of the same, for interdict against the Governors making payment to Wason, and for decree ordaining them to pay it to M'Quaker.

The pursuer, after narrating the scheme and results of the examination which were admitted, averred;—(Cond. 4) "Under the provisions of the 25th section of the scheme before quoted, the defender the said Hugh Wason was not eligible to compete at the said examination for the said Caddall Bursary. He had not attended any public school within the said parish of Ballantrae during the six months or thereby immediately preceding the date of the said examination. He left the Ballantrae Public School on or about 26th October 1888 and went to Glasgow, where he was enrolled as a pupil at Allan Glen's Technical School there, and any connection which the said Hugh Wason had previously had as a pupil in any school within said parish was thus severed. With reference to the statement in answer, it is explained that John M'Quaker attended Auchenflower Public School in the parish of Ballantrae regularly up to and including the afternoon of 29th May 1888. The pursuer is owner of a small croft, which he works during spare hours, and on the said 29th May 1888 John M'Quaker left school in order that he might aid his father in weeding, harvesting, and gathering potatoes, his assistance being absolutely necessary for the fulfilment of the work and the support of the family, which is a large one. It is quite customary for lads over ten to leave school for this purpose, many taking advantage of article 20 B of the Scotch code, which allows absence, when qualified by one hundred and fifty attendances, of children over ten years of age, and certified by the managers to be beneficially and necessarily employed at work when not at school. The teacher of the said school, Mr James M. L. Davidson, in pursuance of his instructions from the Scotch Education Department made inquiries as to the prolonged absence of the pursuer's son from school, and found that he was helping his father in outdoor work, and he undertook to return to school when outdoor work for the year was for the most part completed. Mr Davidson being accustomed to cases of this kind with boys who have passed the 6th standard retained John

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M'Quaker's name as a pupil upon the daily register of school attendances, regularly marking him as absent, on the understanding that he would, as promised, return as aforesaid. The summer holidays extended from 22d June to 7th August, and on 19th November 1888 John M'Quaker returned to school, his name having been retained on the register during his necessary absence, and his copy-book and slate having all along remained in the school. The said John M'Quaker had never ceased to be a pupil in the said school during the summer of 1888, although he was temporarily absent as above set forth; and after a similar temporary absence in the summer of 1889, he again returned to the said school, where he is still a pupil." (Ans. 4) "Admitted that the defender Hugh Wason was enrolled as a pupil at Allan Glen's Technical School on 1st November 1888. Believed and averred that the pursuer's son, the said John M'Quaker, was not a pupil in any public or state-aided school in the parish of Ballantrae for the six months immediately preceding 25th April 1889. *Quoad ultra* denied, and reference made to the said scheme and Code." (Cond. 5) "The parents of the said Hugh Wason do not require aid in giving him a higher education. They had, as already mentioned, sent him to a technical school in Glasgow. They carry on the only banking business in Ballantrae, and his father the defender, the said James Wason, holds the offices of postmaster, inspector of poor, collector of rates, clerk to the local authority, sanitary inspector, clerk and treasurer to the School Board, and clerk to the said Governors, and he is well able to give higher education to his son." (Ans. 5) "Denied that the parents of the defender the said Hugh Wason do not require aid for giving him higher education." (Cond. 7) "At the date of the said examination the defender the said Hugh Wason was over sixteen years of age, having been born on 4th February 1873, and the said John M'Quaker was nearly twelve and one-half years of age. The parents of the said John M'Quaker are unable to provide means for giving him a higher education than he has received within the schools in the parish, and require aid for giving him higher education. They are extremely poor, and have a family of seven children, five of whom are attending school. In other respects the said John M'Quaker was duly qualified to compete at said examination for said Caddall Bursary." (Ans. 7) "Admitted that the defender the said Hugh Wason was born on 4th February 1873. *Quoad ultra* not known and not admitted."

The pursuer pleaded;—1. On a sound construction of the 25th section of said scheme, no pupil is eligible to compete for the said Caddall Bursary unless he has been *bona fide* a pupil in a public or state-aided school in the parish of Ballantrae for the six months immediately before the date of the examination for said bursary. 2. The defender Hugh Wason was not entitled to compete for the said bursary, nor to have the same awarded to him, in respect (1) that he had not been *bona fide* a pupil in a school in Ballantrae for the six months immediately preceding the date of the examination for said bursary, but on the contrary, had severed his connection with any such school by becoming a pupil of a technical school in Glasgow long previously to the said examination; (2) that his parents did not require aid for giving him a higher education than is given in public schools in the parish of Ballantrae. 3. The award of the said bursary to the said Hugh Wason having been illegal and contrary to the provisions of the said scheme, the pursuer is entitled to reduction as concluded for. 4. The said John M'Quaker having been first of the candidates duly qualified to compete at the examination for the said bursary on 25th April 1889, the pursuer is entitled to decree of declarator and payment as concluded for, with expenses.

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The defenders pleaded;—1. No title, *et separatim*, no interest to sue. 2. The pursuer's averments are irrelevant, and insufficient in law to support the conclusions of the summons. 3. The pursuer's averments, so far as material, being unfounded in fact, the defenders are entitled to absolvitor, with expenses. 4. The defender the said Hugh Wason having been eligible to compete for, and having been duly awarded the said bursary, the defenders should be assoilzied from the whole conclusions of the summons.

The parties lodged the minute of admissions quoted below.*

On 21st June 1890 the Lord Ordinary (Wellwood) sustained the second plea in law for the defenders, and dismissed the action as irrelevant, finding the defenders entitled to expenses.†

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* By this minute the parties "concurred in stating that John M'Quaker had attended Auchenflower Public School, in the parish of Ballantrae, for several years; that from the beginning of the school year on 1st April 1888 he attended up till and including 29th May 1888, and from 19th November 1888 until the date of the examination on 25th April 1889; that the school holidays during the said year extended to six weeks, viz., from 22d June to 7th August; that school attendances are marked twice daily, and that the total number of the said John M'Quaker's attendances for the school year ending 31st March 1889 was 175, and for the year immediately preceding 25th April 1889 was 181; that the said John M'Quaker has also attended the said school from 25th April 1888 to 5th June 1889, and from 22d October 1889 to the present date, and is still attending the same, and that the summer holidays during the said year extended to six weeks as previously. Further, that Hugh Wason had attended the Ballantrae Public School for several years prior to 26th October 1888; that during the year immediately preceding 26th October 1888 his attendances were 383, and that during the school year ending 31st March 1889 his attendances were 190, the whole of these being prior to 26th October 1888, when he left the said school."

† "OPINION.— . . . Taken literally, the words quoted [the 25th section of the scheme] simply mean (1) that the candidate must have been a pupil in a public or state-aided school in the parish of Ballantrae for at least six months, and (2) that the six months' attendance must have been completed before the date of examination. But it is objected that if the clause is thus construed, the bursary would be open to anyone who, perhaps years before the examination had attended a school in the parish for six months. The answer to this is, I think, that the clause must be read and applied reasonably, and that it was not an unreasonable decision on the part of the Governors to allow a boy to compete whose connection with a public school in the parish terminated not quite six months before the examination. They have power by clause 32 to make regulations and bye-laws, in so far as not inconsistent with the scheme, and the question might be fairly tested by considering whether a bye-law would be valid which allowed an interval of six months between the latest date of attendance and the examination.

"The pursuer's construction again involves the reading in of the word 'immediately,' and the contention that, in order to qualify, the attendance must continue till the examination. The difficulty of maintaining this construction is shewn by the boy M'Quaker's own case. He had not attended for at least six months immediately before the date of examination, but only since 19th November 1888, having been absent since 29th May 1888, a period of nearly six months. If the clause, as read by the pursuer, is to be construed strictly, the boy M'Quaker was also ineligible, and on that ground the pursuer has no title to sue, but, says the pursuer, not very consistently, the clause must be construed reasonably as regards the beginning of the six months, and this he proposes to do by eking out the necessary six months by attendance before 29th May 1888.

"Now, while I think the matter calls for regulation, I prefer a construction which does not disqualify a candidate who has left school a few months or weeks before the examination, and which admits of reasonable latitude as to the time

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pursuer reclaimed, and argued;—On a sound construction of the lause of the scheme, the pursuer's son had all the qualifications g him to compete for the bursary in question, and the defender was disqualified in respect (*a*) that he had not been a pupil in a or state-aided school in the parish of Ballantrae for the six months iately before the date of the examination, and (*b*) that his father t a person whose circumstances required aid in order to give his igher education. No objection was stated to M'Quaker's qualifica- on the latter of these grounds of objection to Wason. Nor was he objection that the pursuer had no title to sue based upon the s sustained in former cases,[1] and there could not well be, looking peremptory character of the 25th clause, which left the Governors on but to give the bursary to the best of the candidates who were ualified in terms of the clause, and M'Quaker was admittedly the ndidate if Wason was disqualified. The only objection to the pur- title was that his son had not been for six months a pupil in a rae school, and of course that meant, in the pursuer's view, for the six s immediately preceding the examination. That was the pursuer's

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s at which the pupil must have finished his six months' attendance. , the pursuer's construction would lead to results quite as unfair and to the spirit of the scheme as any which could result from that put upon se by the defenders, because there would be nothing to prevent a boy nected with Ballantrae coming at any time, and attending only for six immediately before the examination in order to gain the bursary. The states a second objection to the award, viz., that Hugh Wason's father, ender James Wason, does not require aid for giving his son a higher on. . . . It appears to me that the question whether a parent requires the higher education of his son is peculiarly one for the consideration of vernors. It would require a very strong case of injustice to induce the o interfere. Now, nothing that is stated is inconsistent with Hugh s father requiring such aid. Nothing is said as to his liabilities and s, or even as to the amount of his income. The very number of the offices he is said to hold indicates that the remuneration in each must be small. herefore not disposed to allow a proof as to the state of Wason's affairs. ice the case was debated, and indeed since my opinion was written, the case us *M'Donald* v. *The Synod of Argyll* was decided by the First Division Court, 17th June 1890. The circumstances of that case were very similar e of the present, and the Inner-House, affirming the judgment of Lord r, held that the pursuer had no title to sue. The defenders in the present ead that the pursuer has no title and no interest to sue; but the only nts stated to me in support of that plea was that the pursuer had no title in respect that on his own shewing his son John M'Quaker had not d school for at least six months before the date of the examination. w it may be that the terms of the deed in the case of *M'Donald* v. *The of Argyll* conferred wider powers of selection upon the administrators of st than the scheme in the present case; and that there are stronger grounds case for maintaining that there was something of the nature of a contract effect that the bursary should be given according to priority in the com- n. At the same time, as I read the opinion of Lord Trayner, which was d to, it seems to me that the grounds of judgment in the case of *M'Donald* le enough to rule the present case.

, however, the point was not argued to me by the defenders, and as I have at the conclusion that the action must be dismissed on other grounds, I ot thought it necessary to postpone giving judgment until the case of *ald* is fully reported."

msay v. United Colleges, St Andrews, June 28, 1860, 22 D. 1328, 32 Scot. 2, affd. 1861, 23 D. (H. L.) 8; M'Donald v. M'Coll, June 17, 1890, 17 R.

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reading of the clause against Wason, and he therefore must necessarily apply it to his son's case. No doubt, however, if he succeeded against Wason upon his second ground of objection, it would be open to him to adopt as an alternative Wason's reading of the clause. Now, the examination took place on 25th April 1889, and M'Quaker had *de facto* attended the school only from 19th November 1888; but from 22d June to 7th August constituted the school holidays, and from 7th August to 19th November M'Quaker, though *de facto* absent from school, was absent by permission of the schoolmaster, was retained on the school books, was at the date of the examination in actual attendance, and was still so, as he had been for some years prior to 22d June 1889. He was, therefore *de jure* a pupil during the whole six months in question. The number of his attendances as stated in the minute of admissions was sufficient to satisfy the requirements of the Committee of Council upon Education.

Wason's case was very different, and if the construction for which the pursuer contended was the sound one, viz., that it was the six months immediately preceding the examination which was the critical period, there could be no doubt that Wason was disqualified. He had finally left the school on 26th October 1888. The pursuer's construction was the sound one—otherwise the words "before the date of examination" were mere surplusage. No doubt this construction involved the interpolation of the word "immediately" into the clause; but that was a simple and very obvious addition. Whereas on the defenders' construction a very much more extensive change would be necessary, if, as the defenders appeared to admit, the case of persons who had left the school for years was to be excluded. It was said that the matter was left to the discretion of the Governors, but the clause did not say so, and it was not easy to see in what the discretion was to consist, for it would be necessary to lay down a rule specifying what length of absence from the school would disqualify, but that was not a matter of discretion, but a rule which presumably would have been inserted in the clause, had it been intended.

Then the pursuer was entitled to a proof of cond. 5. The averments there were sufficient to shew (if proved) that Wason's father was not in a position to require aid; at least they were relevant to warrant a proof.

Argued for the defenders;—The reading which the pursuer sought to put on clause 25 admittedly required the insertion of the word "immediately," but it was contrary to the rules of construction to hold a word as inserted if the words as they stood were capable of a reasonable construction, and the construction which the Lord Ordinary put on the words was one which they could reasonably bear, and was not in itself at all contrary to the spirit of such a bursary as this. No doubt the absence of some such word as "immediately" in form left it open to the Governors to admit to the competition persons who had not been at a Ballantrae school for many years. If they did so, an action would probably lie at the instance of properly qualified candidates. But in all probability the clause was left vague purposely so as to leave something to the discretion of the Governors without tying them down to a hard and fast rule which should oblige them to reject as disqualified boys who had attended the school till within a few days of the competition. Under the scheme the Governors had power to frame bye-laws, and if a rule specifying what period of absence would disqualify was thought to be necessary, a bye-law regulating that matter would not be *ultra vires* of the Governors. In any case, the pursuer's construction was self-destructive, for his son had not attended the school for the six months immediately preceding the examination. He had been absent for a substantial period, even

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admitting that the six weeks of holiday was to be taken as a period of constructive attendance. It was said that his name had been retained on the books of the school, but that was the act of the school teacher only, it was not warranted by the Scotch Educational Code. M'Quaker was not a "scholar" in the sense of the code, and neither therefore was he a "pupil" in the sense of clause 25. As regarded the averment that Wason's father did not require aid to give his son higher education, that was a matter preeminently in the discretion of the Governors. The Court would not interfere unless on averments amounting to corruption.

At advising,—

LORD PRESIDENT.—This is an important and somewhat difficult question undoubtedly, but it appears to me to depend entirely upon the construction of the 25th section of the scheme which has been framed by the Educational Endowments Commissioners for the regulation of this foundation. The Governors, that is to say, the Governors of the Ballantrae Educational Trust, a body which is incorporated by the scheme, are empowered thereby to apply, or rather they are directed to apply—the words are imperative—"the annual sum of not less than £20, nor more than £25, in establishing a bursary for university or technical education, which shall be called the 'Caddall Bursary.'" The bursary is to be awarded by competitive examination, and here again the words of the scheme are imperative—"The bursary shall be awarded by competitive examination"—so far therefore there can be no dispute as to what the duty of the Governors is. They must apply an annual sum of between £20 and £25 in establishing a bursary, and they must award that by competitive examination. Then comes the definition of those who are eligible candidates for this bursary. The competitive examination is to be "among those who have been pupils in public or state-aided schools in the parish of Ballantrae for at least six months before the date of the examination, and whose parents or guardians require aid for giving them higher education; it shall be tenable for such period, not exceeding four years, as the Governors may determine, at a university or school for higher or technical or professional education, to be approved by the Governors"; and "in the event of equality in examination between candidates a preference shall be given to those resident in the *quoad sacra* parish of Girvan."

That is the clause to be construed, and the first thing that appears to me to be pretty clear upon the face of the clause is, that this is properly speaking a school bursary. It is not a bursary which is to be held at a particular university, or a particular technical or advanced school, but it is a bursary which is to be held by a pupil at a Ballantrae school. That is made, I think, very clear by the words of the clause, and accordingly the competitors for this bursary are described to be those who have been pupils in Ballantrae schools for at least six months before the date of the examination.

Now, the defender of this action, Wason, at the date of the examination, had ceased to be a pupil of the Ballantrae school. I think that is a matter of fact that cannot be disputed, because he had dissevered himself from that school and all connection with it, and had betaken himself to another school in a different part of the country, for the purpose of proceeding with his education, and therefore in any ordinary sense the term "pupil of Ballantrae school" could not be applied to him. He was a pupil of a school in Glasgow—Allan Glen's Technical School—and the objection to him therefore is, that he does

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not fall within the description of a pupil within the meaning of section 25 of the scheme.

On the other hand, the son of the pursuer of the action, M'Quaker, is in this position—He has not attended a Ballantrae school continuously during the whole period of six months preceding the date of the examination, and therefore if that be essential as a qualification for competition he does not possess it. But it rather appears to me that that is not the meaning of the section. The question whether a boy is a pupil of a particular school does not depend upon his actual attendances. He may be a pupil although not in attendance, and I use the word "pupil" as exactly synonymous with the word "scholar" as used in the code. I do not think there is any difference between them. It means a boy who is bound under ordinary circumstances to attendance at the particular school, whose name is on the school roll, and whose absence from school, unless it be satisfactorily accounted for, is a fault for which he may be punished. Now, that is precisely the position of M'Quaker. His name was on the roll of the school during the whole of the period of six months preceding the examination. His absence is accounted for in this way. A part of the period of his absence was a period of vacation, and it is needless therefore to say anything more about that. For the rest of the period of absence he was engaged in useful work, assisting his father, who was a crofter, in out-door labour, and all this with the approval and sanction of the school authorities. Therefore, not only was his name on the school-roll, but his absence was justified by the employment in which he was engaged outside the school. It was therefore a justifiable absence, and being a justifiable absence it appears to me that it could not possibly be an absence that disqualified him from being a pupil or scholar of the school during the time of that absence.

That being so, my opinion is that the pursuer, M'Quaker's son, fully comes up to the requirement in the 25th section of the scheme, that he should have been for at least six months before the date of the examination a pupil in a Ballantrae school. But then Wason, on the other hand, has not been an enrolled pupil or scholar of a Ballantrae school for a considerable period. The length of the period is not very material, because this is not a question of more and less; it is a question whether, during six months immediately preceding the date of the examination, the condition of this 25th section had been complied with. Now, as I have said before, all connection between Wason and this school was put an end to at a period which in that view disqualifies him entirely as a pupil of any Ballantrae school. And therefore if I am right in my construction of the clause—that it means that this shall be treated and dealt with as a school bursary in the proper sense of the term—the pursuer's son has the necessary qualification and Wason has not.

That is the view of the case which I take, and I do not think it necessary to go into any of the other details at all. There are a number of things left to the discretion of the Governors, and with these we do not interfere in any degree and among other things I would hesitate very much to interfere with the discretion of the Governors in determining whether the parent of a competitor was in such a condition of life as to require the aid of this bursary to enable him to send his son to a university or technical school. At all events, that is a matter for consideration by the Governors in the first instance. If they were flagrantly wrong, and conferred the benefit upon a boy whose parent was quite able to send his son to a university at his own cost, probably there

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e means found to restrain that, but there is no case of that kind
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orry to say I cannot agree with the interlocutor of the Lord Ordinary,
ink the pursuer is entitled to prevail.

ADAM.—It appears that on 25th April 1889 the Governors of Ballan-
cational Trust held a competitive examination for a bursary of the value
o £25 a-year, with the result that they awarded the bursary to Hugh
nd placed John M'Quaker second. The present action is raised by
'Quaker's father to have it found that the Governors in so awarding
ry to Wason acted wrongly, and ought to have awarded it to his son,
ound that Wason was not qualified under the conditions under which
ry fell to be awarded, and that his son as second is entitled to have
ry awarded to him. If it is proved to our satisfaction that Wason was
that M'Quaker was qualified, the defenders do not contest M'Quaker's
the bursary, or, in other words, they do not contend that a second
ion must be held before the bursary can be awarded, and I think
tly abstain from putting forward that contention, as in my opinion if
r were the best of the qualified candidates he is entitled to have the
warded to him.

rst question is, whether Wason was qualified as a candidate under the con-
nposed by the scheme? The facts which raise this question are these :—It
d dispute that Wason ceased to be a pupil of any school in Ballantrae in
1888—that is, in the October preceding the April in which the examina-
place—and that he became a pupil of Allan Glen's Technical School in
on 1st November 1888. The question is whether, on a construction of
section of the scheme, a person in that position was qualified to com-
the bursary? I agree that this question depends entirely on the con-
of that section, and I also agree that the bursary is intended to be what
d a "school" bursary, to be competed for by persons who are pupils of
ic schools in Ballantrae. It is the intention of the scheme and the con-
of the scheme, as I read it, that the bursary should be awarded among
o are at the time of the examination pupils of one of the public schools
ntrae, with this further qualification added, that they must have been
such school for the six months before the date of the examination.
the section bear that interpretation it is not necessary to interpolate
ds, though no doubt the meaning might be expressed in another way
g that the bursary was to be awarded among those "who are and have
pils" in the Ballantrae public schools for six months. I also think that
uite entitled to look at the possible consequences of reading the section
e. It is to be observed that the governors have no discretion as to
g the bursary. If a duly qualified candidate appears they must award
defenders say that the only necessary qualification is that a candidate
ve been at some time a pupil in a public school at Ballantrae for six
—no matter when or how long before the competition—and that if a
e so qualified is successful, he is entitled to have the bursary awarded to
t is a very startling conclusion to reach, that a person, it may be, who as a
ve had been a pupil in one of the Ballantrae public schools for six months
be entitled to come back and compete for the bursary against present
f these schools. That would be an unlikely condition to attach to any

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bursary, and it would require a great deal more distinct language than I can find in the section to make me put that interpretation upon it. If, however, that were to be taken as the proper interpretation of the scheme, I think the observation made by Mr Jameson would be correct, that there would be no use of the phrase six months "before the date of examination." These words would, it appears to me, be in that case mere surplusage, but if the other view is adopted, that a candidate must have been a pupil of a Ballantrae school for the six months immediately preceding the examination, then the presence of these words is explained.

I agree, therefore, that on the construction of section 25 of the scheme the bursary is a proper "school bursary," to be awarded to a boy who has been a pupil of a Ballantrae public school during the six months preceding the date of the examination.

If, then, that is the true construction of the 25th section of the scheme, the result as to Wason's claim to the bursary is quite clear, because it is beyond doubt that he was not a pupil of any school in Ballantrae at the time of the competition. He had six months before withdrawn from the school at Ballantrae, and had become a pupil of a school in Glasgow, and if there had been a similar bursary there he might have competed for it. It is clear in the view I take of the scheme that as he was not a pupil of a Ballantrae school at the date of the examination he was not qualified to compete for the bursary. Even if he had happened to be a pupil of such a school nearer the time of the examination than he actually was, that would not in my opinion make any difference, the conclusive and cardinal fact being that he was not on the rolls of, and was not a pupil of any school in Ballantrae at the date of the examination. I think therefore, that Wason was not entitled to compete for the bursary or to have it awarded to him.

The next question is, whether M'Quaker has a qualification? Now, the facts bearing on this question are these:—The competition, as I have already said, was held on 25th April 1889, and M'Quaker's attendances at the Auchenflower Public School in Ballantrae during the preceding year were as follows:—From the beginning of the school year on 1st April 1888 till 29th May 1888, and from 19th November 1888 until the date of the examination, 25th April 1889. He was accordingly absent from the school between 29th May and 19th November in that year, but six weeks of that period—from 22d June to 7th August—were taken up by the school holidays. It is, however, beyond all doubt that he was a pupil of a Ballantrae public school at the date of the examination, as he was then on the rolls of the Auchenflower School, and had been attending that school during the five months preceding the date of the examination, and the only question which remains is, whether he was or was not a pupil of that school for six months preceding the date of examination. It is contended by the defenders that he was not, because he did not attend the school during the month prior to 19th November 1888, but it is necessary to point out that the question is not one of attendance, but simply whether he was a pupil of the school during the necessary period. As a matter of fact, he was absent during the month in question, but with the permission of the school authorities, and he was on the roll during that period, and was marked as absent because he was regarded as being on the roll and as a pupil of the school. It is not, I think, necessary to go into the question whether the authorities of the school ought or ought not to have treated him as a pupil of the school. In the

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the country, schoolmasters, with some authority from the code, are in y of allowing lads during the summer leave of absence to assist their s in the field-work, and that is regarded, and apparently quite properly ed, as an ordinary ground of absence, and was so treated in this case, as ster of the school, with the authority of the Governors, treated him as a of the school, and marked him as absent. The question however is not er he was entitled to earn the Government grant, but whether he was a and I think he was. If so, he was qualified as a candidate for the bur- nd it ought to have been awarded to him, and if that is the view of the no difficulty is raised as to his being found entitled to it.

h regard to the question whether Wason satisfies another condition of npetition, namely, that his parents should require assistance in giving him education, I shall only say that that question does not arise for considera- this case. If I had to express an opinion upon it, I should say that that matter almost entirely within the discretion of the Governors. They the locality and the circumstances of each candidate's parents, and they persons to judge whether or not the parents require assistance in educat- eir children. I do not say that we would not interfere if they had ed the bursary corruptly, but there is no such case here, and I should not ined to interfere with the Governors' award on this second ground.

ree that the interlocutor of the Lord Ordinary should be recalled and for the pursuer pronounced.

D M'LAREN.—We are reviewing the decision of the Lord Ordinary in an brought to have it found that the successful competitor for a bursary is lified and that the second best competitor is to be preferred. The dis- cation is rested on two grounds. It is said that the boy Wason who was ed did not comply with the conditions of the order of the Education vment Commissioners, in respect that he was not a pupil in a public or ided school in the parish of Ballantrae for six months immediately pre- the date of the competition; and then it is said that his parents or ans are not in the position of requiring aid to give him a higher education. e latter question, I entirely agree with the observations which have fallen your Lordship in the chair and from Lord Adam. I think that a condition s kind does not mean that it is absolutely impossible for a parent to give ild that higher education out of his own means—that he cannot, even by ing himself to privation, send his son to a higher school or to a university. ans that in the ordinary acceptation of the language he is a person who es aid for that object, whose circumstances are not such as to make it easy m to send his child to a university or higher school without pecuniary nce. Without professing any accurate local knowledge, I may say, from ing I know of the locality, I should think it would be difficult to find a a village like Ballantrae who was disqualified on the ground that his ts were too well off to need assistance. But, of course, it might happen person with a large income had settled down in a country village, and it not be right that if he were in easy circumstances his son should be allowed npete. That is no doubt a sufficient reason for the insertion of this very le restriction.

ssing from that part of the case I come to the more important matter, which construction of the first condition—"The bursary shall be awarded by

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competitive examination among those who have been pupils in public or state-aided schools in the parish of Ballantrae for at least six months before the date of the examination." I agree with your Lordship that this points to what is usually known as a school bursary. I think one may gather from the clause as a whole, and from the character of the order, that it was intended to enable boys to pass direct from the parish public school to a school or college of higher instruction. I could not for a moment entertain the view that it would enable a grown-up person at any distance of time to come forward and compete with the proper recipients and objects of this foundation upon the plea that he had in early life attended six months at this public school at Ballantrae. But I arrive at that result entirely by implication—implication from the whole object of the foundation, and especially from the tenor of this particular clause; because, as I read the clause, there is no restriction in words as to the time at which the attendance may have been given. On that subject I would venture, as the Lord Ordinary's opinion was not very fully brought under our notice by the bar, to read a sentence from it which fully expresses my view on this question. His Lordship says,—"Taken literally, the words quoted simply mean (1) that the candidate must have been a pupil in a public or state-aided school in the parish of Ballantrae for at least six months; and (2) that the six months' attendance must have been completed before the date of examination. But it is objected that if the clause is thus construed the bursary would be open to anyone who, perhaps years before the examination, had attended a school in the parish for six months. The answer to this is, I think, that the clause must be read and applied reasonably, and that it was not an unreasonable decision on the part of the Governors to allow a boy to compete whose connection with a public school in the parish terminated not quite six months before the examination." I have nothing to add to this expression of opinion on the question of the reasonable construction, as I should consider it, of this clause, but as to the literal construction of the clause I should like to add a word. I think the expression "those who have been pupils for at least six months before the date of the examination" is not a strictly accurate expression, because if read literally it would mean only those who had attended school before the passing of the order. The words are "who have been," referring to time past. What is really meant is attendance in the future. I am not finding fault with the language; it is good colloquial language; but if it were in an Act of Parliament we should expect it to read "among those who shall have been pupils at least six months before the date of the examination." Now, that is a form of speech which is no doubt equally applicable to a period of six months completed immediately before the examination, or to a period completed at any previous time. But then if the former is to be the meaning, one would expect that the word "immediately," or some equivalent word, would have been inserted, or that the clause might have been put, "among those who are at the time of the examination and have been pupils for the period of at least six months." The Lord Ordinary holds—and I agree with him—that the pursuer's construction involves the reading in of the word "immediately," and the contention that, in order to qualify, the attendance must continue until the examination. Now, there are cases where a Court of construction may justifiably introduce into the clause which is construed some word which is not there, but which is clearly implied, and is necessary either to make the clause sensible or to give effect to what may be reasonably supposed to be its meaning when the whole clause is read consecutively. But it seems to me

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is at least a conceivable construction that the Commissioners by whom rder was made intended to leave the competition open, not only to boys ad just completed a period of six months' attendance, but also to those ad completed it only a short time before the examination commenced, and ad not done anything that might be considered to be an impediment to passing from the school to the university. I see no particular public tage in limiting the competition to those whose attendance has exactly and ually terminated at the time of the examination, and I see no disadvantage ing in those who had completed their school attendance a few months

And therefore I cannot assume that the insertion of the word "imme-" (if it is to be inserted) is necessary in order to make sense of the clause, rder to give effect to the general intention of the order. I rather under- your Lordship to think that "immediately" was implied, because you he word in giving your view of the sense of the clause. But in my humble n we are not entitled to read the clause in that sense, because there are rds, so far as I can see, that impose any such strict limitation as to time. ave only to add that, for the reasons which I have given, I think that aker also was qualified. I have no doubt of it, although, strictly speaking, d not been in attendance during six months immediately preceding the nation. The difference is that you had to add a period at the beginning Quaker's attendance to complete the six months, while you have to add a at the end to the attendance of the other young man to bring him within ause. Both, I think, are quite legitimate according to my interpretation scheme. I do not think it necessary to proceed at all—indeed, I doubt nuch the relevancy of proceeding upon the rules of the Department of tion, which are not in any way referred to in this enactment. If Wason qualified, I should doubt very much whether M'Quaker would be in any position, but if the view of the majority of your Lordships is taken, this does not call for further consideration. My opinion is that the judgment Lord Ordinary should be affirmed.

D KINNEAR.—I concur with your Lordship in the chair, and with Lord

first question to be considered is, whether the pursuer has a good title to nd that depends upon whether his son has or has not a qualification to te for this bursary in terms of the scheme. That of course requires us to ue the scheme, and I agree with the construction which your Lordship and Adam put upon it. The 25th section is certainly not expressed in very e or accurate language, and I do not think it could be made more precise urate by the mere insertion of any additional words. I agree with an ation which was made by Lord M'Laren, that we are not to criticise too ly the grammatical structure of a scheme of this kind, but that we ought ept the language which the Commissioners have used as being in conformity colloquial usages although not in accordance with strict grammatical rule. reading it in conformity with that observation, I should be disposed to also with the observation Lord M'Laren made in the course of the discus- that if this sentence had been expressed grammatically it would have run —"The bursary shall be awarded by competitive examination among those t the date of the examination shall have been pupils in any of the public te-aided schools in the parish of Ballantrae for a period of at least six

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months." If that is the meaning of the clause, and I think it is, then I think there can be no question at all that the pursuer's son did satisfy the qualification. What is required is, that he shall have been a pupil of the school, and it is proved to us that he began to be a pupil of the school more than a year before the date of the examination, that he was still a pupil of the school at the time that examination took place, but that his continuous attendance during the period immediately preceding the examination had lasted for five months only, his previous attendance having been interrupted by absence, which was sanctioned by the headmaster and the authorities of the school. And therefore it comes to this, that he had been a pupil for a year, that he had been in continuous attendance for five months before the date of the examination, but that he had leave of absence for the part of the period preceding the five months. I am of opinion that a pupil who has leave of absence is still a pupil of the school, and therefore that the pursuer's son has satisfied the qualification required by the scheme. I should agree with the observation made in the course of the discussion, either from the bar or from the bench, that to keep a boy's name upon the roll will not of itself make him a pupil, if it is not done in good faith and in the ordinary course of school administration. But then there is no suggestion that in this case anything that was done was not done in the ordinary course of the administration of the school. It would be altogether out of the question to exclude from the benefit of a bursary of this kind a boy who during a portion of the period of six months required by the scheme had obtained leave of absence from the school for a sufficient cause. If he were absent through illness I suppose nobody would raise a question about his right to be considered a pupil of the school. If he is absent for such a reason as that which was sanctioned in the present case by the master, namely, that his father required his son's help in cultivating his croft, and that the son might be absent without prejudice to his study at school, I should think that such a case was exactly in the same position as a case of illness. But we are not, as it appears to me, to inquire into the reason of absence, and the grounds upon which the master sanctioned it. It is enough that the school authorities sanctioned his absence, and I think, therefore, that he must be held to have remained a pupil of the school. I only desire to add upon that point that it does not appear to me that in order to bring him within the position of a pupil we are to take into account the attendance for a certain period and add the period during which he did attend. All we have to consider is, whether this boy was or was not a pupil. It is conclusive upon that subject that he having attended the school his name was retained upon the roll by the headmaster, and his absence during the period at which he was not at school was with the headmaster's sanction.

If the pursuer has a title, the next question is, whether the boy Wason who beat him in the competition had also a qualification? and I am of opinion that he had not, because he was not a pupil of the school. I agree with your Lordship that what is established by this scheme is an ordinary school bursary. It is a bursary to be given by competitive examination among scholars of Ballantrae schools, and not among boys or young men who have already obtained a higher education at a university or a technical school. Now, the boy who has succeeded had left Ballantrae school for months, and before the date of the competition, I think, he had been for some months at a technical school in Glasgow. It is not material during what period of time his attendance at that school has lasted. The material point is, that he had absolutely left the school in Ball

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d had gone to a higher technical school. Now, if that were not held ify, it would appear to me that the scheme must be read so as to let s and young men who had at any time of their lives been even for six any Ballantrae public school. That would be altogether inconsistent lesign of the scheme, and we cannot arrive at a construction involving nconsistency—an inconsistency that would be a sufficient reason for he construction. I think the only reasonable construction is in favour suer's view, and of the view your Lordship has expressed.

COURT pronounced the following interlocutor:—"Having con-dered the cause, and heard counsel for the parties on the reclaim-g note for the pursuer William M'Quaker against the interlocutor Lord Wellwood, dated 21st June 1890, recall the said interlo-tor: Reduce, decern, and declare in terms of the reductive and claratory conclusions of the summons: Interdict, prohibit, and scharge the defenders the Governors of the Ballantrae Educa-onal Trust from making payment to the defender Hugh Wason the Caddall Bursary, or any instalment thereof: Further, decern d ordain the said Governors to award the said bursary to John 'Quaker, to be held by him for four years, commencing at 1st ovember 1889, and to make payment to him or the pursuer Wil-m M'Quaker, as his administrator-in-law, of the sum of £20, s. annually, the tenure of the said bursary by the said John 'Quaker being subject always to the conditions and provisions the scheme for the management, *inter alia*, of said bursary proved by the Queen's most Excellent Majesty in Council the day of April 1886, and particularly article 27 of said scheme: nd the pursuer and reclaimer entitled to expenses," &c.

SIMPSON & LAWSON, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

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ILVIE AND OTHERS (Edward's Trustees), Pursuers, Real Raisers, and Claimants.—*Baxter.*

ES SMITH EDWARD, Claimant (Reclaimer).—*Dickson—Aitken.*

OUNG AND ANOTHER, Claimants (Respondents).—*D.-F. Balfour —Salvesen.*

ANE EDWARD AND OTHERS, Claimants.—*Baxter—Hay—Law.*

n—Testament—Accumulations—Uncertainty.—A testator by holo-, after expressly declaring that C., one of his nephews, was "to get nd leaving legacies to certain of his relatives named, appointed four per-his trustees,—two of them being legatees, the third a stranger, who got and the fourth a sister, who also got no legacy,—and directed his trus-umulate the income of his estate for fifty years, "After the fifty years e money to purchess an estate in my name that cannot be sold nor in-d the income from it, after paying expenses, to be divided amongst those in my will yearly." There was no other direction as to the estate. was one of the next of kin of the testator, maintained in a multiple-aised a year after the death of the testator that the estate, after satis-legacies, ought to be distributed as an intestate succession, on the at the clause quoted was void from uncertainty, and, therefore, that ion to accumulate, whether as regarded the period permitted by the Act, or as regarded the period struck at by that Act, was likewise , as being ancillary to the said clause.

hat as the direction to accumulate was unambiguous, and as it did not t at the expiration of the period of accumulation the directions in the necessarily be incapable of execution, the direction to accumulate must

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receive effect in so far as permitted by the statute, and that it was premature to determine *in hoc statu* the rights of parties in the capital and accumulations.

WILLIAM EDWARD, surgeon, Letham, Forfar, died on 6th August 1889 leaving a holograph trust-settlement in the following terms:—

"Letham, 13th September 1888.

"This is the will of William Edward, surgeon.

"1. Charles Smith Edward, my brother James' son, is to get nothing not to be allowed to enter my house, that's him settled.

"2. John Young, my sister Ann's son, is to get £5; William Young £5; Jane Young, their sister, £5.

"3. John Ogilvy, stationmaster upon the Caledonian Railway, £20 Jessie Ogilvy £30 yearly, to help to bring her family up and educate them, and also money to college her three sons; and John Ogilvy money to college one son, the amount each year not to exceed £30 for each of them.

"It has taken me hard work fifty years to make the money that I have, and I want it kept for another fifty years, and what is over expenses paying each year added twice a-year to the stock. The estate at present is as follows—£3,400 in the Royal Bank at Forfar, £2,000 in the Bank of Scotland at Forfar, £2,600 in the Commercial Bank at Forfar, all upon deposit-receipt, besides my book-accounts, pony, and furniture. I appoint Robert Bruce, agent in the Commercial Bank at Forfar, and John Ogilvy, stationmaster, and Jessie Ogilvy, his sister, and Jane Edward, my sister, my trustees. The trustees always to be four. Haldane Edward Fyfe, if he come up well, to be appointed one at twenty-one years. Everything here is my own, and if any person enter objections beat them off.

"WILLIAM EDWARD, Surgeon.

"It requires no witnesses. See left side."

[On left side.]—"After the fifty years is past, the money to purchase an estate in my name that cannot be sold nor indebted, and the income from it, after paying expenses, to be divided amongst those mentioned in my will yearly. WILLIAM EDWARD, Surgeon."

The heirs *in mobilibus ab intestato* of the testator were Jane Edward (one of the trustees appointed by the will), his only surviving sister; Charles Smith Edward (mentioned in the will) the only son of the testator's only brother, James Edward, who predeceased him; John Ogilvy and Jessie Ogilvy or Fyfe (both mentioned in the will), the only children of the testator's sister Innes Edward or Ogilvy, who predeceased him: John, William, and Jane Young (all mentioned in the will) the only children of the testator's only other sister, Annie Edward or Young, who also predeceased him.

In consequence of competing claims the trustees, on 21st December 1889, brought a multiplepoinding, in which they claimed, as their first alternative claim, to retain the residue of the estate until 6th August 1909.

Charles Smith Edward claimed as one of the heirs *ab intestato* of the testator to be ranked and preferred to one-fourth of the whole estate, all events after satisfying the legacies under heads 2 and 3 of the will, on the footing that the provision in the will for the disposal of the accumulated fund and the fee of the estate was void from uncertainty.

John and William Young (besides claiming on the same footing as Charles Smith Edward) maintained alternatively "that on a sound construction of the will the deceased thereby directed his trustees to purchase an estate and to entail it for behoof of the five persons taking benefit under the will, viz., the present claimants, and Jane Young, John Ogilvy, and Jessie Ogilvy. These directions, however, being defective, the claimants contended that the whole of the testator's means, under burden of the annuities

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d by the will, and under deduction of the special legacies thereby ell to be paid or conveyed equally among the said five persons. tively, the claimants contended that the trustees were bound to d accumulate the fund *in medio*, as directed by the will, for a period ty-one years, and thereafter to divide the estate among the said sons, or their issue as coming in place of them, on the footing that truly imported a gift of the fee of the estate among them; or, in nt, that the trustees were meantime bound to give effect to the 's direction to accumulate for a period of twenty-one years, leaving stions as to the disposal of the fund and the income arising there- be determined at the end of said period."

ns were also lodged for other parties, to which it is unnecessary to detail.

st November 1890 the Lord Ordinary (Wellwood) pronounced this utor:—"Finds that the pursuers and real raisers, trustees of the d Dr William Edward, are bound to implement and satisfy the ons in the second and third heads of the will, and to retain the of the trust-estate until the 6th August 1910, being twenty-one om the date of the truster's death, the free balance, after paying es of administration and providing for the said special legacies, dded to the capital at the two terms of Whitsunday and Martinmas year: Further, finds that it is premature to determine *in hoc statu* nts of parties in the capital and interest of the said residue: There- stains the first alternative claim stated for the said pursuers, and the remaining claims in the competition in so far as inconsistent e foregoing findings: Finds the claimants entitled to their expenses competition out of the funds of the trust-estate: Allows accounts to be given in, and remits the same, when lodged, to the Auditor nd report, and grants leave to reclaim." *

PINION.—It is to be regretted that the parties have not agreed to a divi- the fund *in medio*, because I am unable to hold that the testator's direc- to the disposal of the residue of his estate are so radically bad from un- y as to warrant an immediate division of the fund. The will contains a arly expressed direction to accumulate the free income of the estate for of fifty years; the reason assigned being that it had taken the testator rs to make the money and that he desired it kept until it reached a sum t to purchase a landed estate. This direction, so far as accumulation is ed, can only receive effect for twenty-one years, the time limited by But, subject to that restriction, the direction must receive effect unless ctions as to the ultimate disposal of the fund are so inextricable and n as to lead to the bequest being annulled.

e directions are as follows:—'After the fifty years is past the money to e an estate in my name, that cannot be sold nor indebted, and the income after paying expenses, to be divided amongst those mentioned in my rly.'

w these directions are confused and incorrectly expressed; but it is pretty at what was in the testator's mind was, that he wished his trustees to e a landed estate and settle it by deed of strict entail, and that the heirs l should adopt his name. Of course the direction to entail (if it can be cannot receive effect, because no tailzied destination, and indeed no ion at all, is given. There still, however, remains a direction to purchase e with the residue.

much as to the subject. As to the objects of the bequest, they are d as 'those mentioned in my will.' It was strongly maintained by all mants, except John and William Young, that there was radical uncertainty e persons referred to in these words. The words certainly need construc- t I do not see any insuperable difficulty in putting a reasonable construc- on them. I do not wish to prejudge any questions which may hereafter

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Charles Smith Edward reclaimed, and argued;—Except as regarded the pecuniary legacies and the educational provisions, this will was void from uncertainty. There was no doubt a distinct enough direction to accumulate for fifty years, but the clause expressing the purpose for which this accumulation was to take place was unintelligible. It was impossible to discover who were the persons intended to be benefited, or what precise benefit they were intended to take. They were described as "those mentioned in my will." Was that expression intended to be confined to those mentioned beneficially, or did it include also those who were mentioned only as trustees, one of whom, it might be observed, was the testator's only surviving sister? Then what were these persons, whoever they were, intended to take? What was said was, that "the money" was to purchase an estate in the testator's name that could not be sold or indebted, the yearly income to be divided among these persons. There was in that no express gift of the fee, but merely of the income, but it was said that a gift of the fee was to be implied. Plainly not an absolute gift in fee, for the provision about paying the income would then be meaningless. Possibly what the testator had in his mind was a confused notion of an entailed estate, but it was obvious that there was here no effectual direction to entail; for one thing, there was no destination. It might be that by means of a trust a testator could tie up his moveable estate for the purpose of paying the income to such persons as he might select if he made it quite clear what he intended, but that would not warrant the inference that he intended the same persons to take the fee. The fee therefore being undisposed of fell into intestacy. That being so it followed that the intended accumulation, in so far as it was to have

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arise, but I may say, in illustration, that *prima facie* there is a good deal to be said for the contention of the claimants John and William Young. They maintain that by 'those mentioned in my will,' the testator meant those beneficially interested under it, namely, his nephews and nieces (five in number), to whom he left specific bequests; that the expression clearly did not include his nephew Charles Smith Edward, who is disinherited in very emphatic terms; and that it would be unreasonable to hold the words to refer to the persons named as trustees, other than those who are already named as legatees. The remaining trustees other than those already mentioned as legatees are Robert Bruce, agent in the Commercial Bank at Forfar, who was not apparently connected with the family, and Jane Edward the testator's sister. As to the latter, there would have been much to say in favour of its being intended that she should get a share of the residue, had it not been that the time contemplated for payment cannot in human probability arrive during her lifetime. I do not say that the argument should prevail, but it is certainly stateable and not extravagant.

"There is more difficulty as to the extent of the interest which the persons favoured are to take. It may be that when the time for decision comes it will be held that the testator died intestate *quoad* the capital of the residue. But assuming that it is clear who the persons are who are described as 'those mentioned in my will,' the will says that they are to receive at least the free yearly income of the estate when purchased.

"I therefore think that the truster's directions to accumulate must receive effect in so far as allowed by law, and at the expiry of twenty-one years from the date of his death it will fall to be decided who are then entitled to the income and capital of the estate. It may be that even then the trust may not be brought to a close; but as a question will then arise as to the disposal of the income which can no longer be legally accumulated, it is not necessary at present to look further ahead.

"This being my opinion, I think the trustees must continue to hold the fund for twenty-one years, accumulating the free income, and in the meantime satisfy the provisions of the second and third heads of the will."

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e during the period beyond the twenty-one years permitted by so fell into intestacy, for it was only where the fund or estate, the source of the intended accumulation, was given to some o that the accumulation was a mere burden on the gift, that the *testato* were excluded from the benefit of the Act.[1] Of course, as Act went, the direction to accumulate was good for twenty-one it was a direction to accumulate for a purpose which was so bly expressed as to be void for uncertainty, and consequently the even so far as within the statute, was ineffectual. The Court eclare that now, for it was not a case in which some contingent ight have emerged at the end of the twenty-one years.[2]
for John and William Young;—It was at anyrate plain that r intended the reclaimer to get nothing; the deed therefore e critically construed so as to carry out that intention, if pos- was also plain that the testator intended the income of his be accumulated, and it was sufficiently plain to take the case e category of wills void from uncertainty that the persons o be benefited by the accumulation were those mentioned in parts of the will beneficially. The fair reading of the added to give the whole estate, capital and income, to those persons; yrate there was no reason why the unambiguous direction to e should not receive effect, in so far as within the statute.

STICE-CLERK.—This is undoubtedly a very curious will. The ques- we have to determine is, whether it is, or is not, intelligible in so uires to be dealt with at present. It clearly is so as regards Charles ward, of whom the testator emphatically states that he is to get d there is also no difficulty as to the special legacies and as to certain provisions. But then the testator goes on to say that as it has taken ears' hard work to make his money, he wishes it kept for another fifty "what is over expenses paying each year added twice a-year to the nd he adds in a codicil or postcript:—"After the fifty years is past, to purchase an estate in my name that cannot be sold nor indebted, come from it, after paying expenses, to be divided amongst those in my will yearly."
think the only question which we have now to decide is whether istinct direction to accumulate, and I have no hesitation in saying is. No doubt the law says that the accumulation must cease at the nty-one years, but if there is a good direction to accumulate given n able to give such a direction it must receive effect in so far as the s. There may be some difficulty at the end of the twenty-one years ning what is to be done with the money, but the problem may have elf out by that time. I think, at all events, that we are not called cide now how the accumulated fund is ultimately to be disposed of. that the Lord Ordinary's judgment is right, and should be affirmed.

OUNG.—The only direction dealt with by the Lord Ordinary is the direc- mulate, and the meaning of that direction is not doubtful. It is a direc- mulate the income of this estate, under certain deductions, for fifty years.

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e v. Kirk-session of Dundee, July 18, 1846, 8 D. 1229; Mackenzie v. 's Trustees, June 29, 1877, 4 R. 962; Maxwell's Trustees v. Maxwell, 877, 5 R. 248.
loch v. M'Culloch, Nov. 28, 1752, reported as a note 5 W. and S. on v. Skinner, March 6, 1844, 16 Scot. Jur. 422.

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Of course that period must, in terms of the Thellusson Act, be restricted to twenty one years, but why should the direction, so restricted, not receive effect? The only objection which has been stated is of this nature,—it is said that at the end of the twenty-one years it will be found that the accumulation has all been in vain,—that the provisions of the will directing what is to be done with the accumulated fund at the end of the period are unworkable. Now, like your Lordship and the Lord Ordinary, I do not think that I am in a position to affirm this proposition now. I would if I could. If I were sure that these provisions are incapable of execution, I should be willing to interpose now, and find that they are, but it is quite possible that there may be found persons at the end of the twenty-one years who are entitled to the whole accumulated fund. I therefore agree with your Lordship in thinking that the interlocutor of the Lord Ordinary should be affirmed.

LORD RUTHERFURD CLARK.—I agree with your Lordships in thinking that it is impossible for us to hold that the accumulation directed by the testator must necessarily be to no purpose. On the contrary, it may be found at the end of the twenty-one years that there are persons entitled to the benefit of the provision of the will, even although no one is pointed out to take the fee of the estate. My impression is that the accumulation can only be for the benefit of the persons named in the will who under it are declared to be entitled to the income of the estate after the accumulation has ceased. But whatever may be my impression upon that matter, I cannot decide it now. I think we can do nothing else than affirm the Lord Ordinary's interlocutor.

LORD TRAYNER.—I concur entirely with Lord Young.

THE COURT adhered.

ARCHIBALD MENZIES, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—A. W. GIFFORD, W.S.—JOHN RHIND, S.S.C.—Agents.

No. 113.

Feb. 7, 1891. King, Brown, & Co. v. Anglo-American Brush Electric Light Corporation, Limited.

1st DIVISION. C.

KING, BROWN, & COMPANY, Pursuers.—*Daniell.*

THE ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION, LIMITED, Defenders.—*Jameson.*

Appeal—Expenses—Petition for interim execution pending appeal—Expenses of petition and of extract.

(SEE *ante*, vol. xvii. p. 1266.)

In this case the defenders having appealed to the House of Lords, the pursuers petitioned for interim execution for expenses pending appeal, and in moving the Court to grant the petition, asked for interim decree for the expenses of the petition and the dues of extract. The Court declined to pronounce any other than the usual order.

THE following was the interlocutor:—"Having resumed consideration of the petition for execution pending appeal, along with the Auditor's report upon the petitioners' account of expenses, approves of said report, and decern against the Anglo-American Brush Electric Light Corporation, Limited, for the sum of £1114, 1s. 4d., the taxed amount of said expenses: Allow said decree to go out and be extracted and execution to proceed thereon, all as prayed for in said petition, upon the petitioners finding caution in common form to repeat whatever sum or sums they may receive under this decree in the event of the interlocutors appealed against being reversed in the House of Lords."

DAVIDSON & SYME, W.S., Agents.

s Riddell and Others (Rev. W. Barr's Trustees), Pursuers (Respondents).—*Shaw—W. Campbell.*
am Riddell and Others (Mrs Barr's Trustees), Defenders (Reclaimers).—*Lorimer.*

No. 114.

Feb. 19, 1891.
Barr's Trustees v. Barr's Trustees.

n—Testament—Clause of return.—A testator directed his trustees is wife (1) £2100 with full power of disposal thereof; (2) "£2000 to her during her lifetime, and the uncontrolled possession and profit of shall enjoy as long as she lives, which sum, however, should nothing nder it necessary to touch upon, or induce her to dispose of it other- she shall have power to do, the same or balance thereof shall at her n and form part of my trust-estate." In a supplementary settlement his trustees to pay his wife (1) the said £2100 to be at her sole dis- (2) the £2000, "the free and unfettered use of which she shall enjoy he lives, with power even to trench upon the principal should she ever emergency require to do so; declaring, however, that the said £2000 t required for my wife's personal use shall at her death return, and, necessary, be ordered by her then to return to my estate."
e survived. At her death she left the £2000 separately invested her means, but disposed of it expressly by will. *Held* that the wife er to dispose of the £2000 *mortis causa*, and that it belonged to the rustees.

v. William Barr died on 7th June 1883. He left a wife, but By his settlement he conveyed his whole estate, heritable able, to certain persons as trustees, appointing them also his By the third purpose he directed his trustees, *inter alia*, at erm after his death, to pay to his widow £2100, "with power to rself alone, to dispose of the same during her life, or in such manner as she shall think fit." In the fourth place, the testator he trustees to pay to Mrs Barr at the first term after his death, tional sum of £2000 to be held by her during her lifetime, and trolled possession and profit of which she shall enjoy as long as which sum, however, should nothing occur to render it neces- er to touch upon, or induce her to dispose of it otherwise, which have power to do, the same or balance thereof shall at her death l form part of my trust-estate." The residue of his estate was lied as directed by a subsequent writing. The settlement was Mrs Barr in virtue of a clause therein contained to the effect pproved of the provisions made for her, and accepted thereof in of her legal rights.

2d Division. Ld. Kyllachy. M.

pplementary settlement, dated 26th January 1882, Mr Barr, on ive of his former settlement, instructed his executors to pay his l continued:—"My debts thus paid, I instruct my said executors nly to hand over to my wife for her liferent use all my house- iture, &c., as specified in my previous will, but also to pay to two sums on the conditions stated,—1st, the sum of two thousand nund. pounds sterling (£2100) in fee, to be alike in use and n at her sole and absolute disposal; and 2d, the sum also of and pounds (£2000), the free and unfettered use of which she y so long as she lives, with power even to trench upon the should she ever under any emergency require to do so; declar- ver, that the said £2000 so far as not required for my wife's use shall at her death return, and, if thought necessary, be y her then to return to my estate and be disposed of as I shall and on the further narrative that the residue of his estate would *nter alia*, "what is likely to return to my estate after the death

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of my wife, £2000," directed the trustees to divide the whole residu among the nephews and nieces of himself and his wife.

After her husband's death, Mrs Barr received two sums of £2100 an £2000. She died on 24th October 1889, leaving a trust-disposition an settlement whereby she conveyed to trustees her whole estate belongi to her, "or over which I may have power of disposal at my death, . . declaring that the above clause is intended to include and shall include sum of £2000 left to me by my said husband under his trust-dispositi and settlement, and what my said husband intended I should dispose as I thought right and proper."

In September 1890, Mr Barr's trustees raised against Mrs Barr's tru tees an action for payment of the £2000 received by her from her hu band's estate. They averred that it was separately invested by her, th she did not require to use it, and did not use it, having other ample mea over and above her liferent of it.

The defenders denied this averment, and stated that Mrs Barr treat it as part of her general estate.

The pursuers pleaded;—(1) The said Mrs Barr not having trenche upon or disposed of the said sum of £2000, the same falls to be re to the estate of the said Rev. William Barr, as provided by his set ment, and decree should accordingly be pronounced as concluded (2) The settlement of the said Mrs Barr not being a valid exercise her of the power of trenching upon or disposing of said £2000, the pu suers are entitled to decree.

The defenders pleaded;—(1) On a sound construction of the Re William Barr's settlements, Mrs Barr, on his death, took an absolu right to the £2000 in question, or otherwise had a testamentary powe disposal thereof. (2) The late Mrs Barr having trenched upon or di posed of the said £2000, under the power to that effect conferred on h the defenders, as her trustees and executors, are not liable to pay as cc cluded for.

A joint minute was put in for the parties, shewing the manne which the £2000 had been invested.

The Lord Ordinary (Kyllachy) gave decree in terms of the conclus of the summons.*

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* "OPINION.— . . . The first question is as to the true construction Mr Barr's settlement with respect to the bequest of £2000, which is the ject of the action. In my opinion, that settlement must be held to inclu both the original trust-disposition and settlement and the holograph sup mentary settlement; and reading these documents together, I am unab come to any other conclusion than that maintained by the pursuers, viz., th Mrs Barr's right was in effect a liferent, with a limited power of disposal dur her life. I do not doubt that she might have spent the money, and it mig that she might have disposed of it gratuitously *inter vivos*. But I do not thi it possible to hold that she had the power to test upon it, and therefore, ass ing—as I do assume—that she was entitled to have the money paid over t and to use it, or any part of it, for any purpose she pleased during her life consider that she was under an obligation to repay at her death to her husb estate so much of it as she did not so use.

"The next and only other question is, whether Mrs Barr did in fact l the sum in the bequest intact. I am of opinion that the joint minute of a sions (No. 20 of process) sufficiently establishes that she did. It is not nec sary to consider what would have been the result if she had mixed the f with her other funds. An argument might in that case have arisen which do not arise. For it is clear that Mrs Barr kept the bequest separately invest so that there is no difficulty in tracing and identifying it. Indeed, in her w

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fenders reclaimed, and argued;—Mrs Barr had a right to "dis- the £2000. That included a right to do so by *mortis causa* It was her money, for it would have been liable for her debts, ould spend it at pleasure. It should therefore fall under her

rsuers were not called on.

OUNG.—I do not think it necessary to call for a reply. I agree with Ordinary that not only the trust-deed, but the holograph supplemen- ment, must be taken into account. It is therefore unnecessary to con- we should have decided if the latter deed had not existed. Taking together the question is, whether the sum of £2000 passes under the , or whether the testamentary trustees of the husband are entitled to it as part of the husband's estate. I think the latter is the correct e wife, in my opinion, had only a liferent of the sum of £2000, and was provided that under circumstances of exceptional necessity she it, she had no power to dispose of it by will. The contrast between nd the other sum of £2100 makes this clearer. I think the husband hat the £2100 was to be at the wife's own disposal, but that the £2000 o be used by her if a necessity should arise, and that not having been returns to the trustees of the husband.

UTHERFURD CLARK and LORD TRAYNER concurred.

RD JUSTICE-CLERK was absent.

THE COURT adhered.

MICHAEL & MILLER, W.S.—WINCHESTER & NICHOLSON, S.S.C.—Agents.

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Feb. 20, 1891. Russell v. North of Scotland Bank, Limited.

S RUSSELL (Surveyor of Taxes), Appellant.—*Asher*—*Young*.
RTH OF SCOTLAND BANK, LIMITED, Respondent.—*Dickson*.

—*Income-Tax—Application for certificate of over-assessment—Appeal ency—Income-Tax Act*, 1842 (5 *and* 6 *Vict. cap.* 36), *sec.* 133—*Taxes nt Act*, 1880 (43 *and* 44 *Vict. cap.* 19), *secs.* 57 *and* 58.—By section Income-Tax Act, 1842, it is enacted, "That if within or at the end of urrent at the time of making any assessment under this Act," any arged under schedule D should find, and should prove to the Commis-

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she attempts to bequeath the fund to the defenders, she treats it as a nd still extant fund.

as argued that it was clear from Mrs Barr's settlement that, in bound for her brother in a certain cautionary obligation for £900, intended to create a charge on the £2000. I do not, however, think inference can be legitimately drawn from the settlement, and I also w far, in such a matter, the settlement can be legitimately appealed he whole I think that the pursuers must have decree in terms of their

following authorities were referred to:—For pursuers, *Sprot*, June 12, D. 840, 27 Scot. Jur. 432; *Lawson*, June 10, 1841, 3 D. 1001; *Smith*, 1883, 10 R. 1144; *Tronson*, 12 R. 155. For defenders, *Buchanan's* Feb. 28, 1868, 6 Macph. 536, 40 Scot. Jur. 273; Ersk. iii. 8, 45; 13 S. 246; *Dwyer*, 1 R. 943."

orities in note of Lord Ordinary; Reddie's Trustees v. Lindsay, March 17 R. 558.

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sioners, that his profits during the year had fallen short of the computed sum upon which he had been assessed, it should be lawful for the Commissioners to cause the assessment to be amended, and if the sum assessed should have been paid, to grant a certificate of overpayment.

A banking company on 12th October 1888 discovered that they had been over-assessed, on their own return, for the year 1888-9, but they made no claim under the above section until 10th July 1890. The General Commissioners granted a certificate of over-assessment, holding, *inter alia*, that the claim for overpayment had been made "within a reasonable time." The Surveyor of Taxes appealed to the Court of Exchequer. The bank objected to the competency of the appeal, on the ground that an application for a certificate of over-assessment was not an appeal to the Commissioners within the meaning of the Taxes Management Act, 1880, and therefore, that an appeal from the determination of the Commissioners to the Court of Exchequer was incompetent; and, on the farther ground, that the appeal was an appeal against the determination of the Commissioners on a question of fact, viz., the reasonableness of the delay in applying for a certificate of over-assessment.

The Court *sustained* the appeal, *reversed* the determination of the Commissioners, and remitted to them to refuse the certificate, holding that the bank, by failing to make the application within or at the end of the year of assessment, had lost their remedy under the Income-Tax Act, 1842, sec. 133.

Opinion per cur. that the claim must be made either within the year or within the shortest period after the close of the year sufficient in the circumstances to enable the person assessed to ascertain, by using due diligence, whether and to what extent an overpayment has been made.

Exchequer Cause.
1ST DIVISION.
C.

AT a meeting of the Commissioners of Income-Tax for the County of Aberdeen, held on 29th October 1890, the North of Scotland Bank, Limited, appealed under the Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 1[illegible], as amended by the Customs and Inland Revenue Act 1865 (28 Vict. cap. 30), sec. 6, against an assessment upon £35,840, 7s. made upon them on their own return under schedule D of the Income-Tax Acts for the year 1888-9, and craved to have it restricted to £27,036, 8s. 7d.; and inasmuch as the tax on the assessment had been paid the bank also craved for a certificate of overpayment and to be repaid the sum of £220, 1s. 1[illegible], being the tax at the rate of 6d. in the pound on £8803, 18s. 5d., the amount of the alleged over-assessment.

The Surveyor of Taxes opposed the appeal on the ground that it had not been intimated "within or at the end of the current year" in the sense of section 133 of the Income-Tax Act, 1842.*

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* "The Income-tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 133, enacts,—"And be it enacted, that if within or at the end of the year current at the time of making any assessment under this Act, or at the end of any year when such assessment ought to have been made, any person charged to the duties contained in schedule D, whether he shall have computed his profits or gains arising the last aforesaid on the amount thereof in the preceding or current year, or on the average of years, shall find, and shall prove to the satisfaction of the Commissioners by whom the assessment was made, that his profits or gains during such year for which the computation was made fell short of the sum so computed in respect of the same source of profit on which the computation was made, it shall be lawful for the said Commissioners to cause the assessment made for such current year to be amended in respect of such source of profit as the case shall require, and in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for Special Purposes at the head office of Stamps and Taxes in England the amount of the sum overpaid on such first assessment, and thereupon the said last-mentioned Commissioners shall issue an order for the repayment of such sum as shall have been so overpaid."

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Commissioners sustained the appeal and granted a certificate of ment, being of opinion (1) that the words "within or at the end urrent year" did not imply a limitation, but an extension of time; that the appeal had been intimated within a reasonable time, g that the statute was to be read as meaning that appeals must ated within a reasonable time.

Assessor obtained a case.

llowing were the facts stated in the case:—"1. The company ssed under schedule D on its own return on the full amount of xed profits on the average of the three years 1885, 1886, and shewn by its balance-sheets made up to 30th September in each years. 2. The proved amount of the untaxed profits for the year ment, estimated in conformity with section 6 of 28 Victoria, cap. ne average of the three years, including the year of assessment, t of the amount assessed by the sum of £8803, 18s. 5d., and it is on this sum at the rate of 6d. per pound (£220, 1s. 11d.), which is unt of which repayment is sought for 1888-89. 3. The company's for each of the years on which the foregoing average is founded tified by the company's auditors as under:—1886, on 15th October 887, on 17th October 1887; and 1888, on 12th October 1888. 4. ting of the shareholders at which these balances and directors' were approved, were held as under:—1886, on 5th November 887, on 4th November 1887; and 1888, on 2d November 1888. e time the company made the return for the year 1888-9 the f the year of assessment were not and could not be known, the 's financial year ending on 30th September in each year. 6. No on of any appeal was made until 10th July 1890."

uestions of law were:—"(1) Whether the Commissioners' decision t to appeal or review; and (2) if it be so, whether, according to stated, the Commissioners had power to grant a certificate of ment for the year 1888-89?"

d for the Assessor;—(1) An appeal to the Court of Exchequer on uestion as the present was competent.[1] It was said that the pro- before the Commissioners were not of the nature of an appeal, ons 57 and 59 of the Taxes Management Act, 1880 (43 and 44 . 19) read together shewed that such proceedings constituted an o the Commissioners in the sense of that Act, and therefore an o the Court of Exchequer under section 59 was competent. It further that, admitting (on the merits) that the 133d section a limitation as to time, what was meant was that intima- ver-assessment must be made within a reasonable time, and that ommissioners had here determined that the intimation had been thin a reasonable time, an appeal against that determination, as determination on a matter of fact, was final. Now, in point of haps, the Commissioners had here determined a matter of fact, but reality they had determined was a question of law—the interpre- the statute,—and that on a matter affecting their own jurisdiction, appear from the second branch of the argument. (2) On the ne Commissioners were wrong. The meaning of the statute was imations of over-assessment must be made within the year of nt, or, if that was impossible, as soon after the end of the year as ossible for the person assessed to have discovered the error. The vas so worded as to permit a certain latitude as to time, because

[1] lton v. Commissioners of Inland Revenue, May 22, 1890, 17 R. 787; of Taxes v. Macrae, Dec. 12, 1884, 12 R. 336.

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the exigencies of a large business might make it impossible to discover the actual profits for any given year within that year, but the statute did not permit any greater latitude than was absolutely necessary to make that discovery in the particular case. The bank misunderstood the import of the *Copper Company's* case.[1] The Court there had no certain information as to when the company discovered that they had returned an overstatement of their profits for the year; the decision therefore was simply a decision that in the circumstances of that particular case it was reasonable to assume that delay for a certain time after the end of the year was necessary in order to make the discovery, and consequently that that delay was, in the particular case, permissible under the statute. The decision was no authority for the proposition that a similar period of delay was permissible in all cases, or that any period of delay was permissible at all, where, as here, the person taxed had certain knowledge of the overstatement before the end of the year. To hold, as the Commissioners here had done, that a delay of twenty months after that knowledge had been acquired was a reasonable delay, was practically to read the words under construction out of the statute. The Commissioners therefore had misinterpreted the statute, and their finding that the intimation had been made within a reasonable time was *ultra vires*, and, being so, could not bar an appeal, as the bank contended it did in answer to the first question. The Act 23 Vict. cap. 14, did not apply. Its purpose was to impose a limit—three years—in cases where there had been no limit before; but here there was a limit—that imposed by the words under construction.

Argued for the bank;—(1) The appeal was incompetent. The proceedings before the Commissioners were not of the nature of an appeal but were merely administrative proceedings,[2] and under section 59 of the Taxes Management Act, 1880, it was only "on the determination of an appeal," *i.e.*, to the Commissioners, that a right of appeal to the Court of Exchequer was given. Further, the Commissioners had found in fact that the intimation of over-assessment had been made within a reasonable time, and that being a finding in fact was not appealable under the Taxes Management Act, 1880.[3] Then (2) on the merits, the words "or at the end of the year," if understood as meaning "at the latest moment of the year," had no practical effect, for the words, so understood, added nothing to "within" the year. The words therefore must either be rejected as meaningless, or must be open to construction, and the fair construction was, that if the intimation was made within a reasonable time after the end of the year it would be good. That was the ratio of the *Cape Copper Company's* case, where an intimation was held to be good although it was made until nearly three years after the end of the year of assessment. If, on the other hand, the words were meaningless, *i.e.*, imposed no limitation at all, then the case was regulated (if the right of appeal was in any way limited as to time) by the Act 23 Vict. cap. 14, which imposed a limit of three years.

At advising,—

LORD PRESIDENT.—This is an appeal under section 133 of the Income-Tax Act (5 and 6 Vict. c. 35) by the North of Scotland Bank against an assessment made on them on their return for the year 1888-9.

[1] The Queen v. Special Commissioners of Income-Tax (*In re* Cape Copper Mining Company) 1888, L. R., 21 Q. B. Div. 313, 2 Tax Cases, 332.

[2] Strain v. Strain, June 26, 1886, 13 R. 1029.

[3] *In re* Cape Copper Mining Co., *supra*.

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The proved amount of the untaxed profits for the year of assessment estimated in conformity with sec. 6 of 28 Vict. c. 30, on the average of the three years, including the year of assessment, fell short of the amount assessed by £8803, 18s. 5d.; and it is the tax on this excess, at the rate of sixpence per pound (£220, 1s. 11d.), of which the appellants claim relief for the year 1888-9.

The company's balance for the year of assessment was certified by their auditors on 12th October 1888. This balance, and the directors' report thereon, were approved by a meeting of the shareholders on 2d November 1888.

It does not appear from any statement in the case before us at what date the overpayment was made, and probably this is immaterial. Indeed, I am disposed to think it is quite immaterial. The important dates are (1) when the fact of overpayment was ascertained, and (2) when application was made to the General Commissioners for a certificate of overpayment. After the overpayment was made the only remedy open to the appellants was an application for a certificate of overpayment under sec. 133 of the Statute 5 and 6 Vict. c. 35. The question is, whether they have made such application within the time prescribed by the section according to its true and just construction?

The blunder had been discovered by the company's auditor so early as the 12th October 1888, but no claim was made for a certificate of over-assessment till the 10th July 1890. The surveyor maintains that this demand comes too late according to the true construction of sec. 133, while the company's contention is *in effect* that there is in the section no limitation of time for making such demand.

The words of the section are—"If within or at the end of the year current at the time of making any assessment . . . any person charged to the duties contained in schedule D, whether he shall have computed his profits or gains arising as last aforesaid on the amount thereof in the preceding or current year, or on an average of years, shall find and shall prove to the satisfaction of the Commissioners by whom the assessment was made that his profits or gains during such year for which the computation was made fall short of the sum so computed in respect of the same source of profit on which the computation was made, it shall be lawful for the said Commissioners to cause the assessment for such current year to be amended in respect of such source of profit as the case shall require, and in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for special purposes the amount of the sum overpaid on such first assessment," and thereupon the Commissioners for special purposes shall issue an order for repayment of the sum overpaid.

The words specially requiring construction are the words introductory to the section—"within or at the end of the year current at the time" of making the assessment. Literally these words may be read as meaning that the claim must be made before the expiry of the year of assessment; and in some cases there may be no difficulty in complying with this strict and literal meaning of the words. But when there is another and ever largely increasing class of cases in which such compliance is absolutely impossible, as where a company is engaged in large mercantile concerns involving the keeping of accounts in various parts of the world, which cannot be brought together and balanced as a whole without the lapse of a considerable time after the lapse of the financial year on the 5th of April—to apply a strict and literal construction to the statutory words in such cases would be in the highest degree unreasonable and

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unjust. On the other hand, it would be quite as unreasonable to extend the time for making the claim to any time subsequent to the lapse of the year of assessment. This construction would really deprive the words "at the end of the year" of all intelligible meaning. It seems to me therefore that the only rational and the satisfactory solution of the difficulty is to hold that the claim must be made either within the year or within such a period after the close of the year as will enable the trader to ascertain, by using due diligence, whether and to what extent an overpayment of tax has been made.

The case of *The Queen* v. *Special Commissioners of Income-tax* (*in re Cape Copper Mining Company*) came first before a Divisional Court and afterwards before a Court of Appeal of the High Court of Justice in England. The arguments of counsel and the judgments are to a considerable extent devoted to technical questions with which we have no concern. But there are very distinct and lucid expressions of opinion as to the construction of the opening words of section 133, which are worthy of the highest consideration, particularly as in the end they formed the real ground of the judgments.

In the Court of Appeal the Master of the Rolls said (T. C. p. 350),—"You must give a meaning to these words 'at the end of the year' elastic enough to make them fairly and reasonably applicable to the different cases to which they will have to be applied. I think it must not be so large as to say at any time after. I think it must not be so restrictive so as to say that the Court can lay down one single period within which every case must be found and proved. I think you must give an interpretation, as I say, which will make it applicable to each particular case, and the real construction of it to my mind is this. It must be in as short time as in the particular case, by exertion, the party can fairly be said to have found out and to have proved; it is not simply to say that it is within a reasonable time as a general mode; it is in the shortest time that he can do it if he has made every exertion which he ought to have made. So that if a person really delays the examination of his affairs, although it may not be unreasonable for him to delay, if he really delays it beyond the time when if he had made all the exertion he ought to have made he would have found it out sooner, he is too late; he has not complied with this stipulation 'at the end of the year'; but if he has made every exertion which he ought to have made, then to say because a man has been several months, or in some cases more than a year, or, if you please, more than two years—for you cannot fix a time—if he has made every exertion that he ought to have made and yet cannot have done it within a less time than he has done it, to my mind he has satisfied the meaning of the section."

Lord Justice Lindley said (T. C. p. 355),—"It appears to me the true view that expression has been stated correctly by the Master of the Rolls. It is soon after the end of the year as is reasonably possible having regard to the facts of each particular case. Not literally at the end; that is absurd—everyone sees that it is impossible. Nor does it mean at any time hereafter, nor even within a reasonable time afterwards, unless diligence be employed as a limitation."

These opinions commend themselves to my mind as presenting the most rational and satisfactory view of the intention of the Legislature in using the language under construction. And therefore, without further discussion, I content myself with expressing my entire concurrence in these opinions.

The application of the rule so established to the present case does not admit of any dispute. As already mentioned, the fact and the amount of the over-

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of tax was ascertained so far back as the 12th of October 1888, but no made for a certificate of over-assessment till the 10th of July 1890. any therefore, in full knowledge of the facts, delayed their application nmissioners for a period of twenty months. This is certainly not the gence" nor "every exertion which he ought to have made" in the of the learned Judges already quoted.

dgment of the Court, I think, ought to be, to reverse the determination ommissioners, and remit to them to refuse the certificate of over- t for the year of assessment mentioned in the case.

ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

COURT reversed the determination of the Commissioners, and emitted to them to refuse the certificate of over-assessment.

SOLICITOR OF INLAND REVENUE—ALEX. MORISON, S.S.C.—Agents.

No. 116.

Feb. 20, 1891.
Loudon v. Tailors of Ayr.

VID CUNNINGHAM LOUDON, Pursuer (Reclaimer).—*Dickson—W. Campbell.*
NCORPORATION OF TAILORS OF AYR, Defenders (Respondents).—*Asher—Johnston.*

— Trade incorporation — Member — Qualification—Process—Amend- urt of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.—A tailor , who was born and received his education in Ayr, brought an action he Incorporation of Tailors of Ayr for declarator that he was entitled to ted a member of the Incorporation as being the son of a member, and hat by immemorial usage the sons of members were as such entitled to ted, although not resident in Ayr. The defenders did not dispute that ner's father had been a member at his death, but denied the averment The Lord Ordinary assoilzied the defenders, holding that the aver- usage was not proved. On a reclaiming note the pursuer abandoned ment of usage, and contended that he was entitled to admission as ailor in Scotland, and offered, if necessary, to amend his summons to ct. *Held* that the proposed amendment, even if competent, would be t.

on (*per* Lord President) that the proposed amendment was incompetent, uld have the effect of converting an action on the pursuer's own account action for behoof of the public at large.

1ST DIVISION. Lord Kincairney. C.

D CUNNINGHAM LOUDON, tailor in Annan, raised an action against orporation of Tailors of Ayr, and against two persons named,— known members thereof,—of which the main conclusion was for tor that "in terms of the constitution and regulations of the said ration the pursuer is entitled to be admitted a member of the said rotherhood of the said Incorporation of Tailors as the son of a r and guild brother thereof." He also had a conclusion for declara- t he was entitled to be admitted to a benefit scheme connected ne incorporation.

pursuer averred;—(Cond. 1) "The Incorporation of Tailors of which the defenders are the sole present members, is of very t date. . . . By the immemorial usage and custom of said in- ation, both prior to and since 1761, the sons of members, as such, on application, admitted members thereof, and of the said relative e, though not burgesses of Ayr or tailors exercising their trade in It is not the case, as alleged by the defenders, that only burgesses r, and tailors exercising or about to exercise their trade in Ayr, admitted as members." (Cond. 5) " . . . The pursuer's

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father, James Loudon, tailor and clothier in Ayr, became a member of the incorporation and relative scheme on or about 24th January 1831 and continued a member till his death on 28th November 1872, having enjoyed an annuity from the corporation for some years prior thereto. After his death the pursuer's mother enjoyed an annuity till her death in August 1882." (Cond. 6) "The pursuer was born on 2d October 1845 and is a master tailor and clothier. He was born, brought up, served his apprenticeship, and learned his trade in the burgh of Ayr, and has the strongest claims for admission into the said incorporation. The pursuer does a considerable tailoring business in Ayr. . . . His father before his death in 1872, and thereafter the pursuer himself, made repeated applications to the incorporation for the admission of the pursuer as a member thereof and also of the said scheme, as the son of a member, but the defenders have most improperly delayed or refused to admit him."

The defenders did not dispute the earlier averments, but denied the averment of usage, and stated that no one had ever been admitted a member of the incorporation who was not a burgess of Ayr, and who was not a tailor exercising or about to exercise his trade in the town; that the pursuer was not a burgess of Ayr, and was a tailor in Annan and not in Ayr, and that he was not at the date of the action or at any prior time qualified to be entered a member of the Incorporation of Tailors of Ayr or eligible to its said scheme.

The pursuer pleaded;—(1) Under the constitution and regulations of the said incorporation and of said scheme, the pursuer, being a son of a member, is entitled as such to be admitted a member of said incorporation, and also a member of the benefit scheme incident thereto.

The defenders pleaded;—(4) That the pursuer being neither a burgess of nor a tailor in Ayr was not qualified for admission as a member of the incorporation or of the scheme.

On 30th November 1889 the Lord Ordinary (Kincairney) allowed the parties a proof before answer.*

* "OPINION.—The pursuer, who is a tailor and clothier in Annan, concludes for declarator that, as a son of a member of the Incorporation of Tailors of Ayr he is entitled to be admitted a member and guild brother of that incorporation and of 'the scheme of said incorporation for the benefit of aged and infirm members and the widows and children of members.' He avers that he was born in 1845; that his father was a tailor and clothier in Ayr and a member of the incorporation and of the scheme; that by the immemorial usage of the incorporation the sons of members as such were on application admitted members of the incorporation and scheme though not burgesses of Ayr or tailors carrying on their trade in Ayr; and that from 1872 downwards he and his father on his behalf had applied for the admission of the pursuer as a member of the incorporation and of the scheme.

"The pursuer's demand is resisted by the present members of the incorporation on two grounds,—First, because the pursuer is not possessed of the essential qualification for membership, not being a burgess of Ayr nor a tailor exercising his trade in the burgh of Ayr; and secondly, because he has passed the age for admission to the scheme, which they aver has been fixed at the age of thirty by the regulations of the incorporation.

"On this latter point the pursuer's case seems to be, that a member of the incorporation according to the regulations is admissible to the scheme until he is forty, and that he applied for admission and was entitled to be admitted on his application before he had attained either age.

"There are thus two questions involved—

"First, Whether the pursuer possesses the requisite qualifications for membership of the incorporation? and

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defenders reclaimed to the First Division. On 8th January 1890, rt adhered.

proof was mainly documentary, consisting of voluminous excerpts e books of the incorporation, and of states tabulating the position ons who had been admitted to the incorporation during a long f years. There was no evidence to shew that persons had been d merely as being the sons of members. A considerable propor- the persons admitted were not at the date of their admission es of Ayr, but many, though not all, subsequently became es. With at most three possible but somewhat obscure exceptions had been admitted who was not at the date of admission a tailor in Ayr. Why these exceptional persons—if they were excep- were admitted it did not appear, but there was nothing to shew was because their fathers had been members.

st July 1890 the Lord Ordinary (Kincairney) pronounced this utor:—"Finds that (1) it is not proved that the pursuer carried business of a tailor in Ayr; (2) that it is not established by proof

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ndly, Whether he established his right to be admitted to the scheme e had reached the age at which he ceased to be eligible?

defenders have pleaded that the pursuer has no title to sue, and they d a very interesting and weighty argument in support of that plea. It d on the position that this Incorporation of the Tailors of Ayr, like de incorporations of the kind, was a subordinate burghal incorporation of the wider incorporation which was the burgh itself. It was sub- hat no man could be a trading member of the incorporation of a burgh being a resident burgess, and that, therefore, it was impossible that any d be a member of the subordinate trade incorporations without being a burgess. In support of this position the defenders' counsel appealed to no doubt a work of the highest possible authority on this subject—the n the Municipal Corporations of Scotland, dated in 1837. The argu- mitted and the authority for it will no doubt require careful considera- eafter, but it does not appear possible to give effect to it at this stage of . It may have been, and no doubt was, very frequently the fact that bers of such minor incorporations were always resident burgesses. Still t maintained as a proposition in law that it was legally impossible for not a burgess to be admitted as a member of such an incorporation; pears impossible, on the strength of the argument submitted, to ignore t as wholly irrelevant the pursuer's averment that it was according to e of this particular incorporation to admit to its membership sons of though not themselves burgesses nor residents in the burgh. I think e on the point must be ascertained, and the weight due to the usage considered, and I cannot think that any satisfactory judgment could unced founded on historical investigations as to the usage of such trade ations generally without regard to the usage of this particular incorpora-

pears to me, therefore, that the pursuer has stated averments in support im to be admitted a member of the incorporation which ought to be to probation.

ether he is also entitled to be admitted to the scheme of the incorpora- different question, and depends on the regulations of the incorporation point and on the date and character of the pursuer's application for n. On these points parties are at variance."

defenders urged that the proof should be confined, in the first instance, rmer point, because if that were determined in their favour an inquiry second point would be superseded. But it does not appear that the oint can involve any lengthened inquiry, and it does not appear expedi- ke a course which might involve the necessity of having two separate the cause."

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of custom, or otherwise, that by the constitution of the Incorporation of Tailors in Ayr he is entitled to be admitted a member of that incorporation merely as the son of a member thereof: Therefore repels the first plea in law for the pursuer, and assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuer liable in expenses, &c., reserving meantime any question as to modification."

The pursuer reclaimed. At the hearing he abandoned his claim to be admitted as being the son of a member, but argued that he was entitled to be admitted as being a tailor in Scotland, or at all events a tailor who though not resident in Ayr, did business there. By becoming a member of a trade incorporation of a place a person merely acquired a qualification to practise the trade in the place, which he might use or not as he pleased. Of course the necessity for such a qualification was now abolished, but it was necessary to look at the original theory in order to determine the pursuer's right. The proof established that burgess-ship was not essential, nor even residence, at the date of admission. If necessary the pursuer was willing to amend his summons.

The defenders were not called on.

LORD PRESIDENT.—I understand that none of your Lordships think it necessary to require an answer in this case.

The action is laid upon a very distinct ground, namely, that the pursuer has a right to be admitted as a member of the Incorporation of Tailors of Ayr, on the qualification which he alleges is that he is the son of a member and grandbrother thereof. The leading conclusion of the action is for declarator that, "in terms of the constitution and regulations of the said incorporation, the pursuer is entitled to be admitted a member of the said guild brotherhood of the said Incorporation of Tailors as the son of a member and guild brother thereof," and the further conclusions of the summons are precisely in accordance with the leading declarator. In like manner the qualification set out in the statement on record is the same, and the pleas in law are all embodied in the first plea, because the others are merely ancillary. The first plea is that "under the constitution and regulations of the said Incorporation of Tailors of Ayr, and of the benefit scheme, the pursuer, being the son of a member, is entitled to be admitted a member of the said incorporation, and also a member of the benefit scheme incident thereto." I may here say in a single word in regard to the benefit scheme mentioned in that plea, that that really has no bearing upon the question present before us. Of course the pursuer can have no interest in, or right to, that benefit scheme unless he is entitled to become a member of the incorporation, and his title to become a member of the incorporation depends entirely upon the face of this record, upon his being the son of a previous member.

The case was brought before us at an earlier stage by a reclaiming note against a judgment of the Lord Ordinary allowing a proof to the pursuer of his averments, and it was very clear from the Lord Ordinary's note appended to the interlocutor of 30th November 1889 what it was that he intended that the pursuer should be allowed to prove. He sets out that the pursuer avers "that he was born in 1845, that his father was a tailor and clothier in Ayr, and a member of the incorporation and of the scheme, and that, by the immemorial usage of the incorporation, the sons of members, as such, were, on application, admitted members of the incorporation and scheme, though not burgesses of Ayr, or tailors carrying on trade in Ayr." Again he says in a later part of his note,—"It appears impossible to ignore and treat as wholly irrelevant the pursuer's averment that

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cording to the usage of this particular incorporation to admit to its
rship the sons of members, though not themselves burgesses nor residents
burgh." Now, in adhering to that interlocutor, I am quite satisfied that
pted the view which the Lord Ordinary thus expressed, and that it was
e of that particular averment as to the immemorial usage of the incorpora-
admit sons of members, as such, on application, that we affirmed his
ip's impression that it was a matter proper for inquiry; and indeed, in
over the record again, I do not see that there is any other matter for
at all. That seems to be the only substantive averment in support of
ion as laid, namely, an action for declarator that the pursuer is entitled,
son of a former corporator, to be admitted, as such, a member of the in-
ation.

now matter of concession that that immemorial usage which the pursuer
to exist has really no existence at all, and that the fact of a man being
of a former corporator gave him no title whatever, according to the usages
corporation, to be admitted a member himself. The pursuer is a tailor,
bt, and I have no doubt he was bred in Ayr, and probably received his
ducation in Ayr, but his present position in life is that he is a tailor in
, and it is not said that a tailor in Annan has any particular qualification
dmitted to the Incorporation of Tailors of Ayr.

only other ground, upon which the argument submitted to us that he has
ification is founded, is that he is a tailor in Scotland. It seems to me to
o that, and if that is a qualification, it certainly seems a very strange one,
ch as I never heard in connection with corporation law before. But if
a tailor in Scotland is a qualification to be admitted as a member of the
oration of Tailors of Ayr, I do not see how we are to stop at Scotland.
should not every tailor all the world over have a good right to be admitted
benefits of this incorporation? I cannot see a ground of distinction, and
ore, even if the pursuer were in a position to amend his record and to in-
e this as a new ground of action, I should have very great scruple and
lty indeed in listening to such a suggestion.

I doubt the competency of such an amendment in a case of this kind,
e in this case the pursuer is suing on his own account. He is suing to be
ed a member because he is the son of a previous member; but if he is
d to convert his action into a suit to be admitted as a member because he
ilor, that is to say, because he is either a Scottish tailor, or a tailor some-
else in the world, then it becomes an action of a very different class in-
much more comprehensive in its conclusions. It would be an action suing
r behoof of the pursuer himself, but for behoof of a great community. I
think that is within the scope and intention of the Act of Parliament,
allows such extensive amendments as we are now acquainted with.

really it is in vain to speculate upon whether that amendment could be
d, because if it were, and if this action were converted into an action of
ator that every tailor in Scotland was entitled to be a member of this in-
ation, that would be so plainly and obviously irrelevant that I think your
hips would at once reject the whole amendment.

hink the pursuer's case entirely fails. He has no title according to the
ce of immemorial use as the son of a previous member, and he has, in my
n, no title or shadow of a title arising from the mere fact that he happens
a tailor, and is in some way connected by birth or education with Ayr. I

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am therefore of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD ADAM.—I am of the same opinion.

LORD M'LAREN.—I concur in your Lordship's opinion. In coming to the consideration of this question, I think we start with a very elementary rule of the law of corporations—namely, that such bodies keep up their membership by co-optation. That is the universal mode of continuing the personality of a corporation, subject of course to modification, according to the written or customary law of the particular institution. But there is unquestionably an element of choice in the mode in which the membership of a corporation is to be continued or increased. We know that in some cases certain persons, especially sons of former members, have, either under the original constitution of the body, or by custom, acquired the privilege of being admitted as of right, and the case with which the pursuer came into Court was a case of that nature—that in respect of being the son of a member he could claim to be admitted into this body as of right. That is a perfectly intelligible case, and, if well founded in fact, is consistent with what we know of the usage of such bodies. But then when we come to the question of fact, on which proof was allowed, the Lord Ordinary has shewn that the case of the pursuer entirely fails, and it was not suggested in the argument addressed to us that the proof contained anything contrary to the Lord Ordinary's opinion. It was admitted that the claim as founded upon birth membership has failed, and now it is sought, for the first time, to press the claim of the pursuer on a very different and more general ground, namely, that in respect of mere membership of the trade or ability to exercise the trade, the pursuer is entitled to be admitted without reference to the wishes, or, I take it, to the past practice of this corporation. Certainly it has not been shewn that the past practice of this corporation recognises any absolute right on the part of non-resident tailors to be admitted members. The records contain instances of individuals, who were non-residents, being admitted to membership, but these instances are not very numerous, and there is nothing to shew that the admission was given as matter of right; the inference is rather, I think, of the opposite character. I am of opinion with your Lordship that the position which is now taken up by the pursuer is really hardly distinguishable from this, that any person is entitled to join this corporation. That does not seem to me to be a relevant statement of qualification at all, and therefore both in respect that it is different from the ground of action set forth on record, and also because it does not appear to me to be a relevant ground of action even if it were there, I am of opinion that the action has failed.

LORD KINNEAR.—I concur with your Lordships, and have nothing to add.

THE COURT adhered.

MACPHERSON & MACKAY, W.S.—HENDERSON & CLARK, W.S.—Agents.

No. 117. Feb. 21, 1891. Flynn v. M'Gaw.

DAVID FLYNN, Pursuer (Appellant).—*Shaw—Salvesen.*
WILLIAM M'GAW, Defender (Respondent).—*Jameson—Sym.*

Reparation—Master and Servant—Employers Liability Act, 1880 (42 *and* 43 *Vict. c.* 42)—*Relevancy.*—In an action of damages raised by a labourer against his employer, a contractor, at common law and under the Employers Liability Act, 1880, the pursuer alleged that in the course of working as a

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er at the demolition of an old building he fell by part of one of the floors way and received injuries, that he had been employed at the work under rection and superintendence of a foreman, to whose orders he was bound form, that he had been ordered by him to go upon a floor which was weak h age and decay, and through the removal in the course of the work of supports, that he met with the accident by conforming to this order, and e pursuer was not aware of the danger he incurred by obeying this order, e foreman was grossly negligent in giving the order to go upon the floor, he knew or ought to have known was dangerous without guarding against t, or enabling the pursuer to guard against it, and that the foreman was ncompetent to be left in charge of the work, and that his want of skill or contributed to the accident.

l (diss. Lord Young) that the pursuer was entitled to an issue.

2D DIVISION. Sheriff of Lanarkshire. I.

VID FLYNN, labourer, raised an action in the Sheriff Court of Lanark- against William M'Gaw, contractor, Maryhill, for damages for s through the alleged fault of the defender. The pursuer had been defender's employment. The action was laid at common law, and nder the Employers Liability Act, 1880.

pursuer averred;—(Cond. 2) "The pursuer was at the date of the nt after mentioned, and for about three weeks previously, in the yment of the defender as a labourer." (Cond. 3) "During the of September 1890 defender was in the course of pulling down an ilding at 216 Holm Street, Glasgow, and the pursuer was employed t as a labourer, along with other two men, under the direction and ntendence of Samuel Merrigan, a foreman in the employment of er. The pursuer was bound to conform to the orders and direc- of the said Samuel Merrigan in connection with said work." 4) "On 23d September 1890 pursuer was ordered by the said l Merrigan to go up to the floor of the first flat of said building at Holm Street, and to remove the flooring and joists." (Cond. 5) partition walls of said flat had already been partly taken down, the lime, and rubbish therefrom were left lying upon the floor, and l of the joists which supported said floor, had also been already taken The said work had all been done under the directions of the said l Merrigan." (Cond. 6) "While clearing away the rubbish prepara- lifting the floor, a portion of the floor gave way beneath pursuer, and s in consequence precipitated to the bottom of the building, a ce of nine or ten feet, where he fell upon a quantity of bricks, and ied the injuries after mentioned. The said accident resulted from rsuer having conformed to the orders of the said Samuel Merrigan narrated." (Cond. 7) "The said accident, and the injuries which d to the pursuer therefrom, were due to the fault of the defender, said Samuel Merrigan, for whom the defender is responsible. The n question was in an insecure state, in consequence of its age, and ate of decay into which it had fallen, prior to the operations in on, and it had been rendered still more insecure and dangerous by erations of the defender, under which are included the removal of ists from beneath a portion of it, said removal having taken place instructions of the said Samuel Merrigan, or the defender, who ime to time personally supervised the work. The pursuer was not of the danger he incurred by obeying said order, and he received rning on the subject. It was the duty of the said Samuel Merrigan e first ascertained whether the work which he ordered pursuer to ld safely be carried out before giving him said order. Had he done weakness or defect in the floor would have been discovered and cident would not have occurred. The said Samuel Merrigan was

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grossly negligent in ordering the pursuer to proceed to do work at a place which he knew, or ought to have known, was insecure and dangerous without in any way guarding against such an accident as occurred, or enabling the pursuer to guard against it." (Cond. 8) "Alternatively, the defender is responsible for the said accident, in respect that the said Samuel Merrigan was quite incompetent to be left in charge of said operations. Had a skilful foreman been put over the job at which the pursuer was engaged, as ought to have been done, owing to the difficulties and dangers connected with it, he would presumably have taken means to guard his gang against dangers, such as those which led to the pursuer's accident. The said Samuel Merrigan was not sufficiently skilled or experienced to be entrusted with the direction of such operations, and his want of skill caused or contributed to the accident to the pursuer."

The defender stated, *inter alia*, that Samuel Merrigan was employed not as a foreman but as a labourer.

The Sheriff having allowed a proof, the pursuer appealed for jury trial.

The defender argued that the action was irrelevant. It appeared from the pursuer's condescendence that there was no duty on the defender's part to provide a secure flooring. The work was the taking down of an old building, and certain risks were incident to it. Of these the pursuer had as good an opportunity of judging as Merrigan or the defender. It was not said that he did not know about the operations which had been performed, nor what a skilled foreman ought to have done that was undone.

The pursuer argued;—Merrigan was said to be an incompetent man and to have failed in duty, with the result that there was an accident. That alone would make the action relevant.[1] It was also said that the operations had made the floor very insecure, and yet that the pursuer had been ordered to go and work upon it. It could not be assumed against him that he knew of the danger. In any view there was a relevant case under the Employers Liability Act.

LORD JUSTICE-CLERK.—The case made by the pursuer is, that he and seven other men, working under charge of a foreman, were engaged in pulling down a ruinous old building, that this was an operation requiring more knowledge and skill than could be expected from an ordinary workman, and that the foreman was the proper person to direct the operations, he having special knowledge and skill. It is also alleged that the master, in appointing the person he did as foreman, appointed a man who was incompetent and unskilled for the work. That is the fault alleged against him, and it is averred that that fault led to the accident. It is rather an unusual averment, because in almost all these cases the pursuer does not dispute the skill of the foreman, and the averment of the defender is that the foreman was quite a competent person, and that the master was justified in appointing him. Now, whether this work of pulling down the old house was a work requiring more skill than could reasonably be expected from the pursuer is a question of fact, and I think also that the question whether the foreman appointed by the master was a person incompetent for the duty assigned to him is also a question of fact.

The case is no doubt a narrow one, but I do not think that I would have excluded inquiry in this case even if that averment of the incompetency of the foreman had not been upon record, because the pursuer avers that he was bound to conform to the orders of the foreman, who knew that the place he was set

[1] M'Aulay v. Brownlie, March 9, 1860, 22 D. 975, 32 Scot. Jur. 415.

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to was insecure, which he himself did not. He was sent up to help in taking down this storey of the house, and while he was doing some necessary preliminary work of clearing away lime and rubbish he fell through the flooring. The question whether the person who sent him up was a foreman in the sense of the Employers Liability Act is also a question of fact.

I must say I think that in cases of this kind, where the Sheriff has granted an inquiry, it is unfortunate that the pursuer should bring the case here, and ask for the much more expensive form of inquiry by jury trial; but I see no ground to refuse the pursuer an issue.

LORD YOUNG.—I am bound to say that I think this case as stated is irrelevant, and ought not to be submitted to a jury.

In the first place, I take the case as it is presented to us at common law. The parties are at issue whether a certain person was a foreman or whether he was a labourer. The statement of the pursuer is, that he and two other men, under the direction of a foreman, had been engaged for a period of three weeks in taking down this old building. The defender says that there were four labourers engaged, and that the pursuer, who was one of them, had as much skill as any of the others, and was as well qualified as they to look out for himself. Now, whether this man Merrigan was a foreman or not, the pursuer has not stated any case against the master so as to make him liable, because he has not averred any ground upon which he thinks a more experienced foreman should have been appointed over the work. If one workman or a number of workmen accept the contract with a master that they shall pull down a ruinous old building, and one of them is injured in the course of carrying out the work, I do not think that he has any ground for an action at common law against the master because he did not appoint a skilled foreman to superintend the work which the men had contracted to do.

I can understand a workman making some such accusation as this in a very special case, that he had been led into going on with the work, having been deceived into the idea that he was going to work under a skilled foreman, whereas in fact the man put over him as foreman was not really a skilled man at all. But that is not the case here. The pursuer had been engaged with Merrigan in this job for some weeks, and there is no suggestion upon the record that he had been deceived into the belief that Merrigan was a specially skilled man in matters of this sort. I think that no blame can be attributed to the master for any failure in his duty as a master to provide a specially skilled foreman for this job, and therefore I think that there is no relevant case of fault alleged against Merrigan, one of the four labourers who were engaged.

Then a point was made that Merrigan was a person to whose orders the pursuer was bound to conform. No doubt the language in the Act of Parliament is very loose and general language, but I cannot read that language as meaning that whenever the master has appointed one of the workmen as foreman over the others, and the foreman gives a perfectly general order to his men to go on with their work, that the master shall be responsible for any accident which may happen in the course of the work. I think that that provision applies only to the case where one is acting as a deputy-master, whose orders are given as if they were the master's own orders, and who is giving a special order to the workmen which is being specially obeyed. Here no special order had been given, but merely a general order to go on with the work. Looking to the sum and

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LORD RUTHERFURD CLARK.—I do not think that it would be safe to exclude inquiry in this case, and therefore I think the case must go to a jury.

LORD TRAYNER.—The question before us is one of relevancy only, and in the consideration of such a question I think it is impossible to keep too strictly to the pursuer's averments. The question is, whether if these are true the pursuer has not stated enough to entitle him to the remedy he seeks. I confess I think the record narrow, but I cannot say that, assuming the truth of the pursuer's averments, it is so irrelevant that he has put himself out of Court.

THE COURT granted an issue.

A. C. D. VERT, S.S.C.—MITCHELL & BAXTER, W.S.—Agents.

No. 118. SAMUEL HENRY RAMSBOTHAM, First Party.—*Asher—Johnston—Dundas.*

Feb. 25, 1891. Ramsbotham v. Scottish American Investment Co., Limited. THE SCOTTISH AMERICAN INVESTMENT COMPANY, LIMITED, Second Party.—*D.-F. Balfour—Lorimer.*

Process—Special case—Competency—Court of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 63.—*Held* that a special case between a limited company and one of its shareholders for the opinion and judgment of the Court upon the question whether special resolutions of the company creating preference shares were *ultra vires*, was a competent form of process, as the question raised might have been tried between the same parties in another form of process.

Company—Creation of preference shares by company—Ultra vires—Companies Act, 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 12.—The memorandum of association of a company registered under the Companies Act, 1862, and limited by shares, provided that the capital of the company should be £1,000,000 divided into 100,000 shares of £10 each. The articles of association provided that the company might, by special resolution, increase the capital, and might "determine the conditions on which such increase shall be made, the number and amount of the shares into which such increased capital shall be divided, and the time, mode, and terms at, and according to which, such last-mentioned shares shall be issued, and how the premium, if any, on such shares shall be applied." *Held* that a special resolution of the company to increase the capital of the company by the creation of preference shares was *ultra vires*.

1ST DIVISION. C. THE SCOTTISH AMERICAN INVESTMENT COMPANY, LIMITED, was incorporated under the Companies Acts, and was registered on 29th March 1873.

The fifth head of its memorandum of association provided that "the nominal capital of the company is £1,000,000, divided in 100,000 shares of £10 each."

The articles of association contained, under the title "Capital and Increase thereof," the following provisions:—"28. The original capital shall be £1,000,000 sterling, divided into 100,000 shares of £10 each; but the company, with the sanction of a general meeting of the members to be specially convened for that purpose, may from time to time increase such capital to any amount that may be determined by such meeting. Such general meeting, or any subsequent general meeting, may determine the conditions on which such increase shall be made, the number and amount of the shares into which such increased capital shall be divided, and the time, mode, and terms at and according to which such last-mentioned shares shall be issued, and how the premium, if any, on such shares

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be applied, and all new shares so created shall be offered to the ng members in proportion to the existing shares held by them, or as is may be."

March 1875 the capital of the company was increased by special tion to £2,000,000, and the memorandum and articles were altered lingly.

an extraordinary general meeting of the company, held on 11th nber, confirmed at another meeting held on 30th December 1890, llowing special resolutions were passed, *inter alia*:—

That the capital of the company be increased to £2,400,000 by the on of 200,000 shares of £2 each, entitled to a fixed cumulative pre- ial dividend of 4½ per cent per annum, but to no further or other ipation in the profits of the company.

. That the following changes be made in the memorandum and es of association, viz.:—

) That article 5 of the memorandum of association as altered by l resolution be deleted, and the following substituted in place f:—The nominal capital of the company is £2,400,000, divided 00,000 preference shares of £2 each, entitled to a fixed cumulative ential dividend of 4½ per cent per annum, and into 200,000 ordi- shares of £10 each. Any shares when fully paid may be converted tock by resolution of the shareholders in general meeting."

') That article 28 of the articles of association as altered by special tion be deleted, and the following substituted in place thereof:— apital of the company shall be £2,400,000 sterling, divided into 00 preference shares of £2 each, and into 200,000 ordinary shares of ach. The preference shares shall be entitled to a fixed preferential lative dividend at the rate of 4½ per cent per annum, before any nd is paid on the ordinary shares, and to priority in repayment of l, but shall in no case be entitled to participate in surplus assets; he company may (if it see fit), convert its shares, or any portion or thereof, when fully paid, into stock: The company may, further, ime to time, increase its capital to any amount that may be deter- l by the shareholders in general meeting."

Samuel Henry Ramsbotham, a shareholder in the company, inti- to the company that he objected to this proposed creation and of preference shares as *ultra vires* both of the directors and of the ny.

pecial case was thereupon presented, Dr Ramsbotham being the first and the company the second party.

e question of law was:—"Whether the increase of the capital of the sh American Investment Company, Limited, by the creation of 00 shares of £2 each, entitled to a fixed preferential cumulative nd at the rate of 4½ per cent per annum before any dividend is paid e ordinary shares, and to priority in repayment of capital, but with ht to participate in surplus assets, is within the powers of the com- and whether the special resolutions of December 1890, so far as they rt to increase the capital by the creation of such shares, are valid?"

en the case was called in the Single Bills on 9th January 1891 doubt was suggested from the bench as to the competency of the on the ground that the question raised was one which affected the e body of shareholders, whereas the parties to the case were the com- and only a single shareholder.

rimer, for the parties, cited the *Parochial Board of Bothwell* v. *Pearson*,[1]

[1] Feb. 6, 1873, 11 Macph. 399, 45 Scot. Jur. 264.

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and contended that the case fell within the rule there laid down, viz., that where the question raised could have been tried between the parties in another form of process a special case was competent. Special cases analogous to the present had recently been considered without objection.

LORD PRESIDENT.—I rather think that Mr Lorimer is right in saying that the present case stands the test of which he spoke, for I think the second party, although only a single shareholder, might have challenged the proceedings of the company by a suspension or a declarator, and therefore I think that the case is one which complies with the provisions of the 63d section of the Court of Session Act.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The case was sent to the roll.

At the hearing on the merits the second party argued;—The 5th head of the memorandum of association, and articles 28 and 29 of the articles of association, taken along with the 12th section of the Companies Act, 1862* gave the company power to create preference shares. The memorandum of association was no doubt in a general sense the charter of the company, but nevertheless the memorandum and the articles were contemporaneous documents, to be read together, and the articles might legitimately be used to explain the memorandum as to matters on which it was ambiguous or silent.[2] Now, so using the articles the company had power to increase its capital, and to determine the "conditions" of such increase. "Conditions" was a word of wide import; it described the whole elements which went to the constitution of the company, and among such conditions there might well be included a provision that new capital should be issued on the footing of a preference over the old, and it had so been held in England in *Harrison's* case.[2]

Argued for the first party;—An essential principle of all companies under the Companies Acts was that of equality among the shareholders in the matter of dividends, unless there was a clear stipulation to the contrary in the memorandum and articles of association. If they were silent on the subject, it was *ultra vires* of the company to derogate from that principle of equality by creating and issuing preference shares. There might be some difficulty in reconciling the English authorities on other matters, but they were at one on this rule of presumed equality

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[1] Bruce v. Ratepayers of Fordoun, March 7, 1889, 16 R. 563; Police Commissioners of Kirkintilloch v. M'Donald, Oct. 31, 1890, *supra*, p. 67.

* The Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 12, enacts,—"Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association."

[2] Harrison v. Mexican Railway Co., 1875, L. R., 19 Eq. 358; South Durham Brewery Co., 1885, L. R., 31 Chanc. Div. 261.

[3] Ashbury v. Watson, 1883, L. R., 30 Chanc. Div. 376, per Lord Esher, M. R. at p. 381; Harrison, *supra*, per Jessel, M. R., at p. 366.

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sent case was ruled by the cases of *Hutton*[1] and *Ashbury*.[2] It was
t it might be a "condition" in the sense of article 29 that the
pital should have a preference. The word "condition" had never
d this wide meaning. In the cases founded on as shewing that it
vider meaning, it was collocated with "privileges" or "priorities,"
se cases[3] expressly recognised the authority of the cases of *Hutton*
hbury.

PRESIDENT.—The fifth head of the memorandum of association of this
y provides,—"The nominal capital of the company is £1,000,000
into 100,000 shares of £10 each."
that undoubtedly suggests an equality of interest in all the shareholders,
re does not appear to be anything in the articles of association, which
temporaneous with the memorandum of association, which in any way
from that equality of interest.
28th section of the articles of association declares,—"The original capital
one million pounds sterling divided into one hundred thousand shares
pounds each, but the company, with the sanction of a general meeting
members to be specially convened for that purpose, may from time to
crease such capital to any amount that may be determined by such meet-
That is precisely in accordance with the 5th head of the memorandum
ciation which I have read, and certainly imports no variation of that
which appears upon the face of the memorandum of association.
e immediately, however, follows in the articles a clause (29) which de-
—"Such general meeting, or any subsequent general meeting, may deter-
he conditions on which such increase shall be made, the number and
of the shares into which such increased capital shall be divided, and
e, mode, and terms at and according to which such last mentioned shares
issued, and how the premium, if any, on such shares shall be applied,
new shares so created shall be offered to the existing members, in pro-
to the existing shares held by them, or as near as may be."
it is said that that imports that a general meeting called in terms of
cles of association may determine the conditions upon which an increase
tal may be made, in this sense, that it may make it a "condition" of
crease that the new capital shall have a preference over the old.
appears to me to be an unreasonable construction of the word "con-
A "condition," in the ordinary and literal sense of the word, imports
tion of a right, and not an extension, priority, or privilege, and I can see
in the 29th article which suggests that the word is to receive any other
ordinary meaning.
pears to me therefore that the word is to be read in its ordinary sense.
mpany are to determine at a general meeting when, where, and how the
ares are to be paid for, and whether the shareholders are to participate in
end at a particular time or date, but to interpret the word "condition"
ning anything of the nature of a privilege or priority over the other
would be to depart from the ordinary meaning of the word, and accord-

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tton v. Scarborough Cliff Hotel Co., 1865, 2 Dr. and Sm. 514 and 521.
hbury v. Watson, *supra*.
rrison v. Mexican Railway Co., *supra*; South Durham Brewery Co.,

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ingly it is a reading which I am not prepared to adopt. I therefore think that the powers given by article 29 of the articles of association do not in any way conflict with the 5th head of the memorandum of association, or confer any power on the company to create preference shares.

What, then, have the company done? We find that they came to a resolution on 11th December 1890, confirmed on 30th December of the same year, that "the capital of the company be increased to £2,400,000 by the creation of £200,000 shares of £2 each, entitled to a fixed cumulative preferential dividend of 4½ per cent per annum, but to no further or other participation in the profits of the company."

Now, for the reasons which I have stated, and applying my mind as best I can to the statements of the case, the resolution appears to me to be entirely beyond the powers of the company, and altogether illegal. I am therefore for answering the question in the negative.

LORD ADAM.—In the case of a limited company, as we all know, certain things are required to be set forth in the memorandum of association which cannot be altered except to a limited and modified extent.

The fifth clause of the memorandum of association of this company is as follows:—"The nominal capital of the company is £1,000,000 divided into 100,000 shares of £10 each." This clause may be modified, but only to the extent and under authority of the 12th section of the Companies Act, 1862 (25 and 26 Vict. c. 89), which enacts,—"Any company limited by shares may so far modify the conditions contained in the memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock."

Now, had the question occurred for the first time, I should, I confess, have entertained doubts as to whether the resolution, not merely to increase capital and consolidate and convert, but to issue new shares upon terms altogether different from those applicable to the original issue, was competent under the 12th section of the Act, although power to issue such shares might be contained in the articles of association but not in the memorandum. One cannot, however, avoid seeing that the English cases cited to us have treated the memorandum of association and the articles of association as contemporaneous documents which should be read together and not separately, and therefore a clear and distinct power to create preference shares, though contained in the articles of association only, would probably be sufficient to warrant such a resolution as the one in question here.

I agree with your Lordship that the words of the 5th clause of the memorandum imply equality of interest in all the shareholders, and I come to the opinion upon a construction of the words and upon the principle which underlies the cases cited to us, which is that equality in benefit is necessarily to be implied, and is not to be displaced unless there is a clear stipulation to the contrary.

I can find nothing in the 29th clause of the articles (in which the power given by the 12th section of the Act is embodied) to subvert the necessary implication of equality of interest in the shareholders.

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t the cases quoted to us were different from the present. In one of find not only the word "conditions" but also the word "privileges," word implies priority. Then in another case the words were "special and priority."

absence of such words clearly implying a change in the equality of any, I am of opinion that the resolution was *ultra vires* and illegal.

M'LAREN and LORD KINNEAR concurred.

THE COURT answered the question in the negative.

E, BELL, & BANNERMAN, W.S.—MENZIES, BLACK, & MENZIES, W.S.—Agents.

No. 119.

Feb. 26, 1891. Haworth & Co. v. Sickness and Accident Assurance Association, Limited.

HAWORTH & COMPANY, Pursuers (Respondents).—*J. A. Reid—Ferguson.*

SS AND ACCIDENT ASSURANCE ASSOCIATION, LIMITED, Defenders (Reclaimers).—*Lorimer—W. C. Smith.*

ner—Contract—Conditions—Guarantee for servant's fidelity—Failure to use checks stipulated for.—An assurance association entered into a vith a merchant and a traveller employed by him by which the associa- ed, on payment of a premium, to guarantee the employer to a certain gainst loss by embezzlement on the part of the traveller. The contract that the employer had delivered to the association a proposal containing atements, and a declaration setting forth, *inter alia*, "the checks to be n" the traveller's "accounts, and has consented that such proposal ration, and each of the statements therein referred to or contained, the basis of the contract," "and this agreement is granted on the that the business of the employer shall be conducted in every parti- ccordance with the said proposal, statements, and declaration, except consent of the association in writing." The proposal referred to con- e following questions to and answers by the employer:—"(Q.) How l the employer balance and settle the applicant's accounts? (A.) (Q.) Specify the checks which the employer will use to secure in the applicant's accounts. (A.) Statements sent to customers by (Q.) In particular, will the employer send accounts direct to cus- nd if so, how often? (A.) Every three months."

action by the employer against the association for payment of the f a sum embezzled by the traveller, it was proved in defence that no settlements had been made between the employer and the traveller, the practice had been that, at the end of three months from the date der, the employer sent the account, not to the customer direct, but to ller himself for collection.

hat the employer had failed to comply with the conditions of the con- l that the defenders were not liable.

2D DIVISION. Ld. Stormonth Darling. J.

RS JOSEPH HAWORTH & COMPANY, tea-merchants in Manchester, is action against the Sickness and Accident Assurance Associa- nited, Edinburgh, for payment, under a contract of guarantee, of s. 10d. alleged to have been embezzled by Richard Slater, a , formerly employed by them.

efenders pleaded, *inter alia*;—(1) The pursuers having failed to checks upon Slater for the protection of the defenders stipulated agreed to in the contract of guarantee, the defenders are not liable, uld be assoilzied from the conclusions of the action.

greement of guarantee entered into between Messrs Haworth & y, Slater, and the association, in July 1889, narrated,—"Whereas loyer has delivered to the association a proposal containing cer-

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tain statements, and a declaration setting forth, among other things, th duties and remuneration of the said employed, the moneys to be entruste to him, and the checks to be kept upon his accounts, and has consente that such proposal and declaration, and each of the statements therei referred to, or contained, shall form the basis of the contract hereinafte set forth," and, after narrating the payment of the yearly premiu further bore,—"Now it is hereby agreed that, relying on the truth the said proposal, statements, and declaration, and on the strict observan and performance by the said employer of the contract hereby made, a subject to the conditions herein contained, the association, during o year from the date hereof, . . . shall make good and reimburse the employer, to the extent of the sum of £250, and no further, all mone which the employed, in connection with the duties hereinbefore refer to, shall embezzle or fraudulently appropriate and apply. . . . A this agreement is granted on the condition that the business of the e ployer shall be conducted, and the duties and remuneration of the e ployed shall remain in every particular in accordance with the propo statements, and declaration hereinbefore referred to; and if during t continuance of this agreement any circumstance shall occur or cha be made which shall have the effect of making the actual facts differ fro such statements without notice thereof being given to the association, the consent and approval in writing of the association being obtained, any suppression or misstatement of any fact affecting the risk of t association be made at the time of payment of the first or any subseq premium, or if the employer shall continue to trust the employed w money after having discovered, or after having received notice of, having reasonable cause of suspicion of any act of embezzlement or a propriation as aforesaid, or of any act of dishonesty whatever, this ag ment shall be void."

The proposal, &c., referred to in the contract contained, *inter alia*, th questions as to the checks to be kept by Haworth & Company upon Sla These, with the answers, were as follows:—"(11) How often will employer balance and settle the applicant's accounts? (Ans.) Mont (12) Specify the checks which the employer will use to secure acc in the applicant's accounts. (Ans.) Statements sent to customers employer. (13) In particular, will the employer send accounts dire customers, and if so, how often? (Ans.) Every three months."

Appended to the proposal was this declaration signed by Haworth & Company and by Slater,—"We declare that the answers forth above are true and in conformity with fact, and we agree that th accuracy shall form the basis of the contract with the association."

At the end of December 1889 Slater was dismissed by his employ He was subsequently found to have embezzled money belonging to to the amount of £87, 11s. 10d.

The defenders alleged, *inter alia*, that the pursuers had failed to s out statements direct to their customers, and to balance and settle accou with Slater monthly.

A proof was allowed, from which it appeared that Slater's defalcati began with an order received from a customer named Moran on August, and took place with regard to twenty-two orders dated in S tember, October, November, and December. The goods contained in th orders were sold on three months' credit, and the manner in which Sl embezzled the money was that he went to the customers within the per of credit and uplifted and appropriated the sums in their accounts. duty was to pay into Haworth & Company's bank sums which he upli and send in cash sheets shewing them, which were compared by the cas

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he bank's advice notes, and this he had not done in the case of the mbezzled.

ettlement of the commission which Slater received for his work nor ation of his accounts had ever taken place between Haworth & ny and Slater, because the latter was always indebted to the former ances to account of commission which he had requested.

ppeared that Haworth & Company never sent accounts direct to stomers till after Slater had left their service. They followed their y custom in business, which was to send the accounts to Slater at l of the three months' credit.* At 1st January 1890, three days Slater was dismissed as an inefficient traveller, and before his defal- were known, statements of the accounts of his customers as they n Haworth's ledgers, and bearing reference to Haworth's "quarterly were sent out to customers, many of whom then intimated that ccounts had been paid to Slater.

Lord Ordinary (Stormonth Darling), on 26th November 1890, d against the defenders for payment to the pursuers of £85, †

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worth, the sole partner, deponed,—"In the conduct of my business I send nts of accounts direct to customers only when they are considerably over- when I have any doubt as to the solvency of the customers. Before I com- e directly with them, the accounts are sent to my travellers, and are by esented to the customers. . . . (Q.) Supposing you had sent the accounts the customers, would that have been any check upon Slater's honesty? t necessarily so. When he had authority to collect the accounts, I don't made the least difference as regards embezzlement whether the accounts ssed through him or sent direct to the customers. In either case, the r would get notice of the sum due, and pay it to Slater. When accounts due more than three months, it depends entirely upon who the customer ong it would be before I would communicate directly with him. In the person in good credit, I should not think of pressing him and requesting ayment till the account was five or six months old. Cross.— . . . With e to my reply to question 13 in the proposal—'Will the employer send s direct to customers, and if so, how often?'—I meant that they were ect to the customers through the traveller. (Q.) How do you come to an employer is sending accounts direct to the customer if he is sending rough the traveller? (A.) Because it is the custom of the trade, and we llow the custom. (Q.) And not the terms of the contract? (A.) I con- nave followed the terms of the contract in adhering to the custom. The f sending a statement direct from the employer to the customer is to the money. (Q.) Has it nothing to do with being a check upon the r? (A.) No, not unless we have received ground for suspicion, and it is ked upon in that sense. (Q.) Did you not understand you required to he checks which were stipulated in this policy? (A.) I applied the strictly to the letter, in the ordinary way of business. As soon as accounts due the statements were furnished for collection; we did not post them and I never contemplated that in answering these questions. . . . . eference to my answer to the question in the proposal—'How often will ployer balance and settle the applicant's accounts?'—those accounts refer mission only, and he was always in my debt, so there was practically to settle. My answer did not apply to accounts. I made up a state- hich contains his commission account for settlement at the end of the (Q.) When did you first ask him to make up a statement of his commis- count? (A.) He does not make up a statement at all; we keep the books ake up a statement. I never asked Slater before the 20th of December me a statement of the accounts he had received."

OPINION.— . . . The first order in the list of defalcations (No. 220

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The defenders reclaimed, and argued;—The object of the questions put by them before the guarantee was given, which, with the answers, formed

of process), was taken on 14th August, and the amount (£8, 14s. 6d.) was collected by Slater on 16th September. This was nearly two months before the sum was due, for all the goods were bought on three months' credit. The remaining orders were taken from time to time down to 14th December, and the amounts uplifted, in the majority of cases, much within the period of credit. Slater's remuneration (besides a nominal salary of £5) was to consist of a commission of half the net profits; but no settlement of this commission took place between him and the pursuer, monthly or otherwise, the reason being, as the pursuer explains, that he was always in advance to Slater, and accordingly there was nothing to settle. It appears from the correspondence that accounts were sent by the pursuer to Slater for collection at or about the expiry of the three months' credit, but no accounts applicable to any of the orders obtained by him were sent direct to the customers till 1st January 1890.

"The pursuer's explanation of this is that he never sent accounts direct to customers until they were overdue, and that customers would have resented it if he had. He also says that his only departure from that rule was in the case of the statements sent to Slater's customers on 1st January, the reason being that he had by that time resolved to dismiss him.

"As regards the absence of monthly settlement of Slater's accounts, it seems to me that the pursuer's explanation is sufficient.

"It cannot be said that, in the actual circumstances, a monthly settlement would have led to the detection of any of Slater's embezzlements, and I think that the undertaking so to settle meant nothing more than that he was to remit his commission, if any should be due, at monthly intervals. So far as payments by Slater were concerned, the system was that he should pay sums collected by him into the pursuer's bank account, and should send the pursuer cash-sheets which, when compared with the bank's advice notes, would shew how far he was in the pursuer's debt. He did make certain payments into bank, and did forward certain cash-sheets, and the correspondence shews that the pursuer was constantly urging him to be more active both in obtaining orders and remitting money. But, of course, no statements by him nor settlements with him could throw any light on intromissions of his which he deliberately suppressed, and I think, therefore, that the defenders are not relieved from liability by the want of formal monthly settlements, which in the circumstances could have done no possible good.

"It is a much more difficult question whether the pursuer has lost his remedy by a breach of his undertaking to send statements direct to customers every three months. But there also, though not without hesitation, my opinion is in favour of the pursuer.

"I assent to the defenders' doctrine that answers 12 and 13 were not mere vague representations of how the pursuer's business was likely to be carried on, but constituted a positive undertaking by the pursuer that he would send statements direct to customers every three months as a check on Slater's conduct. Nor can I accept the view suggested by the pursuer himself in his evidence that he sufficiently fulfilled this undertaking by sending statements through Slater. The statements, if they were to be of any value as a check, clearly required to be sent direct. But the expression, "every three months," is ambiguous. It might mean, and the defenders contended it did mean, on the first quarter-day occurring after the date of the order. Thus they say that the statement applicable to Moran's order of 14th August should have been sent out on 1st October. On the other hand, it might mean three months complete from the date of each order, in which case Moran's statement should have been sent out on 14th November. Again, it might mean on the first quarter-day occurring three full months after the date of the order, in which case Moran's statement did not require to be sent out till it actually was sent out, viz., on the 1st of January. I reject the first of these interpretations, because I do not think the words justify it, and because I fail to see what check it would afford in the

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s of the contract, was to ascertain what checks the employers would prevent or detect defalcations by Slater. They undertook by their to the defenders' questions to balance and settle accounts with him ly," and to use the "check" of "statements sent by the employers ustomers direct every three months." It was certain that none of recautions was taken. The Lord Ordinary's judgment proceeded

case to send a statement to the customer before the account was due. te true that Slater, by importunity or contrivance of some sort, did get of most of his accounts before they were due; but I think that the of a stipulation of this kind must be taken with reference to the length given in the particular trade, and that the check was much more likely ectual if the statement was to be sent after the time when the salesman irly be expected to have received the money. It would, in that case, ertainly draw from the customer the explanation that he had already account; while, in the other case, he would not require to take any it at all. For the same reason, I think it unlikely that the expression hree months' was used or understood in the sense that an account e sent out on the exact expiry of three months from the date of each The average amount of the orders is apparently not more than a few and such a course would mean a constant sending out of very small , with the probability, as in the case last supposed, that it would not any useful information from the customer. I come, therefore, to the on that the most reasonable interpretation of the undertaking is that accounts were to be sent direct to the customers, but not till the were due. If that is even a possible interpretation, I think the pur- ntitled to the benefit of it; for if the defenders understood it in a differ- e, and intended to exact a strict performance of it, they were bound to all ambiguity at the time.

re is some confusion in the proof as to what the pursuer's practice was ard to the time of sending out his quarterly statements. He says that o fixed quarter-days, but I rather think that in saying so he must have his mind the accounts which he sent to his salesman for collection, ndoubtedly were sent at various periods occurring on the termination of e months' credit. I agree with the defenders that the lithographed and especially the phrase 'quarterly audit,' together with such indica- practice as are to be found in the correspondence, all point to the con- hat the statements sent to the customers were sent on fixed quarter- But if the defenders were not prepared to accept the pursuer's explana- t he never sent these statements in the ordinary case till the items were they might have brought evidence to shew that the statements did, in fact, include items which were not yet due. In the absence of such , I must accept the pursuer's explanation.

umber of cases were cited to me, but I do not think that the legal prin- pplicable to the case are doubtful. No assistance is to be derived from ke *Weems* v. *Standard Life Assurance Company*, 11 R. 658 (H. L. 48), urn on the question whether statements applicable to existing facts are nature of representation or warranty. The answers here on which the rs rely were undoubtedly of a different kind, and imported an under- for the future. I do not doubt that these answers were part of the , and that the pursuer was bound by them in the sense explained by ood in *British Guarantee Association* v. *Western Bank*, 15 D. 834 (at , 25 Scot. Jur. 502, viz., that the undertaking was one 'not requiring performance to the letter, but only that it should be substantially ented or fulfilled.' This is in accordance with the *ratio decidendi* English case of *Benham*, 1852, 7 Welsby, H. and G. 744. But my is really founded on what seems to me the reasonable interpretation undertaking, and if so, there can be no doubt that it was sufficiently ful-

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on the footing that they had not. His Lordship discussed the meaning of the expression "every three months." But in no view of the expression had the thing stipulated for been done. The pursuers' own construction of it would admit of five months, or even more, intervening between the order and the sending of a statement of account direct to the customer. If on 1st October the pursuers had sent out a quarterly account to customers who ordered goods in the course of three months before it, the fraud of Slater would have been discovered. Instead of that, it was not discovered till January thereafter. It was enough for the defenders, in any view, that the condition on which the pursuers obtained their guarantee was not observed.

The pursuers argued;—The Lord Ordinary's judgment was right. As there were no commissions due to Slater, monthly settlements were unnecessary. But if they had been made, the embezzlement would not have been discovered. As to sending accounts direct to customers every three months, that did not mean sending them within three months of the orders they gave. Thus the first embezzlement was on Moran's order in August. The pursuers' duty could not be to send an account direct to him on 1st October, within three months of his order, and thus within the period of credit. That would only offend a customer. And if it had been done it would not have elicited the truth, as Slater had authority to collect accounts. The expression really imported, at the first quarterly audit within three months after the period of three months' credit expired. That had been done on 1st January, and the fraud had been discovered. If that was a fair view, the policy must be so construed, because, if ambiguous, it was to be construed against the insurer. It was not a condition precedent of the policy that the answers to the questions should be strictly carried out according to their terms. They were expressions of intention which need only be carried out according to their fair meaning.[1]

Lord Young.—The legal question before us arises on what is sometimes called a guarantee policy. The policy was issued after the employer of the defaulting traveller had made a proposal to the company, which took the form of certain questions and answers, which form the basis of the contract. The important part of these questions and answers is that in which the insurance company ask and the employer states the checks which he is to use to prevent the traveller whose honesty is to be guaranteed, from embezzling his funds. Of these there have been specially brought before us, one, the eleventh, in which, in answer to the question, "How often will the employer balance and settle the applicant's accounts?" the answer "monthly" is given; the other, the thirteenth, in which, in answer to the question, "In particular, will the employer send accounts direct to customers, and, if so, how often?" the employer answers, "Every three months,"—that is to say, those customers who are not reported to him as having paid their accounts are to have their accounts sent to them regularly and direct every three months. That is intended to check the traveller if he is disposed to embezzle his employer's funds by uplifting money and not account for it.

Now, neither of these tests was applied. The employer did not call

[1] M'Taggart v. Watson, April 16, 1835, 1 S. and M'L. 553, Lord Brougham's opinion; Benham v. United Guarantee and Life Assurance Co., 1852, 7 W. and G. 744.

traveller to account every month, and he did not directly render accounts every three months, in any fair meaning of that expression. The only question, then, is, whether that is an answer to this claim upon the policy. It is almost with regret that I say that I think it is. I think that this employer acted in good faith and with no idea at all of neglecting the reasonable interest of the insurers. But he did in fact neglect to take both the steps which it was provided that he should take, and I am of opinion that that neglect forms a good answer to this action, and, therefore, that the interlocutor of the Lord Ordinary must be recalled, and that the defenders must be assoilzied.

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The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

FYFE, IRELAND, & DANGERFIELD, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

GILROY, SONS, & COMPANY, Pursuers (Respondents).—*Asher—Dickson.*
W. R. PRICE & COMPANY, Defenders (Appellants).—*D.-F. Balfour—Aitken.*

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Gilroy, Sons, & Co. v. Price & Co.

Ship—Affreightment—Bill of lading—Exemption of liability for shipowner for default of crew in the "navigation" of the ship.—Goods were shipped under a bill of lading which exempted the shipowner from liability for "any act, neglect, or default whatsoever of pilot, master, or crew in the navigation of the ship in the ordinary course of the voyage." The goods were damaged in consequence of the absence of casing on the pipe of a water-closet, which was broken by the pressure of the cargo in rough weather. It was proved that the master and crew had, shortly before the ship sailed with the cargo in question, removed the casing, and had thought it unnecessary to replace it before sailing, as they relied on other means for protecting the pipe from injury. In an action at the instance of an onerous indorsee of the bill of lading against the owners *held* that the pipe ought to have been provided with casing, that the failure to provide it was a default of the master or crew in the navigation of the ship in the ordinary course of the voyage, and therefore that the shipowner was not liable.

2D DIVISION. Sheriff of Lanarkshire. I.

MESSRS GILROY, SONS, & COMPANY, Dundee, raised an action in the Sheriff Court of Lanarkshire against Messrs Price & Company, the owners of the ship "Tilkhurst," to recover damages for injury done by sea-water to a cargo of jute on a voyage from Chittagong to Dundee. The pursuers were onerous indorsees of a bill of lading under which the defenders accepted the jute as shipped in good order and condition, and undertook to deliver it at Dundee in like good order and condition, "any act, neglect, or default whatsoever of pilot, master, or crew in the navigation of the ship in the ordinary course of the voyage, and all and every dangers and accidents of the seas and rivers, and of navigation of whatever nature and kind excepted."

There was no dispute that the cargo had been damaged owing to the breaking off of the discharge-pipe of the water-closet, and the consequent influx of sea-water into the cargo.

The pursuers averred that the "vessel when she sailed from Chittagong on 5th December 1888 was not in a seaworthy condition; said pipe was then cracked or otherwise faulty. It had no casing such as is usually put round such pipes, and is necessary for their safety. In consequence, the pipe had been injured by pressure from the cargo, or otherwise got

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injury, which would not have happened if the casing had been there. The damage to said cargo was caused in consequence of the defective state of the pipe and/or the want of said casing."

The defenders denied this averment, and stated that the "pipe was in perfect order when the vessel left Chittagong, and that the cargo was stowed and secured in such a way that the pipe could receive no injury therefrom or be injured from the inside of the ship."

They stated with regard to the cause of the breaking of the pipe that the vessel had encountered a severe gale and a very heavy sea on 11th, 12th, and 13th December, by which she was much strained and injured in certain particulars:—"The vessel made no water until the occurrence of the foresaid gale. After that gale water was found in her, and on investigation it was discovered that during the gale the force of the sea, and the working, straining, and labouring of the ship, or one or other of these causes, had broken the iron portion of the port water-closet discharge pipe at the flange, on the ship's side."

The defenders further founded upon the exception clause in the bill of lading which is quoted above, and they pleaded, *inter alia*;—(3) In any view, the damage having emerged through one or other of the perils excepted from the contract, the defenders should be assoilzied.

A proof was led. It appeared the "Tilkhurst" sailed from Cardiff in 1888 on a voyage to Acheen with coals, thence to Chittagong in ballast, and thence to Dundee, with a cargo of jute.

On 11th, 12th, and 13th December, about a week after leaving Chittagong, the ship encountered heavy weather. It was found, *inter alia*, that water had got into the cargo at a water-closet pipe on the port side. She put into Galle for survey, and the cargo (except part which had been jettisoned, and part which had been too much damaged) was dried and repacked.

It also appeared that the pipe in question, which was partly lead and partly iron, was not provided at the time the ship left Chittagong with any casing or protection round it to prevent the pressure of cargo upon it. The casing was taken off between Acheen and Chittagong, when the ship was being painted, and was not replaced. There was much skilled evidence to shew that such casing was both usual and necessary, and that the bales of jute, though packed tightly, were apt to yield somewhat in heavy weather with the motion of the ship, and that the injury to the pipe, which took place at a flange where the leaden part joined the iron part some feet within the skin of the ship, had resulted from the pressure of the cargo upon the pipe. Another view, however, suggested by these witnesses was that the pipe, for want of casing, might have been broken when the stevedores were putting in the cargo by their bringing a bale against it.

The defenders led evidence to shew that the pipe had probably been broken by the shock of a heavy sea striking the vessel during the gale, and not by the cargo, which had been kept entirely off the pipe by dunnage, and in particular by pieces of wood called "toms" so placed upon the framework with which the hold was lined as to keep the jute bales off the pipes. The master and crew thought that a sufficient and proper mode of stowage, and that no casing was needed. The defenders also maintained that the cargo was too tightly packed to shift and so loosen these "toms" and press against the pipe. The Court came to the conclusion on the evidence, which is discussed in the opinion of Lord Trayner, *infra*, that the injury was caused by pressure of the cargo on the pipe during the voyage.

On 18th July 1890, the Sheriff-substitute (Guthrie) found that the

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ers had not proved that their failure to deliver the jute in good nd condition was due to any cause for which they were not respon- nd by a subsequent interlocutor gave judgment for £3407, 11s. 9d., he amount agreed on as the damage sustained.
defenders appealed to the Court of Session.
ued for the defenders;—The defenders were not liable if the case came the exceptions in the bill of lading. One of these was perils of the . It was proved that the ship was seaworthy when she left Chitta- The precaution of casing the pipes was not universal, and the ques- s whether proper means by casing or otherwise were taken to keep go from impinging on the pipes. Now, "tomming" was the mode nd if thoroughly done it was quite as good. The ship being sea- when she left Chittagong and having encountered very heavy he injury to the cargo by sea water was *prima facie* caused by ess of weather, and the defenders had displaced the presumption from the fact of the delivery of the cargo in a damaged state.[1] The hewed that the ship had been severely strained by the weather. t in any view the defenders were protected by the other clause, exempted them from liability for fault of the "master or crew in igation of the ship in the ordinary course of the voyage." If the t arose from the want of casing or from defective "tomming" the and crew were to blame for that, and the exception applied. It ault in navigation by them, for that expression included omissions the departure of the ship on her voyage and during the prepara- it.[2]
pursuers argued;—The cause of the accident was proved to be that e had no casing, and that the natural pressure of the cargo during weather broke it. If, as the defenders said, the violence of the sea ithout had broken the pipe, it was proved that the ship would have other and greater marks of injury than she did shew. The ship erefore unseaworthy when she left Chittagong. The case was like *Steel & Craig*[3] where a ship sailed with a porthole open, which let r and injured the wheat she carried. The fault of not casing was ault "in the navigation of the ship in the ordinary course of the " It was committed before sailing and not at sea, and the pipe en covered up by the loading of the cargo. The cases cited on the ide as to the meaning of the expression "during the navigation" ry special cases, with very different circumstances. Assuming that ident was caused by the pipe having been broken in the loading, l not come within the exemption clause founded on.
dvising,—

TRAYNER.—The "Tilkhurst," belonging to the defenders, sailed from ong for Dundee on 5th December 1888, laden with a cargo of jute.

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liams v. Dobbie, June 27, 1884, 11 R. 982.
michael v. Liverpool Sailing Shipowners' Mutual Indemnity Association, . R., 9 Q. B. D. 242, *præsertim* opinion of Lopes, L. J., at p. 251; Laurie las, 1846, 15 M. and W. 746; Good v. London Steamship Owners' Protecting Association, June 23, 1871, L. R., 6 C. P. 563; The "Work- Dec. 12, 1883, L. R., 9 P. D. 20; Canada Shipping Co. v. British Ship- Mutual Protection Association, 1889, L. R., 23 Q. B. D. 342; Serraino v. Campbell, 1890, L. R., 25 Q. B. D. 501; Norman v. Binnington, 1890, 5 Q. B. D. 475; The Carron Park, 1890, L. R., 15 P. D. 203; The nac," 1890, L. R., 15 P. D. 208.
el & Craig v. State Line Steamship Co., March 16, 1877, 4 R. 657, y 20, 1877, 4 R. (H. L.) 103.

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On the 11th, 12th, and 13th of December the vessel encountered a very severe gale, in the course of which, namely on the afternoon of the 12th, it was found that the vessel had a heavy list to port, and on sounding the pumps it was ascertained that there were twelve inches of water in the well. Early on the morning of the 13th the master of the vessel, finding that the vessel was rather unmanageable in consequence of the list, opened the hatches in order to jettison part of the cargo, when he found that the forward water-closet pipe on the port side had been broken away from the flange by which it was fastened to the ship's side, and that the cargo in the vicinity of that pipe was wet. This was occasioned by water which had come in through the hole in the ship's side from which the discharge pipe already mentioned had been broken away. The hole in the ship's side was plugged by the carpenter at once, and the ship was thereafter taken to Galle, where the cargo was unloaded, and the damaged jute landed. Some of it was dried and repacked and then reloaded. The pursuers, who are onerous indorsees of the bill of lading under which the jute was being carried on the voyage in question, now claim from the defenders the amount of damage sustained through the cargo being wet as aforesaid, on the ground that the ship was not seaworthy when she sailed from Chittagong, the said pipe being then cracked, or otherwise faulty, and not cased, as was necessary for its safety. The defenders resist the pursuers' demand on the grounds that the ship was seaworthy, that the said pipe was in perfect order when the ship left Chittagong, that the damage complained of was occasioned entirely by the perils of the sea; or otherwise, was occasioned by the fault of the master or crew in the navigation of the ship in the course of the voyage, and for which, in terms of the bill of lading, the defenders are not responsible. The case can be conveniently disposed of by considering each of these grounds of defence in the order in which I have stated them, as they cover fully the grounds of action.

The only ground on which the "Tilkhurst" is said to have been unseaworthy is the faulty condition in which the discharge pipe of the forward water-closet on the port side is said to have been when the ship left Chittagong. There is no proof whatever in support of the pursuers' allegation that the pipe itself was cracked or otherwise faulty when the voyage commenced; there is nothing even in the proof to suggest to me a probability that it was so. It is, however, proved by the admission of the master and crew that the pipe in question was not cased as such pipes invariably, or almost invariably, are, and as this pipe itself was when the ship left this country on her outward voyage. The want of this casing, however, did not constitute unseaworthiness, for the ship was quite staunch and strong and fitted to carry her cargo safely to the port of destination without such casing. Nor would the want of casing have led to any damage being done to the cargo if (in view of the want of casing) the master and mariners had done their duty in otherwise securing and protecting the uncased pipe from undue pressure by the adjacent cargo. I think therefore that the pursuers' case fails on the proof, so far as the alleged unseaworthiness of the ship is concerned. The pursuers sought in argument to liken this case to the case of *Steel & Craig*. But I think the cases are essentially different. In *Steel & Craig's* case, the ship sailed with an open or partially open porthole, access to which, from the nature of the cargo, could not be had in the course of the voyage. In the present case there was no open port, or hole, through which the sea water could gain admission to the cargo at the time the vessel sailed. In the one case the ship was tight when she sailed, and in the other she was not; and the defect in the ship in the

rough which the damage complained of was occasioned was one, , which arose after the voyage had commenced, and was not only was reached and remedied while the ship was at sea. The decision, *teel & Craig's* case does not seem to me to have any bearing upon estion.

however, having been shipped in good order and condition, as is e bill of lading, and having thereafter been damaged, the defenders for that damage unless they can shew that the damage was occa- ne cause for which they are not responsible. Accordingly the ntain that the damage in question was occasioned by perils of s, of course, the defenders must establish; and in the ordinary not impose a very heavy *onus* on the shipowner. I agree with own upon that subject in the case of *Williams* v. *Dobie*. If the shew that the damage to cargo has been occasioned by sea water, veather encountered on the voyage and the condition of the ship account for sea water getting at the cargo in a ship which was en the voyage commenced, he will, in my opinion, sufficiently *nus* laid upon him. Of course, circumstances will vary indefinitely, will depend more or less upon its own particular circumstances. tion of what I mean, let me instance the case of a shipowner who damage done to cargo by sea water by shewing that the ship such severe weather as to strain the ship so as to admit sea water ams, or that heavy seas had injured the hatches and so admitted ne hold before the hatches could be repaired or reseamed. In such sumption would be that the damage to the cargo arose from perils presumption which could doubtless be rebutted, but would need by very distinct evidence before the shipowner could be held

nt case I am of opinion that the defenders have failed to dis- s laid upon them, of shewing, even *prima facie*, that the damage pe and consequent damage to the cargo was occasioned entirely f the seas. The cause of the damage, as averred by the defenders, ay,—"On investigation it was discovered that during the gale the a, and the working, straining, and labouring of the ship, or one or causes, had broken the iron portion of the port water-closet dis- t the flange on the ship's side." In support of this averment ses are adduced, who give it as their opinion that a heavy sea, or iking the side of the ship would or might have broken away the flange. None of these witnesses ever knew of such a thing ning—they speak merely to opinion of what might happen, without experience of any such thing having happened. On the other suers have adduced a considerable body of evidence to the opposite witnesses (of great nautical experience) are of opinion that the force king the ship could not have broken the pipe as it was broken, ch a result had followed from the force of the sea, the effects of such hip would have been evidenced by signs of great straining through- It is proved conclusively that there were no such signs,—and tely no evidence of any such straining or labouring of the ship as is e defenders. In addition to this, there is evidence adduced on the rsuers to shew that the pipe in question was broken by pressure

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from within the ship, which although to a large extent mere evidence of opinion, is supported by the real evidence derived from the ascertained facts as to the place and character of the break, and the condition of the pipe when it was discovered broken. On this part of the case, therefore, I have come to the conclusion that the great preponderance of the evidence is against the defenders, and that they have failed to shew that the damage in question was occasioned by the perils of the seas.

It remains now only to be considered whether the defenders can claim exemption from liability for the damage now sued for in respect of the clause in the bill of lading which provides that they are not to be responsible "for any act, neglect, or default of the master or crew in the navigation of the ship in the ordinary course of the voyage." Now, before considering the legal effect of that clause, I think it right to state what in my view are the ascertained facts of the case to which that clause in its legal effect was to be applied. How, in point of fact, and through what fault, did the damage arise which is now in question? It is suggested by some parts of the evidence and it was put to us in argument, although it is not averred upon record, that the damage may have arisen from bad stowage. If that had been proved, I think the defenders could not have pleaded the clause in the bill of lading as exempting them from liability. The cargo was stowed by a stevedore and his men, and they are not among the persons for whose fault or neglect the defenders are exempt from liability by the bill of lading. But I think this is not proved, and therefore I dismiss that matter from further consideration. It appears to me to be established by the evidence, including the real evidence afforded by the character of the break, and the state of the pipe when the break was discovered (by which I refer specially to the bend in the upper or lead part of the pipe and the displacement of the flanges connecting the upper and lower (or iron) part of the pipe) that the pipe was broken by pressure of the cargo. I think it is the result of the evidence that there was a certain—but limited—movement of the cargo to the side and aft when the ship was rolling in a heavy sea, and that in and by such movement the cargo pressed upon the pipe so as to bend and break it, which result would not have followed had the pipe been duly and properly cased, according to the usual if not invariable custom. It was the want of this casing which exposed the pipe to the risk of breakage; it was this want which directly led to its being broken.

If I am correct in this view of the facts, it cannot be doubted that the damage arose through the fault or neglect of the "master or crew" of the ship. It was the duty of the carpenter on board (who had removed the original casing) to have cased the pipe; it was the duty of the master to have seen that this was done. Well then, was this a fault or neglect of the master or crew "in the navigation of the ship"? I think it was. Neglect or default in navigation is the same thing as improper navigation, and that has been well and correctly described as including "every case where something is omitted to be done before the departure of the ship in order to enable the ship to carry the cargo safely from the port of departure to the port of arrival, and where that omission leads to the cargo not being safely and properly so carried" (per Fry, L. J., in *Carmichael*, L. R., 19 Q. B. D. 249; see also *Good*, L. R., 6 C. P. 563). Navigation means more than the transit of the ship across the sea. It includes the management of the ship with a view to her crossing the sea,—there may be navigation "without any voyage at all" (*Carmichael, supra*, 248).

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remains, however, another question, was this fault or neglect on of the master or crew in the navigation of the ship committed ordinary course of the voyage"? If the voyage here referred to n the charter-party voyage, there could have been no doubt, on rities, that any fault or neglect committed while the ship was in port gong was committed in the course of the voyage. But the charter-party out on the record as part of the contract of affreightment with which ers have any concern. It is only mentioned incidentally by the bstitute; and the defenders' counsel stated at the bar that they could the charter-party against the pursuers. The voyage, therefore, with e have alone to do is the voyage from Chittagong to Dundee. Was the n, which led to the damage, committed in the course of that voyage? in my answer must be affirmative. The fault itself, as we have seen, ailure duly to case the pipe. It was a fault no doubt to omit the casing pe while the ship lay at Chittagong before her cargo was loaded. But or neglect was committed every day so long as the neglect continued. erefore committed every day on the voyage from the time the ship left g until the damage occurred. The fault or neglect could have been between the 5th of December, when the vessel sailed, and the 11th ber, when she encountered the gale in the course of which the damage —not easily remedied, perhaps, but certainly possibly. It could have edied by the partial removal of the cargo so as to admit of a casing on; or the discharge hole could have been plugged up (as was done e gale) to prevent damage by the entrance there of sea water, in the the pipe being broken in consequence of the want of casing. The default in question was a continuing one—and although committed as not the less committed after the voyage to Dundee began.

herefore of opinion that the damage in question was occasioned by the default of the master or crew in the navigation of the ship in the course of her voyage, and that for the consequences of such neglect or he defenders are exempted by the express condition of the bill of lading ich the cargo was carried.

ORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK .

s interlocutor was pronounced:—"Recall the interlocutor appealed gainst: Find in fact (1) that the defenders were carriers in their hip the 'Tilkhurst' of a cargo of jute from Chittagong to Dundee nder the bill of lading No. 20 A of process, of which bill of lading he pursuers are the onerous indorsees; (2) that the said cargo vas damaged in the course of said voyage by sea water, which btained access to said cargo by means of a hole in the side of the hip to which was attached or connected the discharge pipe of the orward water-closet on the port side, which pipe was broken in he course of the voyage; (3) that said pipe was broken by pressure f the cargo thereon; (4) that said pipe was not cased as it should ave been to prevent the pressure of cargo on said pipe, and that he want of casing as aforesaid led to the breaking of said pipe nd consequent damage of the cargo; (5) that the failure to case aid pipe was a default or neglect on the part of the master or crew of said ship in the navigation of the ship committed by them

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in the ordinary course of said voyage: And find in law that the defenders are not liable for said damage, it being damage for which they are exempted from liability by the terms of said bill of lading: Therefore assoilzie the defenders from the conclusions of the action: Find no expenses due to or by either party, and decern."

J. & J. Ross, W.S.—Forrester & Davidson, W.S.—Agents.

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Feb. 27, 1891. M'Gavin v. Sturrock's Trustee.

Robert M'Gavin, Complainer (Respondent).—*Johnston—Dundas.*
Thomas Martin Dodds (Sturrock's Trustee) and Another, Respondents (Reclaimers).—*Asher—Hay.*

Right in Security—Lease—Bankruptcy—Security retenta possessione.—A lease of a farm from Martinmas 1858 to Martinmas 1878 provided that in the event of the tenant's bankruptcy the lease should, in the option of the landlord, be null and void, and come to an end at the next Martinmas term. It was also provided that the rent "payable for the last crop of the lease shall be exigible by the proprietor previous to the removal of any part of said crop from the ground," the tenant having the option either of paying the rent in advance, with certain discount, or finding security for payment. After 1878 the tenant continued to possess by tacit relocation, and became bankrupt in August 1890. The landlord sought to interdict the tenant and his trustee, in virtue of the clause of the lease quoted, from selling or removing any part of the crop. *Held* that that clause could not be made effectual as against creditors, in respect it was an attempt to create a security in the landlord's favour over moveables, the possession of which remained with the tenant, and interdict *refused.*

Bankruptcy—Trustee—Adoption of bankrupt's contract.—A lease provided that the rent "payable for the last crop of the lease shall be exigible by the proprietor previous to the removal of any part of said crop from the ground," the tenant having the option of either paying the rent in advance, with certain discount, or finding security for payment. The tenant became bankrupt three months before the end of the lease, and his trustee thereafter directed and controlled all farm operations, keeping a large number of milch cows, sublet some pasture, and generally ingathering the crops. The landlord sought to interdict the trustee and the tenant from removing any part of the crop on the ground that the stipulation in the lease quoted above was good against the tenant, and therefore good against the trustee, in respect he had adopted the lease.

The Lord Ordinary (Kyllachy) *held* that although the trustee without adopting the lease would have been entitled to reap the crop sown by the bankrupt, he had no right to be in possession of the farm for the three months after the sequestration except in virtue of the lease, and that by doing so he must be held to have adopted the lease, and so subjected himself to the obligation not to remove the crop without paying the rent.

On a reclaiming note, *held* (*rev.* the Lord Ordinary's judgment) that, assuming the clause to be good against the tenant, the actings of the trustee did not constitute an adoption of the lease, but were done in discharge of his duty in realisation of the estate.

2d Division. Ld. Kyllachy.

By lease, dated in October 1858, the trustees of William M'Gavin let the farm of Ballumbie to Charles Sturrock. The term of entry was Martinmas 1859, the endurance of the lease nineteen years, and the rent £882 per annum, payable at Candlemas and Lammas after reaping. Assignees and subtenants were excluded, unless with the written consent of the landlord, and in the event of the tenant's bankruptcy it was provided that the lease should, in the option of the proprietor,

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cto null and void, and shall come to an end at the first term of mas thereafter."

lease further provided,—"That the rent payable for the last crop lease shall be exigible by the proprietors previous to the removal part of said crop from the ground, the tenant having it in his either to pay the rent in advance on getting an abatement of t at the rate of 4 per cent per annum, corresponding to the period n the time of actual advance and the stipulated terms of payment, rwise, before removing any part of the crop, to find security to the tion of the proprietors, or their factor, for the regular payment of d rent."

r Martinmas 1878, when the lease came to an end, Sturrock con- to possess the farm by tacit relocation.

28th August 1890 Sturrock's estates were sequestrated, and T. M. was appointed interim factor. On 9th September he was con- as trustee.

24th September the proprietor, now Robert M'Gavin, raised a of interdict against Sturrock and his trustee to prevent them selling and removing, or otherwise disposing of, removing, or other- way taking from the lands . . . any part of the crop of the 890, whether of wheat, oats, barley, beans, peas, turnips, potatoes, other produce of the ground; and whether still growing on the f the said farm, or already reaped or gathered and stored thereon, at aye and until payment shall be made to the complainer of the nounting to £882 sterling or thereby, payable by the said Charles k for the said farm for crop and year 1890, or until security for ne shall be found to the satisfaction of the complainer."

complainer pleaded;—In respect of the above-recited provisions said lease, and of the bankruptcy of the said Charles Sturrock, the iner, in the circumstances condescended on, is entitled to interdict ed.

respondents pleaded;—(3) There is nothing in the said lease, even relevant and binding, nor in the circumstances of the case, which itle the complainer to prohibit the respondent, the said Thomas Mar- dds, as trustee in the sequestration, from recovering and realising the of the bankrupt, or to warrant the conclusions of this process. (4) mplainer's claim for rent, both as to the amount and question of nce, falls to be adjudicated upon in the first instance by the trustee, t to the review of the Court, as provided by the statute.

1st October the complainer gave notice to the respondents to leave m at the ensuing Martinmas, the trustee having previously inti- his intention to quit the farm at that term.

arrangement the crop was allowed to be sold, the proceeds being d, so as to be paid to the complainer in the event of his being suc- l.

oint minute was lodged for the parties as to the state of the farm at ustee's entry to it, and his actings in connection with it.

principal facts were these:—At the date of the sequestration, the op of the year had been cut and secured. The corn crop was uncut. subsequently cut and harvested between 3d September and 11th er. The potatoes, which had been planted in April and May, were the ground. They were subsequently lifted between 14th October st November. The turnips, which had been sown between 24th nd 25th June, were to the extent of an acre or thereby lifted and ned between the date of the sequestration and Martinmas. The nder of the turnip crop remained on the ground and was sold at

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the waygoing sale, to be lifted and removed at buyer's option up to the 1st April 1891. The trustee sublet some pasture in October, and received rent for it. Between the date of sequestration and 5th November 1890, being the date of the waygoing sale after mentioned, there were thirty-two milch cows kept on the farm, and these were fed partly on grass, partly on draff, partly on mashley, for which purpose about seven acres of mashley (portion of the grass crop) was used, partly on turnips, for which purpose about one acre of the turnip break was lifted and used on the farm. Sturrock remained in personal occupation of the dwelling-house until 22d November 1890, but from the date of Dodds' appointment till the waygoing sale all farm operations necessary were performed under his orders and control, as trustee under the sequestration.

Lord Kyllachy (Ordinary), on 7th January 1891, pronounced this interlocutor:—"Finds that, apart from the arrangement" of parties, "the complainer had right to prevent the removal of the crop (other than hay) from the farm of Ballumbie until the rent of the current year was either paid or secured: Finds that as the said arrangement has been or is in course of being carried out, it is not now necessary to grant interdict in terms of the prayer; but in respect of the said joint minute, finds that the respondents are bound to apply the proceeds of the said crop, other than the hay, *primo loco* in payment of the said rent as the amount of the same shall be determined in due course in the sequestration."*

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* "OPINION.— . . . In these circumstances, two pleas are maintained by the complainer. He says, first, that, in respect of the clause in the lease already quoted, there was constituted a security for his rent by way of retention over the whole waygoing crop effectual against both the tenant and his creditors. And he says, second, that in any view the non-removal of the crop until the rent was paid was a stipulation of the lease good as against the tenant, and that the trustee in the present case has so acted as to adopt the lease and render himself liable in its prestations.

"I confess I have had difficulty in seeing how—in the state of the facts with which I have to deal—the first of these pleas can be maintained. The waygoing crop here was reaped and reduced into the tenant's possession during the period of his tenancy. It was not as if the lease had terminated at Whitsunday and the bargain had been that the tenant, while having right to return and reap the crop then on the ground, should yet do so under the condition that he should first pay the rent. It may be that even against creditors that condition would be effectual. I shall have to consider that presently. But the ish of the lease here was Martinmas, and even in the event of bankruptcy the irritancy was only to take effect at Martinmas; by which term, as I have said, the crop was reaped. The question is therefore the same as if it had arisen not with respect to the waygoing crop, but with respect, for example, to some other crop during the lease, which was sought to be poinded and carried off by a poinding creditor. And I am not able to hold that a landlord who has let his lands on an agricultural lease, retains such a possession of the subject as enables him to set up or contract a right of retention over the fruits of the subject. At anyrate such right, if maintainable on principle, must, I think, be held to have been taken away by the statutory abolition of the law of hypothec. I do not overlook what was urged in argument, that in various respects the law still recognises the landlord's right to qualify by paction the tenant's right in the produce of the farm. That is certainly true with respect, *e.g.*, to the straw of all crops except the last, and with respect also to the dung made with such straw. It perhaps also is true with respect to the straw of the waygoing crop. And it may even be that it is so with respect to the waygoing crop as a whole if and when the tenant gets the first crop under his lease free, and the last crop is stipulated to become the property of the landlord on the principle of steelbow.—Rankine on Leases, 256 and 369; *Dun* v. *Johnston*, Jan. 28, 1818, Hume, 451; *Stewart*

The respondents reclaimed, and argued;—In the first place, the clause as to retention did not apply here at all. "The last crop of the lease"

Rose, Feb. 2, 1816, Hume, 229. These, however, are, in my opinion, special cases involving special principles which are here inapplicable. The condition here is not one which affects the proper cultivation of the farm. Neither is it a question of defining or limiting the tenant's property in the fruits of the farm. On the contrary, the tenant's property in this waygoing crop is assumed; and the attempt is not to limit the tenant's right of property, but to create a security over it by way of retention. It appears to me that these are differences which take this case outside the category of the cases I have referred to.

"But this brings one to the second of the complainer's pleas, viz., that the trustee has here adopted the lease so as to become bound by all its provisions. Now, certainly it is very difficult to say that, taking the lease as a yearly lease terminating at Martinmas, there is any benefit which the trustee could have taken under it which he has not taken. Indeed, if the bankruptcy had occurred say at Whitsunday, and the trustee had done for six months what he did for nearly three, I do not at present see how there could have been any doubt as to his liability for the year's rent and fulfilment of the other prestations of the lease. But the question arises in this way, and it appears to me to be a rather delicate question. The trustee was entitled, without adopting the lease, to do all that was necessary to realise to reasonable advantage the moveable property of the bankrupt, including the stock, crop, &c., upon the farm at the date of sequestration; and what he says is that he had no longer or further possession, and took no further benefit from the lease than was reasonably necessary for that realisation. And what I have really to decide is, whether this was so, or whether, on the other hand, the trustee took or is now claiming benefit from the lease which he could not have had if he had renounced, or caused the bankrupt to renounce and cede possession to the landlord, at or immediately after the sequestration.

"Now I think it is clear enough upon the joint minute that the tenant's possession up to Martinmas was the trustee's possession, and that whatever was done in the way of carrying on the farm was done by the trustee. I further think that a part at least of the farming operations as set forth in the joint minute—and particularly the continued pasturing of the cattle from 28th August up to 6th November—went somewhat beyond what was necessary for mere realisation. I confess, however, I should have felt, if that was all, that that was a somewhat narrow ground for a judgment in favour of the complainer. But there is another element in the trustee's action which appears to me to make it unnecessary to consider this somewhat narrow point; and that is, that the trustee is here claiming an immunity from the stipulation in the lease as to the non-removal of the waygoing crop before payment of the rent—which immunity, in my opinion, he could not have claimed but for his continued possession up to Martinmas, and his consequent ability to reap the crop before the landlord obtained possession.

"It must be considered that, except under the lease, neither the bankrupt nor his trustee had right to possess the farm for a day. They had right, no doubt, after quitting possession to return when the crops were ripe and to reap them. And they were entitled to such possession as might be necessary for that purpose. But to continue in possession from August to November so as to exclude the landlord was, I think, to exercise a right under the lease. Now, had that right not been exercised—had the trustee immediately renounced the lease and ceded possession to the landlord, what would have been the result? The crop, it will be observed, was for the most part not only uncut, but unripe. Even the corn crop did not begin to be cut till the 3d September. The landlord, therefore, entering in the beginning of September, would have had undoubted possession of the uncut crop. And I see no reason in principle why, having obtained such possession, he should not have been at liberty to put in force his stipulated right of retention for the rent, if indeed he did not possess such right apart from stipulation altogether. The case would really have been the same as the case I supposed a little ago, of a Whitsunday ish, and a stipulation for a lien over the crop then on the ground for the rent of the year. Or the position would have been

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was quite intelligible in reference to a lease of several years, but when tacit relocation, tenancy from year to year, set in, that clause was meaningless. To apply it to such a tenancy would make the rent a forehand rent for all these years of tacit relocation. In the next place, this lease was, by the provisions of the 42d and 28th sections of the Agricultural Holdings Act of 1883 (46 and 47 Vict. c. 62), declared to be a lease under a contract of tenancy beginning after 1883. The tenant was therefore possessing free of the condition in the lease, for it had become illegal by that Act. Nor could there be any right of retention in the landlord, for he had neither possession of the crop nor property in it. The common law gave the tenant the property in the crop.[1] The case of *Moncreiff*[2] did not deal with crops such as the crops here, which had come to maturity and were ready to be ingathered or actually were ingathered. The obligation upon the tenant, if obligation there were, was a personal obligation merely, and that did not transmit so as to affect his trustee, unless the trustee adopted the contract. Now, did he adopt it? Did he take up the lease? Surely not. All that he did was necessary for realisation of the tenant's property for behoof of his creditors. He had not gone beyond the duties of a trustee, as these had been laid down by the Court.[3] The time itself during which his occupation lasted shewed that his possession could only be for purposes of realisation.

The complainer argued;—The years during which the farm was held by tacit relocation were none of them the last year, till notice was given, as it had been here in the year in question. That made it the last year. Again, any possession by the tenant, or anyone in his right, must be under all the conditions of the lease,—for there was here tacit relocation,—and therefore it was subject to the provisions of the clause in question. The case of *Moncreiff* was closely analogous to the present, for there a clause in similar terms was held to deprive the tenant of all right to reap what he had sown. The trustee took the asset from the bankrupt *tantum*

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on principle the same as if the landlord had obtained a decree of irritancy and ejection proceeding on a clause of irritancy which gave him right to retain and appropriate the crops then on the ground. It is no doubt true that, according to the maxim '*messis sementem sequitur*,' the tenant has presumably a right of property in the growing crops which he has sown, but I know no authority for holding that the operation of that maxim may not be conventionally qualified—I mean by stipulations in the lease. At all events, I know of no authority adverse to the constitution by paction of a security by way of lien or retention over such portion of a waygoing crop as may remain unreaped at the tenant's ish and may pass into the landlord's possession in that event. The only cases quoted on the subject appear to be *Elder* v. *Allen*, 5th July 1833, 11 S. 902; *Moncreiff* v. *Hay*, 6 Dec. 1842, 5 D. 249, 15 Scot. Jur. 84. So far as they go, they are favourable to the complainer.

"But this being so, it follows that by the possession which he retained under the lease the trustee here was enabled to do a great deal more than merely realise. His possession enabled him to get the crops of the year ripened and reaped and reduced to possession, so as to exclude the landlord's possession, and defeat the landlord's security for his rent. It appears to me that in these circumstances the trustee must be held to have adopted the lease which was current at the date of the sequestration, and so to be liable for the year's rent, and disable from removing the waygoing crop (other than the hay) until the rent of the year is paid."

[1] Earl of Hopetoun v. Wight, July 10, 1863, 1 Macph. 1097, 35 Scot. Jur. 621, affd. (H. L.) May 27, 1864, 2 Macph. (H. L.) 35, 36 Scot. Jur. 542, 4 Macq. 773.

[2] Moncreiff v. Hay, Dec. 6, 1842, 5 D. 249, 15 Scot. Jur. 84.

[3] Kirkland v. Cadell, March 9, 1838, 16 S. 860, Lord President at p. 881, 1 Scot. Jur. 363.

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The tenant's right was not a right of property, or at least there was iz., the turnips, in such a condition at the date of the sequestra- at it could not become the tenant's property—enough to satisfy dlord's demand without raising any question as to grain or potatoes. n, the question were confined to the turnips, they were at that date *soli*, they could not be lifted, and therefore were not the tenant's ty. Just as a crop only brairded could not be poinded,[1] so these s could not be the tenant's property. The landlord had then a right n sufficient to ground retention. The minute of admissions shewed ption by the trustee of the lease,—*e.g.*, he should have sold the not kept them.

dvising,—

D YOUNG.—The landlord maintains, under the stipulation in his lease, s claim for rent is a preferable debt in the sequestration, to the amount value of the crop, and maintains also that he has sufficient support for that tion in the fact that the trustee, being free to adopt or to reject the lease, to adopt it, and that therefore this claim is good against him, which it y might not have been in other circumstances. The Lord Ordinary n his note the grounds why he is against the landlord on the former of leas, but in his favour on the second. I agree with the Lord Ordinary former point, and differ from him on the second.

landlord is exactly in the position of a creditor for a debt to the amount rent. The debt has been incurred, although the period of payment has ived. Before the change of the law in 1880, landlords were in a very able position as regards such debts, for they had security over their s' property of which these debtors retained possession, or even after a rence by the debtor in pursuance of a *bona fide* contract with a third party. law held. But after 1880, the landlord came to be in the same position other creditor. The law does not allow to any creditor security by con- over property which is allowed to remain in the debtor's possession. fore, in my view, the landlord is by this covenant in no more favourable n than any creditor would be to whom the tenant had given security over p of 1890. He could not do that without giving possession. I therefore with the opinion of the Lord Ordinary on the first question.

on the second question I feel constrained to differ. The Lord Ordi- opinion is put on this, that the trustee is put to his election to or to repudiate the lease. I am of opinion that he is put to no n. I am of opinion that it is his statutory duty to realise the debtor's to ingather it, and expend it in payment of his debts. The crop he tenant's property. He may have been under contracts with respect He was under this contract with the landlord. But the crop was his rty and passed to the trustee, he being bound of course to implement any cts which were binding on him. This contract was not binding on him. is the first point again. His duty was clear, to realise the property, and l no more. I cannot assent to the view that he adopted the lease. The Ordinary, by his answer to the second question, negatives his answer to rst question, for he says, if you take this crop, which you must take, you the lease, and then, it seems, the landlord will prevail.

[1] Elder v. Allen, July 5, 1833, 11 S. 902, 5 Scot. Jur. 518.

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I cannot agree with that view. My opinion on both questions is adverse to the landlord. I think that he has no preferable claim.

LORD RUTHERFURD CLARK.—On the first question I agree with the Lord Ordinary, and I am satisfied with the reasons which he has given.

On the second question I differ from his Lordship. I do not think the trustee adopted the lease. He has done nothing more than realise the property of the bankrupt.

LORD TRAYNER.—I agree with the Lord Ordinary in thinking that the clause in the lease referred to on record, which provides that the rent payable for the last crop should be seizable before the crop was removed from the ground, is one which cannot be enforced as against creditors, being merely, at least in effect, an attempt to create a security over moveables in the possession of the debtor. Taking that view of the legal effect of the clause, it is unnecessary to consider whether, having regard to the terms in which it is expressed, the clause (as was argued by the trustee) is inapplicable to a lease for one year, which this lease had come to be at the date of the tenant's sequestration. But I am unable to concur in the view of the Lord Ordinary, in respect of which he has pronounced the judgment reclaimed against, that the trustee in the sequestration has adopted the lease and thereby become bound for payment of the rent. The lease came to an end by the bankruptcy of the tenant, who, however, by the express terms of the lease was entitled to remain in possession of the farm until the term of Martinmas thereafter. Until that term arrived the tenant, or his trustee as vested in his right, was entitled to remain on the farm to the effect of reaping, securing, and removing the crop. The trustee did nothing more. He took possession of the farm only to the effect and for the purpose of ingathering and realising the bankrupt estate, not as for the bankrupt but as for his creditors. His doing so did not, in my opinion, infer any liability for the rent, for which the complainer must rank on the sequestrated estate.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"Find that at the date of the sequestration the crop of 1890 was the property of the tenant, and by the sequestration passed to his trustee in bankruptcy, who is entitled to realise the same for behoof of the creditors in the sequestration: Therefore recall the interlocutor reclaimed against, repel the reasons of suspension and interdict," &c.

HENRY & SCOTT, W.S.—DAVID MILNE, S.S.C.—Agents.

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M'Intosh v. Waite.

ROBERT M'INTOSH, Appellant.—*Shaw.*
WILLIAM WAITE, Officer of Inland Revenue, Respondent.—*Asher—Young.*

Administration of justice—Second trial where conviction on first trial "null and void"—Public-house—7 and 8 Geo. IV. cap. 53, sec. 68.—A person was convicted before two Justices of retailing spirits without having a licence. One of the Justices was a person employed in the collection of certain duties of excise, and the proceedings were therefore declared by sec. 68 of the above Act to be utterly null and void to all intents and purposes.* On the attention of the pre-

* 7 and 8 Geo. IV. cap. 53, sec. 68,—"It shall not be lawful . . . for any officer of excise or person employed in the collection or management of the revenue of excise to act as a Justice of the Peace in any part of the United

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secutor being called to this fact he repaid the penalty which had been imposed in respect of the conviction. A new complaint for the same offence was brought, and a conviction again followed, in spite of a plea that this second proceeding was incompetent. An appeal having been taken to the Quarter Sessions against the second conviction, a case was stated for the opinion and direction of the Court of Exchequer. *Held* that a decree by a competent Court was necessary to declare the statutory nullity, that the Justices had no jurisdiction to pronounce any such decree, were not at liberty to disregard the fact of a conviction having been already obtained for the same offence, and therefore could not entertain the second complaint.

2D DIVISION. Quarter Sessions of Aberdeenshire. M.

ON 19th June 1890 Robert M'Intosh, grocer at the Cabrach, Aberdeenshire, was convicted before James Lawson and Adam Dunbar, two Justices of the Peace, of selling whisky without a licence, and thereby infringing the provisions of 6 Geo. IV. cap. 81, as amended by 16 and 17 Vict. cap. 67. He was fined £25.

This penalty he paid, and on 21st June lodged an appeal to the Quarter Sessions.

On 15th July 1890 Robert M'Intosh appeared before James Lawson and George Park Wilson, two Justices of the Peace for the county of Aberdeen, to answer to a new complaint, containing precisely the same charges as those contained in the first complaint. Along with the second complaint the prosecutor presented to the Justices a minute, setting forth, *inter alia*, that Adam Dunbar, one of the Justices who heard the first complaint, was at that time a person employed to collect certain duties of excise by means of excise licences; that, as such a person was disqualified from acting as a Justice in said complaint, and had acted as a Justice therein, all the proceedings under the said complaint were, by the Statute, 7 and 8 Geo. IV. cap. 53, sec. 68, "declared to be utterly null and void to all intents and purposes"; and that the previous proceedings being utterly null and void, the proceedings under the new complaint were rendered necessary. The said minute farther set forth that the fine of £25 had been repaid, and there was produced to the Court the receipt of M'Intosh therefor.

At the hearing of the second complaint on 15th July 1890 M'Intosh pleaded in bar of trial,—(1) That Mr Lawson was disqualified, as he sat at the former trial; (2) that the complaint was incompetent on the ground that the respondent had already been tried and convicted of the offences libelled, and had paid the penalty, and that the case was under appeal; and (3) that the respondent did not admit Mr Dunbar's disqualification.

It was proved that Mr Dunbar was a person employed to collect certain duties of excise by means of excise licences, and that the penalty imposed by the conviction of 19th June 1890,—viz., £25,—was repaid on the 4th day of July 1890.

The Justices, on proof of Mr Dunbar's disqualification, and after the examination of witnesses for the prosecution and witnesses for the defence, repelled the objections in bar of trial, and convicted the respondent, fining him £25. He at once appealed to Quarter Sessions.

The appeals in both cases came up before the Statutory Court of Quarter Sessions held at Aberdeen on 28th October 1890, when M'Intosh

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Kingdom in the execution of any of the powers, authorities, clauses, matters, or things contained in this Act, or in any other Act or Acts of Parliament relating to the revenue of excise, . . . and if any such officer or person employed as aforesaid, . . . shall presume to act as a Justice of the Peace contrary to the true intent and meaning of this Act, all proceedings in that behalf shall be, and the same are hereby declared to be, utterly null and void to all intents and purposes."

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stated that he did not insist on the appeal in the first complaint, that in the second complaint the preliminary objections now insisted on were,—(1) That the first conviction could only be set aside by decree of reduction of a competent Court; and (2) whether so set aside or not, the respondent could not be tried a second time for the same offences, as he had already tholed a trial; and he craved the Court to state a case for the opinion and direction of the Court of Exchequer, in terms of the Act.

The Court of Quarter Sessions resolved to state a case accordingly, and adjourned the farther consideration of the case to the next statutory meeting of Quarter Sessions to enable them to get the opinion and direction of said Court.

A case was accordingly stated, the foregoing facts being set forth, and the following questions submitted, viz.:—"(1) On proof of the disqualification of the Justice Adam Dunbar, is the conviction of 19th June 1890 *ipso facto* 'utterly null and void to all intents and purposes,' by virtue of the declaratory words contained in the Act 7 and 8 George IV., chapter 53, section 68, or is a decree of reduction by a competent Court necessary? and (2) Whether, being *ipso facto* null or set aside, is a second trial barred by M'Intosh having been already tried and convicted under the first complaint?"

Argued for the appellant;—(1) In spite of the declaration of the statute, there must be some procedure to get rid of the former conviction. It was true that it was described as "null and void," but in the law of obligations, where certain obligations were void and others were voidable, both kinds stood until they were set aside by reduction. The appellant here could not have refused to pay the fine, resisting all procedure to enforce it by a plea that the conviction was null. [LORD TRAYNER.—I think he could. He could have suspended any proceedings to enforce the decree, but I doubt if a reduction was necessary.] That was a merely formal distinction. The conviction must be taken out of the way by some Court with jurisdiction to do so. The language of the Bankruptcy Statute of 1621, c. 18, was very broad,* as broad as that of the statute in question here, and yet the transactions therein struck at had to be removed by judicial procedure. (2) But even if the former conviction were null, the appellant had tholed an assize, and should not be "twice reduced to so anxious and humiliating a condition."[1] Where a mistake had been made in the designation of the victim of whose murder a pannel had been acquitted, the acquittal proceeding on the error in the designation, it was held that he could not be tried again for the murder of the person now in a second indictment rightly designated.[2] Then the first trial was plainly null, yet there could be no second trial.

Argued for the respondent;—(1) The terms of the section were peculiar. They could not be broader. The attempted analogy of the Bankruptcy Statute failed, its purview being to make reduction competent *ope exceptionis*. The Justices were competent to deal with this complaint. They must be competent to deal with a plea in bar. It would be absurd if a Court, on a plea in bar being proponed, could do nothing till another Court had disposed of that plea. [LORD RUTHERFURD CLARK.—That must depend upon the foundation of the plea in bar.] Admitted

* "The Lordes of Council and Session . . . statutes, ordaines, and declares that they will decreete and decerne all alienations, &c. . . . have beene from the beginning, and to be in all times comming, null and of none avail, force, nor effect . . . by way of action, exception, or reply without further declarator."

[1] Hume, ii. 465.

[2] See Hume, *ut cit.*, case of John Hannah, July 23 and Nov. 4, 1806.

But this plea depended on a simple question of fact, viz., did the Justice of the Peace sell stamps? It was a fact in the case now stated that that fact had been proved. Was it to be said that a declarator of that fact was to be brought in the Court of Session? It would have been objected to such a declarator that it was abstract, and led to no practical conclusion. Would it have been any better if a conclusion had been added that the proceedings were therefore null? The Judges of the Supreme Court would at once have said, "Why bring to us a question so plain as that, which the statute answers for you in so many words?" (2) The pannel could never plead that he had tholed an assize where the proceedings were null, and where nothing could have followed on them,[1]—*e.g.*, where a juryman was a minor.[2] [LORD YOUNG.—But that consideration would apply to any number of abortive trials. Could you—supposing your present conviction should turn out to be null, try this man a third time, or ten times?] Certainly. For no one of these so-called trials would in truth have been a trial. They would have been wiped out *vi statuti*. While such procedure would have been competent, it could not be supposed that any such abuse was likely to happen.

At advising,—

LORD JUSTICE-CLERK.—This is a case sent to this Court by the Quarter Sessions of Aberdeenshire for an opinion on a point of law. The case arises under the Inland Revenue Acts, Robert M'Intosh having upon the 19th of June 1890 been brought before two Justices of the Peace for a breach of the excise law, and adjudged to pay a sum of £25 of penalty, with an alternative of imprisonment. M'Intosh paid the penalty, and entered an appeal to the Quarter Sessions against the conviction. It was discovered afterwards that Adam Dunbar, one of the Justices who heard the case at the Petty Sessions, was a person employed to collect certain duties of excise in the neighbourhood, and that, in accordance with the Act 7 and 8 George IV., c. 53, sec. 68, the proceedings would be—if so declared by a competent Court—null and void to all intents and purposes. Upon that discovery being made the prosecutor in the case returned the fine which had been paid, got a receipt for it, and then proceeded to raise a second complaint before the Petty Sessions on 15th July for the same offence. The accused appeared at the bar and stated objections to the trial proceeding, on the ground that the case had already been tried, and that there was a judgment standing against him in the other case. He stated two pleas—1st, that one of the Justices was disqualified, he having sat at the former trial; and 2d, that the complaint was incompetent, on the ground that the respondent had already been tried and convicted of the offences libelled, and had paid the penalty, and that the case was under appeal. Thirdly, he stated what apparently there was nothing to support, that he did not admit the disqualification of the Justice in the former case, for I think it is quite plain according to the law that the Justice was disqualified. The prosecutor, on the other hand, maintained that

[1] Allison, ii. 618; Hume, ii. 468.

[2] Case of *Menzies*, Dec. 1790, reported by Hume, *ut cit.* The reporter notes that at a sitting of the High Court of Justiciary at Glasgow on 26th December 1887, in the trial of James Stevenson, charged with the crime of theft, after the jury had returned a verdict of guilty, it was discovered that one of the jurymen, who had objections to taking an oath, had not stood up with the rest of the jury when they were sworn, and had not taken the oath. Lord Rutherfurd Clark, after consultation with Lord M'Laren, swore the fourteen jurymen again, and allowed the fifteenth to affirm. The witnesses were recalled and re-examined, and the jury again returned a verdict of guilty.

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the proceedings at the previous trial were absolutely null and void, and must be held as having no existence, and that therefore the two Justices sitting were perfectly entitled to proceed with the case. This view was adopted by the two Justices sitting in Petty Sessions, and they proceeded to hear the case out, again convicted the accused, and again fined him. Against that he appealed to the Quarter Sessions, and the Quarter Sessions have sent the case to this Court in order to get instructions as to how they should deal with it.

Now, as I have said already, there cannot be a doubt that at the first trial one of the Justices who sat, though a competent Justice to sit in ordinary cases before the Petty Sessions, was not a competent Judge to sit in that particular case; and accordingly there can be no doubt that the proceedings in that prosecution, if competently brought up before a competent Court, ought to be declared utterly null and void to all intents and purposes. But that is not the question which we have to decide here. Nor is the question before us whether the appellant has tholed an assize. The question here is, whether there being on the books of the Justices of Peace sitting in Petty Sessions a standing conviction for a particular offence, that can be declared null and void by two other Justices sitting in Petty Sessions, so that they can set it aside as if it had no existence and proceed with a new trial? I am of opinion that two Justices sitting in Petty Sessions have no such power, and that although this first conviction must be set aside and got rid of, if it be brought upon appeal or otherwise before a Court competent to set it aside, they have no power to do so. And upon these grounds I have come to be of opinion that the answer we must give to the Quarter Sessions is that the appeal must be sustained against the subsequent proceedings taken before the two new Justices, and that they had no right in the circumstances to proceed as they did.

LORD YOUNG.—I am of the same opinion.

Every statute is to be construed with reference to the rules of the common law. There is no exception to that as a general proposition. The particular rules of the common law may be made by the statute inapplicable to the particular case, but in so far as they are not made inapplicable they do not require to be enacted. The rules of the common law apply here to the statutory provision declaring that a conviction or any proceedings before Justices under certain circumstances shall be null and void. That is subject to this rule of the common law, that the fact must be ascertained and declared, and made applicable to the particular case, the general declarator being unavailing until that is done. I am of opinion therefore, upon the ordinary rules of the common law, that the conviction must be set aside by a Court of competent jurisdiction before the man can be tried over again. Whether he can be tried over again after it has been set aside is a question upon which I am not required to form or to express an opinion.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

THE COURT pronounced this interlocutor:—"Find that the conviction of 15th July 1890 is bad, in respect of the previous conviction for the same offence of 19th June 1890, which the Justices sitting on 15th July had not jurisdiction to set aside, and were not at liberty to disregard."

DOUGLAS & MILLER, W.S.—DAVID CROLE, Solicitor of Inland Revenue—Agents.

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Duke of Buccleuch v. Johnstone.

DUKE OF BUCCLEUCH AND QUEENSBERRY, First Party.—*Murray—P. J. Blair.*
FREDERIC JOHN WILLIAM JOHNSTONE, Baronet, Second Party.—*Ure—Craigie.*

rior and Vassal—Entry—Casualty—Composition—Relief—Trust.—By *r vivos* trust-disposition dated in 1810 a proprietor (not entered with the r) of lands inherited from a deceased ancestor who was a singular succes- the last entered vassal and who held an *a me* infeftment unconfirmed, d the lands to trustees for the following purposes, viz., (1st) for pay- f the expenses attending the execution of the trust; (2d) for pay- o himself during his life and the subsistence of the trust of a free annuity of £3000, of which £400 was to be paid to his wife during and the subsistence of the trust; (3d) for payment of all the just and debts then owing by him; and (4th) in the event of his death, for the of carrying into effect the provisions of any deed of settlement executed executed by him in favour of his wife and children or any other person ons. Power was granted to the trustees (with the truster's written con- sell any part of the lands disponed to them, and the proceeds of the f any, so sold were directed to be applied in the payment of all the just ful debts due by the truster, and any residue of money in their hands was to be paid to the truster's heirs and assignees, secluding executors. The ed further provided that the trustees should reconvey the remainder of lands and estates and other heritable property which should not have sposed of when the debts had been fully paid off, or if required by under the hand of the truster, should so reconvey the lands to the t Martinmas 1814 whether the debts had been paid off or not. The died in 1811. In 1815 the trustees having obtained decree of adjudica- mplement against the truster's heir, and having been infeft thereon, were with the superior, but as trustees for the uses and purposes of the trust- ly, by charter of sale, adjudication, and confirmation, which recited the of the trustees' right, and confirmed the dispositions and unconfirmed in- ts since the date of the last vassal's entry. The trustees paid composition. In 1860 they granted a conveyance of such of the lands as they had to the truster's heir-at-law, who was infeft thereon, and was thereby in tered with the superior in virtue of the Conveyancing Act, 1874, sec. 4. t surviving trustee died in 1863. The vassal tendered relief-duty; the demanded composition.

(*diss.* Lord Young, *dub.* Lord Rutherfurd Clark) that the cases of *Stuart on*, 17 R. 851, *Duke of Athole* v. *Stewart*, 17 R. 724, and *Duke of Athole ies*, 17 R. 733, did not apply, and that the heir was liable in payment of tion, (*a*) in respect that the entry of the trustees created a new investi- d was not a mere burden on the former investiture, and (*b*) in respect n if it did not create a new investiture, the heir was not the heir of an ure recognised by the superior, as his ancestor had not been entered in ime, and as the subsequent confirmation by the superior operated *retro* the effect of confirming prior conveyances and unconfirmed infeftments missions necessary to complete the title of the vassal in whose favour irmation was granted.

rust-disposition, dated 10th December 1810, Sir John Lowther one, of Westerhall, Baronet, on the narrative that he was anxious his affairs in a regular train of management for the security of his rs, disponed all the lands and heritages belonging to him in Scotland, *ter alia*, the lands of Axletreewell, Dornock, and others, and the lands eckhill and others, to trustees, and gave the trustees power to sell, is written consent, such parts of the lands as he and they should oper. The purposes of the trust were, first, for payment of the e attending the execution of the trust; second, for payment to the during his life and the subsistence of the trust of a free yearly

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annuity of £3000, of which annuity £400 was to be paid to his wife during her life and the subsistence of the trust; third, for payment of all just and lawful debts then owing by the truster; fourth, "in the event of my death, the said trustees shall be bound to carry into effect the provisions contained in the deeds of disposition and settlement executed or to be executed by me in favour of the said Dame Charlotte Johnstone, my wife, and my children, or any other person or persons; . . . And It is hereby provided and declared that these presents are granted for and to this special end and effect, that the said trustees may apply the prices of such lands and others above disponed if sold, and rents thereof preceding the purchaser's entry, and whole other funds, heritable and moveable, hereby disponed and assigned, after deduction of the public burdens affecting the said estates, and after deduction of all necessary charges to be disbursed by them in preparing this trust right and executing the trust thereby committed to them, and of such salaries or gratifications as they shall give to factors, lawyers, arbiters, or others who shall be employed with relation to the management of this present trust, and other suitable gratifications to the said trustees themselves, in the payment of all the just and lawful debts due by me at the date hereof, both principals and interests that may become due upon such principals thereafter, in such order as the circumstances of the case may require: It being hereby expressly understood and conditioned that after payment of my debts as said is, my said trustees shall make payment to me, my heirs or assignees, secluding executors, of the residue of the money or other moveable property in their hands falling under or arising from this trust, any shall remain; and shall, when the said debts are fully paid off, at the term of Martinmas 1814, convey and redispone to me and my foresaids the whole of the remainder of my said lands and estates and other heritable property which shall not have been disposed of, with warrandice from fact and deed only: And which reconveyance, if required by me by writing under my hand, shall take place at the said term of Martinmas 1814, whether my debts are then paid off or not: It being hereby expressly provided that the said trust and the whole powers vested in the said trustees shall subsist and continue ay and until the said trustees shall be relieved of all advances of money and obligations whatsoever they may either jointly or individually be under on my account, and the said trustees shall be entitled to hold the whole subjects hereby disponed and made over till they are relieved accordingly: And declaring that in the event of my death before the said reconveyance shall take place, and my heir being a minor, the said trust shall subsist and continue as to the whole subjects, both lands and others, till my whole debts are paid, subject always to such allowance to my minor heir as I shall direct or appoint by a writing under my hand at any time in my life." The deed further contained an obligation to infeft by two several infeftments in manners of holding, and also a procuratory of resignation.

At the date of the trust-disposition, Sir John Lowther Johnstone had a personal right only to the lands above mentioned,* and at that date the last entered vassals in the lands of Axletreewell, Dornock, and others were James Douglas, of Dornock, in liferent, and Archibald Douglas, younger of Dornock, in fee, and the last entered vassal in the lands of Torbeckie and others was Margaret Graham, of Crowdieknow. The state of the title was then as follows:—

* The special case after mentioned, which incorporated the various deeds, stated that Sir J. L. Johnstone was "duly infeft," but the deeds shewed that he had only a personal right.

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letreewell and Others.—In 1768, William Alexander, merchant in burgh, obtained a decreet of sale and adjudication of these lands st James and Archibald Douglas, in implement of which Archibald las granted a disposition of the lands in favour of Alexander, with nt to infeft *a me* and precept of sasine, which was followed by ment of sasine recorded in 1773. In 1775 Alexander granted a ition and assignation of the lands and the decreet to Sir William ney, Baronet, uncle of Sir John Lowther Johnstone, with obligation eft *a me* and precept of sasine, which was followed by instrument of recorded in the same year. On Sir William Pulteney's death, Sir John ner Johnstone was served heir of line in special to him, and this ser- vas Sir John's title to the lands at the date of the trust-disposition.

beckhill and Others.—In 1765 Margaret Graham, in implement of a ct of sale, granted a disposition of these lands to David Armstrong. 90, in a ranking and sale against Armstrong, Sir William Pulteney ed a decree of sale and adjudication of the lands and foresaid dis- on; and on Sir William's death, his daughter and only child, the ess of Bath, acquired right to the decree, disposition, and lands, by l service as heiress of her father. On her death shortly thereafter, usin, Sir J. L. Johnstone, served heir in general special to her, which e was his title to the lands at the date of the trust-disposition.

John Lowther Johnstone died in 1811 without having made any ion in the titles.

16th November 1814 the trustees obtained a decree of adjudication plement against Sir Frederick George Johnstone, the only son and f the truster, as charged to enter nearest and lawful heir in general granduncle, Sir William Pulteney, which decree adjudged the of Axletreewell and others from him, and declared them to "belong bly and irredeemably to the said trustees for the uses and purposes said trust-disposition, and to their successors and assignees, and that plement of the foresaid trust-disposition to them by the said Sir Lowther Johnstone, and ordained them to be infeft and seased in id lands: To be holden of the immediate lawful superiors of the as he the said Sir Frederick George Johnstone held or could have the same." Of this decreet of adjudication in implement an abbre- was recorded on 12th January 1875.

27th March 1815, the commissioner for the superior, the Duke of sberry, granted a charter of sale, adjudication, and confirmation in of the trustees, whereby he disponed and confirmed to the trustees, trust always for the uses and purposes of the trust, which were ed, the lands of Axletreewell and others. The charter then deduced ght confirmed by reciting (1) the rights of the Douglases; (2) the t of sale in favour of Alexander; (3) the disposition and assigna- y Alexander in favour of Sir William Pulteney; (4) the service of hn Lowther Johnstone, as heir of line to his uncle Sir William ney; and (5) the adjudication led by the trustees against Sir Fre- George Johnstone. It then confirmed the disposition of the lands chibald Douglas to Alexander, the instrument of sasine following n in favour of Alexander, the disposition by Alexander to Sir m Pulteney, the instrument of sasine following thereon in favour William Pulteney, "to be holden the foresaid respective lands by id David Cathcart, Lord Alloway, and Masterton Ure, the trustees id, and the survivor of them, and his or their successors, and assig- of and under the said Charles William, Duke of Queensberry, &c., is heirs and successors, as immediate lawful superiors of the same, -farm, fee, and heritage for ever."

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The trustees paid composition in respect of this entry.

As regarded the lands of Torbeckhill and others, on 14th February 1827, the trustees obtained a decree of adjudication against Sir Frederic George Johnstone, as lawfully charged to enter heir in general special to the Countess of Bath, cousin-german of his father; on 27th November they obtained a decree of adjudication in implement against the heir of Margaret Graham, and on 15th February 1828 they obtained a charter of adjudication in implement from the superior, the Duke of Buccleuch and Queensberry. They also paid composition for this entry.

In 1856, Sir Frederic John William Johnstone, the grandson of Sir John Lowther Johnstone, with consent of his curator, raised an action of declarator, implement, count, reckoning, and payment against Masterton Ure, the surviving trustee acting under his grandfather's trust-disposition, concluding, *inter alia*, that upon the said Masterton Ure receiving a discharge from him and his curator, he was bound to convey and dispone generally the whole heritable estates and property in Scotland then remaining vested in him under said trust-disposition, or to which he had right as trustee foresaid, to and in favour of him, the pursuer, as having right thereto under the disposition and settlement of his grandfather, and to the heirs substituted to him in the said disposition and settlement. The parties were ordained by the Court to prepare and execute the necessary deeds for closing the trust, and accordingly Masterton Ure, as sole surviving trustee foresaid, upon the 16th day of March 1860, granted a disposition of, *inter alia*, the lands of Axletreewell, Torbeckhill, and others (with the exception of certain portions thereof which had been sold by the trustees), in favour of Sir F. J. W. Johnstone, the pursuer, whom failing, the heirs and substitutes called after him to the succession under the trust-disposition. Sir F. J. W. Johnstone was infeft in the said lands by recording the foresaid disposition in his favour on 27th September 1860.

Masterton Ure died in 1863.

Sir F. J. W. Johnstone having been impliedly entered with the superior in virtue of the Conveyancing Act, 1874 (37 and 38 Vict. cap. 94), sec. 4, the question arose whether he was liable in payment of a composition or in relief only.

This special case was accordingly presented, the superior, the Duke of Buccleuch and Queensberry, being the first party, and Sir F. J. W. Johnstone the second party.

The foregoing facts were stated in the case, and the following were the questions of law:—"(1) Whether the second party is liable to the first party in the sum of £671, 6s. 2d., being the composition in lieu of the casualty due by a singular successor on his entry to said lands? or, Whether the second party is liable to the first party in the sum of £13s. $8\frac{6}{12}$d. sterling, being the heir's relief, or the casualty due by an heir on his entry to the said lands?"

The case was originally heard before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Lee, and was taken to avizandum. Lord Lee prepared a written opinion, which was not delivered, in consequence of his Lordship's death before the case was advised. It was again heard of new.

The argument sufficiently appears from the opinions of the Court.[1]

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[1] *Authorities cited.*—Grindlay v. Hill, Jan. 18, 1810, F. C.; M'Millan v. Campbell, March 4, 1831, 9 S. 551, June 28, 1832, 7 W. and S. 106; Duke of Hamilton v. Earl of Hopetoun, March 8, 1839, 1 D. 689; Adv.-General v. Swinton, Jan. 30, 1854, 17 D. 21; Lamont v. Rankine's Trustees, Feb. 28, 1857, 6 R. 739, Feb. 27, 1880, 7 R. (H. L.) 10; Heriot's Hospital v. Carnegys, Oct. 3

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LORD TRAYNER.—In order to determine the question submitted to us, it is not necessary to consider the state of the titles to the lands in question prior to the year 1810. In that year Sir John Lowther Johnstone was vested in the lands. He was a singular successor, and unentered with the superior. By trust-disposition, dated 10th December 1810, Sir John disponed the lands in question to trustees for the following purposes, viz. :—(First), for payment of the expenses attending the execution of the trust; (second), for payment to himself, during his life and the subsistence of the trust, of a free yearly annuity of £3000, of which £400 was to be paid to his wife during her life and the subsistence of the trust; (third), for payment of all the just and lawful debts then owing by him; and (fourth), in the event of his death, for the purpose of carrying into effect the provisions of any deed of settlement executed or to be executed by him in favour of his wife and children, or any other person or persons. Power was granted to the trustees (with Sir John's written consent) to sell any part of the lands disponed to them, and the proceeds of the lands, if any, so sold were directed to be applied "in the payment of all the just and lawful debts due by" the truster. The trust-deed further provided that the trustees should reconvey the remainder of the "said lands and estates and other heritable property which shall not have been disposed of" when said debts had been fully paid off, or, if required by writing under the hand of the truster, should so reconvey the lands to the truster at Martinmas 1814, whether the debts had been paid off or not. Upon this trust-deed the trustees were duly infeft, and they some years thereafter (as regards part of the lands in 1815, and the remainder in 1828) entered with the superior, making payment to him of a composition of a year's rent in respect of their entry. These entries were taken after Sir John's death, which happened in 1811. In execution of the trust purposes, some portions of the lands conveyed in trust were sold by the trustees, and the remainder were conveyed by the sole surviving trustee, Mr Masterton Ure, to Sir Frederic Johnstone (the second party to this case). In March 1860, Sir Frederic took infeftment by recording the conveyance in his favour, and, by virtue of the provisions of the Act of 1874, now stands entered with the superior.

The question now is, what is he bound to pay the superior in respect of such entry? Is it composition as a singular successor, or relief as heir of the last entered vassal?

From the state of the title as I have described it, it appears that the last entered vassal in the lands in question was Mr Masterton Ure, and Sir Frederic Johnstone does not claim to be his heir. So far therefore as regards the form in which the title has been made up, it seems plain enough that Sir Frederic, not being the heir of the last entered vassal, must as a singular successor be liable in respect of his entry in payment of composition. But it is maintained on his behalf that the trust-conveyance to Mr Ure, and his entry with the superior, did not create a new investiture, because the trust was either a trust for creditors or for behoof of the heir, or both, leaving the radical title in Sir John, whose heir Sir Frederic is. Having regard to certain recent decisions, which must be regarded, in the meantime at least, as sound, I think it must be conceded

1884, 12 R. 30; Marquis of Huntly v. Earl of Fife, July 20, 1887, 14 R. 1091; Stuart v. Jackson, Nov. 15, 1889, 17 R. 85; Duke of Athole v. Menzies, March 20, 1890, 17 R. 733; Duke of Athole v. Stewart, March 20, 1890, 17 R. 724.

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that the implied entry (under the Statute of 1874) of trustees in whose favour a conveyance has been granted for behoof of creditors, or the implied entry of testamentary trustees who hold for behoof of the heir, does not create a new investiture, and in saying "implied entry," I do not intend to distinguish between the implied entry under the statute and the entry more formally given by the superior according to the law and practice as it existed prior to 1874, for the Act of 1874 put the two forms of entry on the same footing, and gives them the same effect. But making these concessions, it does not follow that the entry of Mr Ure did not create a new investiture. The trust-conveyance in favour of Mr Ure was not merely for behoof of creditors or for behoof of the truster's heir. It was a trust, in some measure, for behoof of the truster himself and his wife; it was a trust also (or might become so) for behoof of "any other person or persons" whom the truster might desire to favour by his settlement, and these might have been strangers. But, even disregarding these features of the trust conveyance, it is possible to suggest other reasons for regarding Mr Ure's entry as the creation of a new investiture. In the first place, it appears to me that Mr Ure's entry with the superior (Sir John, the truster, never having entered) was necessary to enable him to hold the trust lands conveyed to him on a valid title, and to enable him to give to the purchaser of that part of the lands which he sold such a title as the purchaser was entitled to demand, and was only bound to accept. The investiture of Mr Ure was necessary to enable him validly to carry out the trust purposes, if it was necessary for that end to sell any part of the truster's lands. In the second place, no one who acquired the trust lands or part thereof, from Mr Ure could be called on by the superior to enter or pay a casualty so long as Mr Ure survived. Why? Because during Mr Ure's lifetime the fee was full, and was full because of the investiture created by his entry. There was, in fact, no other investiture existing which the superior had recognised. I am of opinion that the entry of Mr Ure did create a new investiture, and that to hold so in the circumstances of this case is not going contrary to any of the recent decisions to which I have alluded. If the entry of Mr Ure created a new investiture, then, as I have said, Sir Frederic is liable in composition, because he is not the heir of that investiture.

But assume now that the entry of Mr Ure did not create a new investiture, what is the position of Sir Frederic? Claiming to enter as heir on payment merely of relief-duty, he must shew himself the heir of some investiture recognised by the superior. There is no such investiture. Sir John Lowther Johnstone (whose heir Sir Frederic is) was himself a singular successor in the lands, and was never entered, and (if Mr Ure's entry is set aside as not being a new investiture) the last entered vassals were persons entered much more than a century ago, whose heir Sir Frederic is not, and does not pretend to be. The case therefore comes to this, that Sir Frederic is neither the heir of Mr Ure, the last entered vassal, nor the heir of the vassal last before entered. He is not the heir of any investiture recognised by the superior. This fact distinguishes the present case broadly and essentially from the recent cases of *Stuart* v. *Jardine* (17 R. 85), *Duke of Athole* v. *Menzies* (17 R. 733), and *Duke of Athole* v. *Stewart* (17 R. 724). In all these cases the person claiming to be entered as heir was in point of fact, the heir of the last entered vassal, if (as was done) the intervening title of trustees was disregarded. Here, however, to disregard the title of Mr Ure does not enable Sir Frederic to connect himself as heir with any other investiture whatever.

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vas maintained on behalf of Sir Frederic, however, that the superior's nation of Mr Ure's title had the effect of confirming all previous convey- nd infeftments, and that this operated as a confirmation of Sir John's title. deduced from this that Sir John's title having been thus confirmed, Sir c was now entitled to an entry as Sir John's heir on payment of relief. ite true that a superior's confirmation of a vassal's title has a retrospective All the conveyances granted, and infeftments taken, prior to the date charter of confirmation, are thereby confirmed, but they are confirmed transmissions, and to the effect of completing the title of the vassal in favour the confirmation is granted. The superior, by his subsequent ation, is debarred from stating any objection to such transmissions, on und that they were transmissions of lands held *a me*, to which his had not been given, or on any other ground. But I never heard it ed until now that such subsequent confirmation of prior transmissions and ents had the effect of enfranchising the different series of heirs, to whom, hose transmissions, the property had been destined or might have ed. There is no authority for such a view. Indeed, the retroactive such confirmation, and the limit of that effect, cannot be better stated the words of the 115th section of the Titles to Land Consolidation d) Act, 1868, which provides that "Every charter or writ (*i.e.*, confirma- hether from the Crown or from a subject-superior, of whatever description, erate a confirmation of the whole prior deeds or conveyances necessary nfirmed in order to complete the investiture of the person obtaining it or charter." This was no new enactment; it was a declaration of the t then stood. The effect of the confirmation then being confined to what sary to the completion of the new investiture, there is no room, any an there is authority, for the view that such confirmation has the effect nchising the heirs under all or any of the previous transmissions. Such nisement is in no way necessary to "complete the investiture of the btaining the charter." If such enfranchisement did not follow as a ence of the charter of confirmation in favour of Mr Ure, Sir Frederic can benefit from that confirmation in the present question. It follows hat I have said that whether the entry of Mr Ure with the superior a new investiture or not, the position of Sir Frederic is not different. ot the heir of any investiture recognised by the superior, and must, e, as a singular successor, pay a composition.

RUTHERFURD CLARK.—Irrespective of the cases of the *Duke of Athole rt*, and the *Duke of Athole* v. *Menzies*, I should have no hesitation in this question in favour of the first party.

ifficulty has arisen entirely from these cases. I understood them to n the rule that, when trustees held for the heir of the truster, and dis- he estate to him in obedience to the directions of the trust-deed, the s not bound to pay more than relief-duty, provided that the title of the had been completed with the superior. Here the title of the truster was npleted with the superior during his lifetime. But inasmuch as the entered with the superior under a charter of confirmation, the base title h the truster held was confirmed, and of course confirmed as from its It appeared to me, therefore, that the present case might be brought he rule of the cases to which I have referred, in respect that the title of

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the truster was completed with the superior, though not till after his death; for the charter of confirmation would draw back to the date of the base infeftment which it confirmed. But as one of the Judges who formed the majority of the Court thinks that we shall do no violence to these cases in deciding in favour of the Duke of Buccleuch, I conceive that I am entitled to proceed on my own view of the law, and in my opinion the vassal is liable for composition. I need not state the grounds of my opinion. They are sufficiently expressed in the case of the *Duke of Athole* v. *Stewart*.

LORD YOUNG.—The course of this case has been remarkable. It was originally heard in the month of July last, when Lord Lee was a Judge in this Division of the Court, and when I happened to be absent on Circuit. It was very fully heard, and then taken to avizandum. Our lamented brother wrote an opinion which I have had the advantage of seeing—as all your Lordships had—and it is in accordance with the view which Lord Rutherfurd Clark says he also held upon the reported cases. It is in favour of the second party. I concur in that opinion which I think it would be only fair to communicate to the parties.*

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* "OPINION of the late LORD LEE.—The question in this case is, whether the Frederic Johnstone is liable in composition, or only in payment of the casualty of relief, in respect of his entry to certain subjects held of the Duke of Buccleuch and which may be described shortly as (1) Axletreewell, and (2) Torbeckhill.

"The form of his title to the subjects is a disposition executed by the last surviving trustee of his grandfather, Sir John Lowther Johnstone of Westerhall in his favour, as heir-male to his grandfather, and therefore the heir entitled to succeed under the trust-settlements therein recited.

"The trust-deed in favour of Sir John Lowther Johnstone's trustees was executed in 1810, and the purposes of it, so far as material, were (1) to pay debts, and with power to the trustees, with Sir John's consent, to sell such part of the lands as he and they should see proper; (2) in the event of Sir John's decease, to act as his trustees and executors, and to carry into effect the provisions contained in a deed of disposition and settlement executed by him in favour of his wife and children; (3) for reconveyance of the remaining lands 'when said debts are fully paid off, or at the term of Martinmas 1814,' but subject to a declaration that, in the event (which happened) of Sir John dying before a reconveyance, and his heir being a minor, the trust should continue till the debts were paid off. This deed contained an obligation to infeft, by the several infeftments and manners of holding, and also a procuratory of resignation, and the trustees obtained entry under it, in the manner after mentioned on payment of composition.

"Sir John Lowther Johnstone was not infeft in the subjects in question, either at the date of this trust-disposition, or at the date of his death, which took place in 1811.

"At these dates, the last entered vassals in the lands of Axletreewell, being the subjects No. 1, were James Douglas in liferent, and Archibald Douglas in fee; and the last entered vassal in the subjects (Torbeckhill and others) was Margaret Graham.

"It appears, however, from the case, that Sir John had a personal right to both subjects—(Firstly), as regards Axletreewell, as heir served to his uncle William Pulteney, and thereby in right of a decreet of sale and adjudication obtained in 1768 by William Alexander against James and Archibald Douglas and of a disposition and assignation of the lands and decreet, granted in 177[illegible] the said William Alexander in favour of the said Sir William Pulteney, his heirs and assignees whatsoever; and (secondly), as regards the Torbeckhill subjects, as heir of his cousin, Henrietta Laura Pulteney, Countess of Bath, the daughter and only child of the said Sir William Pulteney, and the

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case raises, as was intended, a general question of considerable interest, is, I think, proper that I should state, as clearly as I can, my own views

t of a decreet of sale and adjudication obtained by Sir William Pulteney 0 against Margaret Graham's disponee.

is set forth in the case that the trustees of Sir John Lowther Johnstone ntered with the superior in the first subjects by a charter of adjudication nfirmation, of date 27th March 1815; and in the other subjects by ter of adjudication in implement, of date 1828; and these deeds are l in the appendix; and it is one of the facts of the case that the trustees case paid a composition.

t it was contended for the superior that Sir Frederic Johnstone, acquir- ht by disposition from the trustees, must be regarded as a stranger to the ture, and was therefore liable in composition.

y opinion is, that this argument is ill founded, and that the superior is led from dealing with Sir Frederic Johnstone as a stranger to the investi- the charters granted to the trustees.

ese not only give entry to the trustees, as trustees, for the purpose (after nt of debts) of conveying the lands to Sir John Lowther Johnstone's heir, ey also confirmed the rights vested in Sir William Pulteney and his er, the Countess of Bath, and acknowledged the right of Sir John r Johnstone and his eldest son (Sir Frederic's father) to take up the suc- as heirs to Sir William Pulteney and his daughter. It is in respect of ht that Sir John's trust-disposition is confirmed by the two charters.

w, the effect of a confirmation (though we were not favoured with any ty on the subject) is well settled. It is thus stated by Professor Menzies, hen confirmation is obtained, it operates *retro*, validating the infeftment s date, and the superior is therefore excluded from demanding casualties may have fallen due between the date of the sasine and the confirmation, h before confirming he could have claimed these.' After giving certain ties and illustrations, he adds,—'The confirmation necessarily accreses y prior infeftment flowing from the author whose sasine is confirmed.'

is is supported by the doctrine of Stair (ii. 3, 15). 'Charters of confir- do deduce the rights to be confirmed. . . . These charters of con- on, whensoever granted, are drawn back to the date of the charters ed, which were absolutely null till confirmation, unless there be *medium mentum*, as a prior infeftment by confirmation, or upon resignation by the r; yea, though the infeftment by confirmation be after the death of the of the charter to be confirmed, if the superior do confirm it the confir- is drawn back, and will import the superior's passing from any casualty by the death of the author, unless these be reserved.' (See also Stair ii. and the authorities given in Ross' Leading Cases, Land Rights, vol. ii., 134.)

rd President Campbell's Session Papers, in the case of *M'Dowall* v. *on*, contain a note of his opinion thus: 'Can he claim as apparent heir his father was never publicly infeft? Will the charter of confirmation, so late as 1789, being after old Aikenhead's death, supply the defect? nfirmation draws back and makes the possession public from the begin- The intermediate death of the party infeft does not prevent the on of it. The objection, therefore, seems to me not to be good.'

ow, in the present case, I take by way of illustration the charter of cation and confirmation granted in 1815. It is not said that the other had any different or lesser effect in the question of casualties.

ter confirming the trust-disposition and the right of the trustees (but in lways for the uses and purposes specified), it deduces the right confirmed iting (1) the rights of the Douglases; (2) a decreet of sale in favour of m Alexander; (3) a disposition and assignation by Alexander in favour William Pulteney and his heirs and assignees; (4) the service of Sir Lowther Johnstone, as heir of line to his uncle, Sir William Pulteney; 5) the adjudication led by the trustees against Sir Frederic George

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upon it, which I shall do more briefly by confining my remarks to the lands mentioned in the third paragraph of the special case. These lands I shall for brevity call by the single name of "Dornock."

In 1768 Dornock (using the name as that of the lands) belonged to James Douglas in liferent, and to his son Archibald in fee, and was held by them as vassals of the Duke of Buccleuch. In that year it was, by a decree of sale and adjudication, acquired by a creditor (William Alexander), who subsequently (in 1775) conveyed it to Sir William Pulteney and his heirs. On Sir William Pulteney's death, Sir John Lowther Johnstone expede a special service to him as his heir of line. The service is dated 1809, and was duly retoured to Chancery. These details are perhaps immaterial, and the general statement in the special case sufficient, viz.,—"Upon the death of the said Sir William Pulteney, he was succeeded in said lands (Dornock) by Sir John Lowther Johnstone of Westerhall, Bart., who was duly infeft therein."

It thus appears that Dornock passed out of the Douglas family (the Buccleuch vassals) in 1768, into the Pulteney family in 1775, that Sir John Lowther Johnstone of Westerhall was the heir of line of that family from 1809 till his death, which occurred in 1811, and that, as such, he possessed Dornock as proprietor. It does not appear when Archibald Douglas died. While he lived, the Duke of Buccleuch had no right to either casualty or relief-duty. On his death, if his heir was willing to enter, the Duke was entitled to relief-duty only, which, being only a few shillings, was not worth asking. If not, the Duke on the one hand was entitled to demand casualty (a year's rent), and Sir John Lowther Johnstone on the other was entitled, in return for the casualty

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Johnstone, only lawful son and heir of Sir John, and as decerned, to enter himself as nearest and lawful heir in special to the said Sir William Pulteney, and it then confirms—(Firstly), the disposition of the lands by Archibald Douglas to William Alexander, 1769; (secondly), instrument of sasine following thereon in favour of William Alexander; (thirdly), disposition by William Alexander to the aforesaid Sir William Pulteney, 1775; (fourthly), an instrument of sasine following thereon in favour of the said Sir William Pulteney dated 2d May 1775, and registered in the General Register of Sasines the 8th June thereafter.

"The effect of this charter was to confirm the infeftment of Sir William Pulteney, and the adjudication led against Sir Frederic George Johnstone, as lawfully charged in the character of Sir John Johnstone's heir and representative; to procure himself served as nearest and lawful heir in special to the said Sir William Pulteney, as well as the trust-disposition in favour of the trustees and in virtue of which they completed their right.

"The adjudication so led against Sir Frederic George Johnstone, and followed by charter, was equivalent to a disposition by Sir William Pulteney in favour of Sir Frederic George Johnstone, as Sir John Johnstone's heir; and I think it impossible now to represent his son and heir, Sir Frederic Johnstone as a stranger to the investiture, or to distinguish the case from that of the trustees having obtained a disposition in trust from the last entered vassal, from his heir duly infeft.

"I therefore think that the case is ruled by the case of *The Advocate-General* v. *Swinton* (17 D. 21), and other cases in which it has been held that, if a composition be paid for a new investiture, the intervention of a trust to execute an entail, or to convey in a certain destination, will not render the disponee (being heir of the investiture) liable to pay composition as a singular successor.

"Sir Frederic Johnstone is only in form a singular successor, and, in my opinion, is entitled to obtain entry as an heir.

"I therefore answer the first question in the negative, and the second in the affirmative."

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year's rent, to demand an entry from the Duke, which should confirm the of his ancestor Sir William Pulteney, and make himself the entered vassal ne Duke, so that his heirs of line should be entitled in succession to take ock on payment of relief-duty only, that is, a few shillings. And this is lly true with respect to Sir John Lowther Johnstone's heir of line, viz., ldest son Sir Frederic Johnstone. The Duke, in short, was entitled, on ailure of the heir of Archibald Douglas to enter, to demand a casualty from eir for the time of the Pulteneys, who acquired the estate in 1775, and one lty only so long as Dornock remained in the Pulteney family, and did not pass to strangers.

l that I have said is, I think, too clear to be dwelt upon, irrespective of act which I have not yet adverted to, that Sir John Lowther Johnstone, ly before his death, executed a trust for behoof of creditors. Whether act, taken along with the manner in which the trustees made up their and ultimately divested themselves, so as to terminate the trust, entitles Duke to two casualties, is the general question in the case.

e trust is a very ordinary trust by an embarrassed proprietor to pay his out of surplus income, after making allowance for his maintenance, and sale if necessary, and in the end to restore the property to himself or his or as he might direct. There was no sale, at least of Dornock, and so, at ermination of the trust, it fell to be restored. It must, of course, have been ed to the truster himself had he lived, or to his eldest son, Sir Frederic, e survived. It happened that both were dead, and that the restoration o be made, and was in fact made, so long ago as 1860, to his grandson rederic John William Johnstone (the second party), who was then and is his heir-male, and so also the heir-male of Sir William Pulteney, who red Dornock in 1775. For thirty years after 1860 he possessed Dornock ut it having occurred to the Duke of Buccleuch or his advisers that he did herwise than as the heir-male of his father and grandfather (whose baronetcy herited), and so also of Sir William Pulteney, and that he was in truth a ger and singular successor. He was of course a stranger and singular suc- to Archibald Douglas; but that he was so to his own father and grand- seems an absurd proposition, and I am not surprised that for thirty years urred to no one as stateable.

the Duke has not been paid a casualty of a year's rent in respect of this of Dornock having been conveyed away from Archibald Douglas and his to Sir William Pulteney and his heirs, his present demand is well founded irected against the proper party, viz., the heir-male of Sir William Pul- now in possession, and otherwise I think it is as unfounded as his advisers irty years thought it was.

ave already pointed out that when Sir John Lowther Johnstone succeeded ornock, and entered on possession as heir of Sir William Pulteney, the of Buccleuch was entitled to demand a casualty (if Archibald Douglas's was unwilling to enter, which I shall assume he was), and that Sir John her Johnstone, on his part, was absolutely entitled (without any reference chibald Douglas's heir) to insist that, on payment of a casualty, he should ne the Duke's vassal with confirmation of his own title and that of his cessor, whose heir he was,—Sir William Pulteney. So standing the s of the Duke and Sir John *hinc inde*, the latter executed the trust-deed 810, and the trustees under it, acting in execution of the trust, and with

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the trust money, satisfied the Duke's claim to a casualty, and also the truster's right to be entered as vassal with confirmation of his own and Sir William Pulteney's title, with all the consequences attaching thereto. They thus, with the truster's money, and in pursuance of the trust, satisfied the Duke's claim and the truster's right. It is true, but I think immaterial, that the casualty was paid and the confirmation taken in 1815—four years or so after the truster's death. The Duke got the truster's money, and it is well settled that confirmation operates *retro*. Would it have affected the Duke's right on the succession of the second party in 1860 that the truster had survived the payment and confirmation of 1815, and died, say, in 1816?

But the trustees, quite superfluously, as I think, took in addition a confirmation of the trust-deed and their title under it. Lord Trayner has spoken as if this was necessary to enable them to give a title to a purchaser if it had so happened that they had occasion to sell. I cannot conceive any reason for thinking so. If the truster's title was confirmed as that of a vassal under the Duke, or indeed, whether or not, the trust-deed was good and valid, requiring no assent or recognition from the Duke, and any conveyance by the trustees in the due execution of it would be valid.

Let me put the case, a very possible one,—that the truster had survived the execution of the whole trust purposes, and thereupon demanded and obtained the reconveyance of Dornock to himself. Would he have taken it as a stranger heir and singular successor to his own trustees, who had it only temporarily by his voluntary deed in order to execute certain purposes of his and then restore it to him? It is said that the exigencies of the trust might have required the trustees to sell the land and convey it to a stranger, or that the truster might have altered his deed of April 1810 so as to require the trustees to convey it to strangers instead of to himself or to his heirs-at-law. How these possibilities bear on the case I fail to see. Had the land been conveyed to a stranger, whether by the trustees in execution of their trust, or in obedience to a lawful order of the truster, or by the truster or his heir on the termination of the trust, the superior would no doubt have enforced his rights as existing in that case.

Had the truster, before the execution of the trust, himself paid the casualty and got his title confirmed so as to be entered with the superior, or had the trustees done so, whether in his lifetime or after his death, and whether making up a title in the person of his heir (as they might have done) or not, it is, I think, clear that the superior could have no concern with the trust or its execution or the title of the trustees. Further, when the purposes of the trust were fulfilled, and, the land being unsold, the trustees denuded of it in favour of the truster, if alive, or his heir, as coming in his place, if dead, I think this could not be rationally regarded as an alienation of the land to strangers. Then does it make a difference that the trustees—superfluously or not (I think quite superfluously)—had their own trust-title confirmed at the same time? The superior was not, and could not be, thereby prejudiced, or anyone thereby benefited to his loss or possible loss. Lord Trayner has, I think, suggested that the entry of the trustees was necessary to enable them to hold the lands and give a good title to a purchaser. But this, I think very clearly, is not so, and I can imagine no reason for the suggestion. Further, it is said that a purchaser could not have been called on to pay a casualty while the survivor of the trustees lived. But a purchaser from trustees is assuredly much better protected against a demand for a casualty by the truster or his heir (the real seller although by the instru-

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tality of trustees) being entered. There has been, I think, throughout the ment of the first party some misapprehension or forgetfulness of the nature legal character of a trust such as we have here to deal with. It is merely inery created by the true owner of the land for his own legitimate purposes, who, in all the trustees do, is using them as his instruments. His owner- does not cease while he lives, and it passes to his heir, or according to his when he dies, notwithstanding of the trust, although subject to it while it . On the termination of the trust, the land not alienated in the execution must be restored to the original owner or his heir, legal or voluntary, un- ened of the trust, and so as to be exactly of the character and quality it before the trust existed. The legal character of the second party's right in to have the lands conveyed to him cannot be estimated except with ence to the truster's right had he survived, for his only right was that of ruster's heir-at-law, which he was. He had no other. Then what was the er's right—that is, would have been had he survived? I should say the ership of the lands, which he held subject only to the burden of the trust h he had executed, and so to be ended eventually by the divestiture of the ees. That accordingly was the second party's position in 1860. Lord ner says he was not the heir of Mr Ure, the last entered vassal. True, but er was the truster, whose right (and only whose right) he had. A truster ot be the heir of his own trustee when the trust terminates, and neither is (the truster's) heir. The language is inapplicable. He takes not as the of his trustee, but as owner of the lands with his ownership about to be rdened of the trust which has been executed. Of course neither was he eir of the vassal last entered before Mr Ure, if you mean Mr Archibald las. But he was the heir of the truster, and if the truster had, either nally, or through the instrumentality of his trustees, paid the casualty due spect of the lands passing to him and his heirs from Archibald Douglas and eirs,—there could be no claim upon him as the truster's heir, any more upon the truster himself, to pay it over again on the termination of the . The opinion which I have expressed, and the reasons for it, are obviously cable to all the lands specified in the case, and the conclusion is that, in udgment, the first question ought to be answered in the negative, and the d in the affirmative.

RD JUSTICE-CLERK.—I have had an opportunity of reading the opinion h Lord Trayner has just delivered, and I concur with it in every respect. the present case been on all-fours with the cases of the *Duke of Athole*, hould of course have followed their authority. But it appears to me that, he reasons which Lord Trayner has stated, they are quite distinguishable. judgment of the Court will therefore be in favour of the first party.

THE COURT answered the first question in the affirmative, and the second in the negative, and found and declared accordingly.

ROBERT STRATHERN, W.S.—WELSH & FORBES, S.S.C.—Agents.

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AGNES KINNAIRD OR GILCHRIST AND OTHERS, Pursuers (Reclaimers). —*Dickson—Salvesen.*

JANE GOODLET OR MORRISON AND OTHERS, Defenders (Respondents). —*Murray—Brodie-Innes.*

itle to Sue—Reduction—Proving of the tenor.—Where the heir-at-law and next of kin of a person deceased brought an action for reduction of certain

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testamentary deeds executed by the deceased on the ground of facility and circumvention, and for declarator that the succession of the deceased was to be regulated by a prior testamentary deed under which they were residuary legatees, the pursuers did not produce the prior deed founded on, and the defenders alleged that it had been destroyed *animo revocandi*. The pursuers then added an averment that they were respectively heir-at-law and next of kin of the deceased. *Held* that having the alternative title of heirs *ab intestato* and disponees under the deed alleged to have been revoked, they had a title to sue a reduction of later deeds granted to their prejudice, and that the validity of these deeds fell to be decided in the first place (*rev.* judgment of Lord Wellwood (Ordinary) who had sisted process in order that a proving of the tenor of the prior deed might be brought).

1st Division. Ld. Wellwood. C.

ON 1st July 1890 Mrs Agnes Kinnaird or Gilchrist, widow, and William and Jane Alexander Gilchrist, children, of the late John Gilchrist, Leith, brought an action against Mrs Jane Goodlet or Morrison, Leith, sole executor and universal legatory under a last will and testament bearing to be executed on 6th February 1890 by Mrs Jemima Gilchrist or Purdy, and general disponee and donee under disposition and deed of gift bearing to be executed on 6th February by the said Mrs Purdy, and also against William Rew, merchant, Leith, and William Asher S.S.C., Leith, trustees under a trust-disposition and settlement bearing to be executed by Mrs Purdy on 20th January 1890, concluding for reduction of the said three deeds, for declarator that a trust-disposition and settlement executed on 16th December 1889 by the said Mrs Jemima Gilchrist or Purdy was the deed by which the succession to the means and estate left by the said deceased Mrs Jemima Gilchrist or Purdy fell to be regulated, and that the pursuers were entitled to the provisions made in their favour by the said last mentioned trust-disposition and settlement; and for decree ordaining Mrs Morrison to count and reckon for her intromissions with the estate on that footing.

The pursuers stated (cond. 5), that Mrs Purdy, the deceased, was the elder daughter of the said John Gilchrist, the husband of the first named pursuer and father of the other pursuers. (Cond. 10) "About the middle of December [1889] she sent for the family law-agent, Mr Asher, and gave him instructions to make a fresh will, as she knew her illness was incurable, and she wished to make a final settlement of her affairs in prospect of an early death. Mr Asher accordingly prepared a trust-disposition and settlement, which was executed by her on the 16th day of December 1889, and by which she conveyed her whole means and estate to Mr Asher and his managing clerk, Mr John Rose, whom she appointed her trustees and executors." The substance of the will was payment of debts, &c., and of certain legacies, including one of £500 to the defender Mrs Morrison, and of the residue to the pursuer Mrs Gilchrist in liferent, and to the other pursuers in fee. "The said will was carefully prepared by the instructions of Mrs Purdy, and it was fully considered by her before she signed it. The said deed contained the real wishes of the testatrix with regard to the disposal of her estate after her death. A copy of the said trust-disposition and settlement is herewith produced." The pursuers then set forth the grounds of reduction of the deeds libelled (under which the pursuers were entirely excluded from the succession), which were facility and circumvention.

The pursuers pleaded;—(1) The deeds sought to be reduced not being the deeds of the late Mrs Purdy, ought to be set aside, in terms of the conclusions of the summons. (2) *Separatim*, The said deeds ought to be reduced, in respect that at the dates when the same were executed the deceased Mrs Purdy was weak and facile in mind and easily imposed upon, and that the said Mrs Morrison and John Goodlet, or one or other of

them, taking advantage of her said weakness and facility, did by fraud or circumvention impetrate the said deeds from Mrs Purdy to her lesion. (3) The trust-disposition and settlement of 16th December 1889, being the deed regulating the succession to the deceased Mrs Purdy's means and estate, the pursuers are entitled to decree in terms of the conclusions of the summons.

The defenders lodged answers in which they denied the facility and circumvention alleged, and in answer to cond. 10 averred;—(Ans. 10) "The pursuers are called on to produce this deed or to prove that any such deed was executed and retained by Mrs Purdy as the final expression of her testamentary intentions. It is explained that on the 28th January 1890, the testatrix being then of sound disposing mind, and fully understanding and comprehending the legal results of such action, sent for Mr Peter Peterson Slater, solicitor and law-agent, and after requesting him to act as her agent, explained to him that the said trust-disposition and settlement in the said condescendence mentioned had been in fact revoked by the will prepared by Mr Asher, and executed on the 20th January, as mentioned in condescendence 13, and desired Mr Slater to destroy the same in her presence as useless and as not expressing her will, which Mr Slater accordingly did. Such destruction was deliberately done *animo revocandi*, and the said trust-disposition and settlement is not now in existence."

The defenders pleaded;—(1) No title to sue.

The pursuers at adjustment made this addition to cond. 10;—"With reference to the statement in answer, the pursuers have no knowledge whether the will in question was destroyed, or by whom it was destroyed. *If* Mrs Purdy destroyed it as stated by the defender, she did so in consequence of the defender having by fraud or circumvention induced her to do so while she was weak and facile and easily imposed upon. On the deeds under reduction being reduced, the pursuers will, if necessary, bring a proving of the tenor of the will in question."

The pursuers also made the following addition to their cond. 5;—"The pursuer William Gilchrist is Mrs Purdy's heir-at-law, and the pursuer Jane Alexander Gilchrist is one of her next of kin."

On 15th January the Lord Ordinary (Wellwood) pronounced the following interlocutor:—"Sists process *in hoc statu* in order that the pursuers may, if so advised, raise an action of proving the tenor of the trust-disposition and settlement executed on 16th December 1889 by Mrs Jemima Gilchrist or Purdy, upon which they found; meantime reserves all questions of expenses." *

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* "OPINION.—This action is laid entirely on the footing that the deed by which the succession to the means and estate of the deceased Mrs Purdy falls to be regulated is a trust-disposition and settlement dated 16th December 1889, under which the pursuers are beneficiaries to a large extent. The pursuers claim as beneficiaries under that deed, and the conclusions of the summons and the statements on record, especially those in condescendence 10, shew that that deed is the title on which they rely. It is true that they now state that the pursuer William Gilchrist is Mrs Purdy's heir-at-law; but so little was that in view when the action was raised that the fact was not stated in the original condescendence.

"Now the deed of 16th December 1889 is not forthcoming. It is stated by the defender, and there is little reason to doubt the truth of the statement so far, that it was destroyed on the 28th of January 1890, about a week after the execution by Mrs Purdy of a trust-disposition and settlement dated 20th January 1890, which is the first in date of the deeds under reduction. In these circumstances, *I think* it is necessary for the pursuers to prove the tenor of the deed

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The pursuers reclaimed, and argued;—The pursuers had a double title, as disponees under the deed alleged to have been destroyed, and as heirs of the deceased *ab intestato*. They were entitled to plead these titles alternatively to the effect of insisting on this reduction. That took the present case out of the principle of *Shaw*[1] referred to by the Lord Ordinary, for there the pursuer's only title was the lost deed. A proving of the tenor was not a suitable way of trying what would virtually be an issue of facility and circumvention, for the question in the proving would be the state of the mind of the deceased at the date of the alleged revocation. Such a question ought to be tried by a jury upon an issue in the usual terms. The proper course was to dispose of the validity of the deeds sought to be reduced first, for if they should be reduced the interest of the present parties was reversed, as Mrs Morrison was a beneficiary under the deed alleged to have been destroyed, and the pursuers as heirs *ab intestato* would have an interest to reduce that deed.

Argued for the defenders;—The action was laid upon a deed which was not in existence, and a proving of the tenor was an essential preliminary to any action on a lost document.[2] It could not be founded on as giving a title to sue. Nor could the pursuers plead their alleged title as heirs, for the title of heir became active only if there was no deed to displace it; under the former law, the heir could not have sued a reduction *ex capite lecti* if the effect of reduction was to set up a prior deed. The whole scheme of the present summons was that there was such a prior deed. The question whether a testamentary deed had been destroyed by the deceased *animo revocandi* could quite satisfactorily be disposed of in a proving of the tenor.[3]

At advising,—

Lord Adam.—In this case there is no question that the averments on record are sufficient to sustain the reductive conclusions. The only question is as to whether the pursuers have a title to sue. There is no doubt that when the action was brought into Court the pursuers thought the deed of 16th December 1889 was still in existence, or at least did not know whether it was destroyed or not, and there can be no doubt that that was the title on which the action was originally brought, and that accounts for the

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of 16th December 1889 on which they found. In doing this, they will have to prove the *casus amissionis;* and, if it is true that the will was destroyed by the orders of Mrs Purdy, to prove that she was not then in such a state of mind as to be capable of effectually cancelling or revoking it. The question to be tried in the action of proving the tenor will therefore practically be the same as that sought to be raised in this action. But an action of proving the tenor proceeds in the Inner-House; and therefore the present process must be sisted until the pursuers take steps to set up the deed of 16th December 1889—*Shaw* v. *Shaw's Trustees*, 3 R. 813, and *Bonthrone* v. *Ireland*, 10 R. 779.

"The pursuers strongly maintain that William Gilchrist, being heir-at-law, and entitled to succeed to the heritage left by Mrs Purdy if she died intestate, he is, in any case, entitled to sue the action, and challenge the deeds under reduction. As I have already indicated, the summons is so framed that I do not think it can proceed as an action at the instance of the heir. But, further, if the pursuers' averments are true, William Gilchrist, as heir-at-law, was cut out by the deed of 16th December 1889, and the parties really entitled to challenge the subsequent deeds are the disponees or beneficiaries under that deed."

[1] Shaw v. Shaw's Trustees, June 13, 1876, 3 R. 813.

[2] Gordon v. Robertson, Oct. 28, 1873, 11 S. L. R. 35.

[3] Bonthrone v. Ireland, March 15, 1883, 10 R. 779.

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laratory and accounting conclusions. However, when the case was ught into Court this explanation was made by the defenders,—"It is lained that on the 28th January 1890 the testatrix, being then of sound posing mind, and fully understanding and comprehending the legal results uch action, sent for Mr Peter Peterson Slater, solicitor and law-agent, and r requesting him to act as her agent, explained to him that the said trust- osition and settlement in the said condescendence mentioned had been in revoked by the will prepared by Mr Asher, and executed on the 20th uary as mentioned in condescendence 13, and desired Mr Slater to destroy same in her presence as useless, and as not expressing her will, which Mr er accordingly did. Such destruction was deliberately done *animo revoc-*, and the said trust-disposition and settlement is not now in existence." reply made to that by the pursuers was this,—"With reference to the ment in answer, the pursuers have no knowledge whether the will in ques- was destroyed, or by whom it was destroyed. If Mrs Purdy destroyed it ated by the defender, she did so in consequence of the defender having by d or circumvention induced her to do so while she was weak and facile and y imposed upon." Upon these averments being made by the defender on rd as to the destruction of this deed, which the pursuers supposed to be in ence when they brought this action, and which they do not now admit to estroyed, this averment was put on record,—"The pursuer William Gilchrist rs Purdy's heir-at-law, and the pursuer Jane Alexander Gilchrist is one of next-of-kin"; and that averment is not disputed in point of fact.

ow, from what I have read of the record it is obvious that the real question sue between the parties here is the state of the testatrix Mrs Purdy's mind e date 20th January, when the first of the deeds sought to be reduced was uted, and on 6th February, when the two other deeds were executed. That e real question at issue between the parties—whether or not these three s ought to be reduced on the ground stated. That is the real question with h we have to deal, and I think also that no one could doubt that that tion would best be tried in the usual way before a jury with the issue, her the deed has been obtained by fraud and circumvention in the usual s. I think that unless there be some strong ground to the contrary, that d be the proper way to try the question at issue between the parties in this unless indeed the pursuer has no title to sue. I think that the case would uch better so tried than as the course indicated by the Lord Ordinary d point at, namely, incidentally merely in course of a proving of the tenor, h would go to shew the state of Mrs Purdy's mind on 28th January, when s said to have destroyed the deed in question, and which, if that fact were lished, would no doubt indicate her state of mind at or about the time these deeds were destroyed, and might afford inference one way or other, would not decide the question between the parties to this case, for it is not tate of mind on 28th January that is the question, but the state of mind 0th January.

think it is clear also that the pursuers have a double title to insist in this n. It is obvious and set forth in this record—and perfectly sufficiently orth in this record—that the pursuer William Gilchrist is the heir-at-law, that the pursuer, Miss Gilchrist, his sister, is one of the next of kin of Mrs y. That being so, if the deed of 16th December is not in existence clear that they have a good title to try this case. That is quite clear,

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and if the deed of 16th December has not been destroyed—and the pursuers do not know whether it is destroyed or not—and if it is produced before the trial, they have a perfectly good title. The other is the title of heir-at-law, but they have a perfectly good title on which to try the question here. If the first deed had been the only title upon which the pursuers had to rely, I should on the authority of the case of *Shaw* v. *Shaw's Trustees*, 3 R. 813, referred to by the Lord Ordinary, and on the principle of it, have had no doubt whatever that the course pursued by the Lord Ordinary was the right one, namely, that if that had been the sole title it would have been necessary to bring a proving of the tenor—either to produce it, or, if not recoverable, to proceed by way of proving the tenor first before they could go on with the action. But that is not the state of the title, for as I have already pointed out, the only effect of this first deed is not to destroy the pursuers' title to sue but to give another and equally good title to sue. If it is not produced or not proved, then they are respectively heir-at-law and next of kin.

That being so, I have come to the conclusion that the Lord Ordinary's interlocutor should be altered. I think in this case the pursuers have a perfectly good title to try the question here on issues in the usual form. It may be that after the leading conclusions of the action are decided in one way or another, it may be necessary for the further progress of this action then to have a proving of the tenor. That may be quite possible. If it should be that these deeds are set aside by the verdict of a jury, then it may be that the pursuers will not be enabled to go on with the declaratory and accounting conclusions without putting themselves in a position to insist in these. But if the main question is settled in one way or another, I think that will clear the way for the proper disposal of the remainder. I am therefore of opinion that the interlocutor should be altered, and the case tried by a jury.

Lord M'Laren.—If there had been no averment in this action as to the pursuers, that one of them stands in the relation of heir-at-law, and the other in that of next of kin to the defunct, I should have agreed with the Lord Ordinary that this action could not proceed without a proving of the tenor of the lost deed. position, for I think no one can pursue a reduction founding on the title of his ponee without being liable to be called upon as a condition of prosecuting the case to produce the deed which he asserts to be his title. Admittedly the pursuers are not in a condition to produce the deed which they libel, because it has been destroyed—they say destroyed under circumstances which do not affect its validity, but that is a matter which I think would have to be investigated as a condition of establishing the title to sue in the character of disponee. Now when the summons was originally brought into Court, the character of disponee was the only title alleged by the pursuers. Since then they have apparently without objection amended their condescendence by asserting a title of heir-at-law and next of kin. I confess it would have been more satisfactory to my mind if that amendment had been made by leave of the Court, by minute of amendment and interlocutor following upon it. There has been an amendment of that nature made already, but that does not touch this question; it is an amendment having relation to the character of the defenders. But as I should at anyrate have been prepared to consent to such an amendment if it had been asked for, and as I understand your Lordships think it is within the power of the pursuer on revisal to make such an addition to his condescendence.

I am quite satisfied to deal with the case as one in which the pursuers now found on the double title of disponees and also of heirs *ab intestato*. In the second of these characters they are clearly entitled to follow out this action, because the title of heir and next of kin is always a good title to challenge any deed whatsoever alleged to be granted by a deceased person, and challengeable on these grounds. Therefore, while sympathising with the Lord Ordinary's desires to enforce strictness of pleading in matters of title, I think that the objection that seemed to his Lordship to be insuperable may be got over, and that this action ought to be allowed to proceed. I concur with Lord Adam in thinking that if it turns out that the real interests of the pursuers rest upon anything in the deed, it would then be necessary to set up the deed by some subsequent procedure before operative effect could be given to it.

LORD KINNEAR.—I concur.

LORD PRESIDENT.—I think that if the only title of the pursuers of this action had been that of disponees under the destroyed deed, the course which the Lord Ordinary has adopted would have been the right one, because until that deed was either produced or the tenor of it proved, they could not come to Court at all with a title to challenge what has been done. But the character of heir-at-law on the part of one pursuer, and that of one of the next of kin on the part of another, removes that difficulty altogether, because whether the destroyed deed is to be set up again or not, they are quite entitled to have the deed which has been granted by the deceased to their prejudice set aside if they can make out that the testatrix was not of sound disponing mind at the date of the deed, or was in a state of facility and was circumvented by the defender. The effect of a verdict setting aside the deeds made by the testatrix will be merely this, that these deeds will have no effect whatever; but that will not settle the question whether the deed which is said to have been destroyed, and of which the tenor is sought to be proved, is to be set up or not; but the parties, when decree of reduction has been pronounced, will be in a position then to reconsider their interest in the two events of the destroyed deed being set up, or of their acquiescing in its destruction. We do not know exactly what the interests of the pursuers are under that original destroyed disposition, but if there are interests created by that disposition which are adverse to the interest of the heir and next of kin it will then be a question whether the proving of the tenor might not settle the question between the parties; and therefore I think the logical order of the proceeding is to settle in the first place whether the testatrix was of sound disponing mind, or was circumvented in the granting of the deeds which are now maintained and set up by the defenders. And I therefore come to exactly the same conclusion as Lord Adam, that it is quite unnecessary to consider at present what the effect of a decree of reduction may be.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary, and remit to adjust issues to try the question whether the deeds of 20th January and 6th February 1890 were not the deeds of the testatrix, or whether she was in a state of facility and weakness and was circumvented by the defender."

STUART & STUART, W.S.—SNODY & ASHER, S.S.C.—Agents.

No. 125.

Feb. 28, 1891.
Tait v. Johnston.

GEORGE TAIT, Complainer (Reclaimer).—*Jameson—M'Lennan.*
JOHN JOHNSTON, Respondent.—*Shaw—A. S. D. Thomson.*

Process—Citation—Statute 1592, *cap.* 141—*Citation Amendment Act*, 1882 (45 *and* 46 *Vict. c.* 77), *secs.* 3, 4.—A service copy of a petition in a Sheriff Court was sent by registered letter to the defender, with a citation bearing to be executed by A B, a law-agent, but it was not signed by A B, but by C D, another law-agent, for A B. The execution returned upon the petition was in the statutory form, and was signed by A B.

In a suspension of a decree in absence obtained against the defender, he pleaded that the citation was invalid.

Held that as the execution returned upon the petition had not been reduced, the defender was barred from objecting to the citation.

Opinion (*per* Lord Rutherfurd Clark) that the citation was valid.

Sheriff—Jurisdiction—Process—Union of several counties into one sheriffdom—Sheriff Court Act, 1853 (16 *and* 17 *Vict. c.* 92), *sec.* 4—*Sheriffs Act*, 1870 (33 *and* 34 *Vict. c.* 86), *secs.* 4, 5, 6, 12.—In a sheriffdom in which several counties are combined the granting of a warrant to cite a defender to appear at a Court in a county which is not the county of his domicile, is a matter within the discretion of the Sheriff.

2D DIVISION. Lord Kincairney. M.

ON 7th August 1890 John Johnston, joiner, Innerleithen, raised an action for £50, 17s. 3d., as the amount of the balance of an account, against George Tait, Woodside Cottage, Innerleithen, in the Sheriff Court of the Lothians and Peebles at Edinburgh.

A warrant to cite, dated 7th August 1890, was pronounced by the Sheriff-substitute of the Lothians and Peebles, at Edinburgh (Orphoot), ordaining Tait, if he intended to shew cause why the prayer of the petition should not be granted, to lodge appearance with the Clerk of Court at Edinburgh.

A copy of the petition and warrant was sent by post to Tait, with a schedule of citation bearing to be executed by Marcus J. Brown, S.S.C., law-agent, and to be signed for him by T. H. Lang Guthrie, solicitor. An execution in terms of the statutory schedule, written upon the principal petition, was signed by Marcus J. Brown.*

On 12th September 1890 decree in absence was taken against Tait, who had received the citation and had corresponded with Johnston's agent with regard to the claim, but had lodged no defences.

A charge on the decree was given.

On 13th October 1890 Tait brought a suspension of the decree and charge, on the grounds set forth in his pleas in law, which were;—1. The complainer having no residence or place of business within the county of Midlothian, is not subject to the jurisdiction of the Sheriff of the

* The Citation Amendment Act, 1882, enacts by sec. 3, " . . . In any civil action any summons or warrant of citation of any person . . . may be executed . . . . by an enrolled law-agent by sending to the known residence or place of business of the person upon whom such summons, warrant or judicial intimation is to be served, . . . a registered letter by post containing the copy of the summons, . . . with the proper citation or notice subjoined thereto, and such posting shall constitute a valid and legal citation."

Section 4 enacts, *inter alia*,—"(3) The execution to be returned by the officer or law-agent shall be accompanied by the post-office receipt for the registered letter: The execution returned by a law-agent shall for all purposes be equivalent to an execution by any officer of Court: The execution may be in the form contained in the first schedule hereto."

The schedule bears,—"This summons . . . executed by me, . . . law-agent . . . (*Signature of Agent.*)"

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Lothians and Peebles or his Substitutes sitting at Edinburgh as Judges of the Sheriff Court of the county of Midlothian, and, *separatim*, in the circumstances stated, a citation to the Sheriff Court at Edinburgh was not a citation which the complainer was bound to obey. (2) The proceedings complained of being incompetent and inept, in respect of no jurisdiction over the complainer, suspension and interdict should be granted as craved, with expenses. (3) *Separatim*, The complainer never having been cited to the said Sheriff Court at Edinburgh, the decree pronounced against him is inept, and the same, with all that has followed thereon, should be suspended as craved.

He denied that he was indebted to Johnston in the sum sued for.

The respondent pleaded that the statements of the complainer were irrelevant, and that the decree and proceedings following thereon were regular and formal.

On 7th February 1891 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Repels the first, second, and third pleas in law for the complainer: Repels the reasons of suspension," &c.* The statutes cited at the debate are quoted in the opinion of his Lordship.

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* "OPINION.— . . . . The statute does not expressly require that the law-agent who serves the summons shall sign the schedule of citation. But it was maintained that this is required by the Statute 1592, cap. 141, which requires that 'all copies of summounds and letters quhilkes sall be delivered to ony party be subscrived by the officer executor thereof.'

"It would appear that the documents to which this Act refers are the schedules of citation, and not the principal writs themselves—*Izatt* v. *Robertson*, 25th January 1840, 2 D. 476, 12 Scot. Jur. 303, and *Bruce* v. *Hall* there referred to. But I am under the apprehension that before 1882 (except in the cases to which the Act 34 and 35 Vict. cap. 42 applies) the formalities of citation on summonses in the Sheriff Court were not regulated by that Act, but by the Act 1 and 2 Vict. cap. 119, sec. 23, and the relative Act of Sederunt, 10th July 1839, sec. 13. There is no statutory form of a schedule of citation, and its signature by the officer is not required expressly by either of these enactments, although, perhaps, such a requirement may be implied in the section of the statute, while the presence of a witness at the execution and the signature of the officer on each page of the summons is expressly required by the Act of Sederunt.

"That requirement is not repeated in the Citation Amendment (Scotland) Act, 1882, and, of course, there is no room for a witness in the case of service by registered letter, and I am not at present prepared to hold that the signature of the law-agent, who is said in the schedule to make the service, is a statutory requirement. If it be, I should think it a very loose and dangerous practice to find a schedule signed by one law-agent for another, and should have great difficulty in holding that the schedule of citation in this case was signed by Mr Brown.

"But I think it is not necessary to decide that point absolutely, because no objection has been taken to the agent's execution, which, by the Citation Act, is equivalent to an officer's execution; and it appears to be still in accordance with our practice to refuse to entertain an objection to the schedule of citation when the execution is in form and unreduced—*Calder* v. *Calder*, 20th December 1825, 4 S. 331; *Ramsay* v. *Pettigrew*, 13th December 1828, 7 S. 193; *Macqueen* v. *Clyne's Trustees*, 20th May 1834, 12 S. 610, 6 Scot. Jur. 332. I think, therefore, that this ground of suspension cannot be sustained.

"II. The complainer by his first plea, as originally drawn, and by his second plea objects to the jurisdiction of the Sheriff when sitting as Judge of the Sheriff Court of the county of Midlothian.

"I am of opinion that the plea of no jurisdiction cannot be sustained. The question depends on the provisions of the statutes by which certain counties have been united into one sheriffdom. One or two of the counties in Scotland have been united as one sheriffdom for a long time back, but there have been

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The complainer reclaimed, and argued;—(1) The question raised was not merely one of jurisdiction. The complainer (assuming the jurisdic-

only two statutes recently passed on the subject. The first is the Sheriff Court Act, 1853, 16 and 17 Vict. cap. 92, by which the union of various counties is provided for when vacancies should occur, and sec. 4 provides that when a vacancy should occur in the sheriffdom of Peebles it should be united with the county of Midlothian into one sheriffdom. The later Act, which is the Act directly applicable, is the Sheriffs Act, 1870, 33 and 34 Vict. cap. 86. By secs. 4, 5, and 6 provision is made for the union of the counties of Midlothian, Linlithgow, Haddington, and Peebles into one sheriffdom, to be called the Sheriffdom of the Lothians and Peebles; and by sec. 12 it is enacted, that every union of counties into one sheriffdom 'shall be deemed to be a complete union to all intents and purposes, in so far as regards the jurisdiction, powers, and duties of the Sheriff and his Substitutes, and in so far as regards the powers, duties, rights, and privileges of procurators before the Courts of the Sheriff: And the several counties of any such united sheriffdom shall not be thereafter regarded as separate sheriffdoms or jurisdictions, in so far as regards the powers, duties, rights, and privileges of the Sheriff and his Substitutes, and the procurators of the Sheriff Court.'

"In the face of these absolute and comprehensive words it seems impossible to deny the jurisdiction of the Sheriff of the Lothians and Peebles in this case. Counsel for the complainer referred to sec. 6 of the Sheriff Court Act, 1876, 39 and 40 Vict. cap. 70, which provides that a person having a place of business in a county shall be subject to the jurisdiction of the Sheriff thereof, although domiciled in another county, if cited personally, or at his dwelling-place, with power to the Sheriff to remit such action 'to the Court of the defender's domicile in another sheriffdom,' and to sec. 12, which, by its first subsection, provides for citation in such cases.

"The argument, as I understood it, was, that because the word county was used and not sheriffdom it was to be inferred that but for the Act the Sheriff in one county, forming part of a united sheriffdom, would not have had jurisdiction over a defender who had a place of business in another county, forming part of the same sheriffdom. But I think the inference inadmissible. The statute does not profess to do more than confer jurisdiction. It says nothing about the seat of the Court at which the jurisdiction is to be exercised. It confers jurisdiction in language which is not a whit more clear or absolute than that of sec. 12 of the Act of 1870. I do not think it applies to the jurisdiction of a Sheriff over the divisions of a united county at all. If it does, it adds nothing in language or in substance to his power, and I think that the use of the word 'sheriffdom' at the close of the section shews that there was no intention of drawing any distinction between a county and a sheriffdom.

"Reference was made to *Edwards* v. *The Inverness and Aberdeen Railway Company*, 24th April 1862, 4 Irv. 185, where the Sheriff, sitting in the Small Debt Court at Banff, dismissed an action of damages against the railway company on the ground of no jurisdiction. The statutory domicile of the railway company was Inverness, but it had been cited at Keith, in Banffshire. The pursuer appealed to the Circuit Court at Inverness, and seems to have argued that there was jurisdiction because Keith was a principal station. The appeal was dismissed. The grounds of judgment do not appear quite clearly. But it was pointed out that Lords Neaves and Ardmillan both indicated that there might have been a difference had the action been brought in the Sheriff Court at Elgin, in which county the injury happened; and it was argued that, as Elgin and Banff were united counties, it could, if the respondent's argument were sound, have made no difference as to the question of jurisdiction whether the action was brought at Banff or at Elgin. It does not appear, however, that the attention of the Judges was called to the point at all, and they do not purport to decide it, nor, indeed, allude to it.

"III. The further question is this, whether, admitting the jurisdiction of the Sheriff, it was competent to convene the defender to the Sheriff Court at

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tion) maintained that the only proper place at which to cite him was Peebles, the head burgh of his county, and that there only was he bound

Edinburgh, and entertain a cause against him in that Court, or, whether the complainer is now entitled to say that he was only bound to attend the Court of the Sheriff at Peebles, the head burgh of the county in which he was resident?

"This is not a question of jurisdiction exactly, but rather about the conditions of its exercise, and especially about the Court at which it can be competently exercised. It is not in this case complicated by any question as to the power of the Sheriff-clerk to sign the warrant of citation, because the warrant is signed by the Sheriff-substitute, about whose power there is no question. The point appears a difficult one, and there is, so far as I have been able to discover, hardly any authority in our books on the subject. The only similar reported case, so far as I am aware, is *Dowie* v. *Douglas*, 30th May 1817, Fac. Coll., which it may be worth while merely to refer to, but as I do not see that it can be used as an authority either way it is not necessary to advert to it further. I may refer also to Ersk. i. 4, 5, where he treats of the exercise of a Sheriff's jurisdiction at the head burgh of a county, or of the division of a county, and he gives as an example and illustration 'the shire of Clydesdale,' which in his time had been separated into three divisions, but he does not affirm that it would be incompetent to exercise jurisdiction at the head burgh of one division over an inhabitant of another division.

"Allusion may also be made to the Act for the regulation of the Commissary Courts, 1823, 4 Geo. IV. cap. 97, which by sec. 6 provides that where two counties are under the jurisdiction of one Sheriff they shall constitute one commissariot; and to 1 and 2 Vict. cap. 26, which authorises the Sheriff of two counties to hold Commissary Courts in both counties if he shall think proper. The inference is legitimate that he could, if he chose, exercise his jurisdiction, at least as commissary, in one of the counties over persons resident in another, and that seems simply in consequence of two commissariots being united.

"It is argued, on the one hand, that before the union of the counties it was the right of the defender to be convened at the Sheriff Court in his own county, and that there are no words in the statute to deprive him of that right; that the object of establishing resident Sheriff-substitutes and local Courts was just to make this right effectual; and that although there might be no great hardship in this case still there was some hardship, and the hardship would be very great if in some of the northern counties it were held to be in the power of a pursuer to compel a defender to come from one county to another in the same sheriffdom.

"On the other hand, it was maintained that, seeing the complainer resided within the territory of the Sheriff, he was bound to obey his citation judicially given, and that there was neither principle nor authority for denying to the Sheriff the power to convene any person within his territory to any established seat of his Court; that it was within the power of a Sheriff, by an order of Court, to determine to what seat of Court persons resident in the different districts of his sheriffdom should be convened; that this was a matter safely left to his discretion and not vested in any other authority, and that that power of the Sheriff had been exercised in various cases in which more than one seat of the Court had been established in a county; that the intention of the statute was to abolish all distinctions between the different counties united into one sheriffdom so far as the administration of the law was concerned.

"Having regard to the very comprehensive language of the statute uniting the counties, I am unable to sustain the complainer's contention, or to restrict the Sheriff in the exercise of his jurisdiction without some definite authority, statutory, judicial, or institutional. It is true that it would be highly inconvenient if a pursuer were allowed to call a defender to the Court in a united sheriffdom most convenient to himself, without regard to the residence of the defender, but it is not necessary to hold that a pursuer has that power. The matter is under the control of the Sheriff, who can regulate it by an order of Court, and can, if he thinks fit, refuse to issue his warrant of citation against a defender more suitably amenable to another Court, or can perhaps deal with

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to answer the citation.[1] Were it otherwise, a pursuer who resided in Shetland might convene a defender also residing there to appear at Wick. A defender was not bound to submit to that. (2) A citation must be made by the agent who returned the execution, and by no other. Here it was not so, and this was so plainly a null citation that no reduction was necessary.

Counsel for respondent was not called upon.

LORD JUSTICE-CLERK.—When a statute enacts that certain counties named are to be united into one sheriffdom, and are not thereafter to be regarded as separate sheriffdoms or jurisdictions, it is perfectly clear on the face of it that a citation by the Sheriff to the head burgh of the principal of the counties united cannot be bad, although it may be inconvenient for a defender residing in another part of the jurisdiction to be cited there. At the same time, no one can doubt that the Sheriff, upon a representation being made to him that it would seriously inconvenience the defender to defend the action in the place to which he has been cited, would consider that objection and dispose of it. It is not to be assumed that the Sheriff exercises his powers in an unreasonable manner. If all the business of Edinburgh were attempted to be removed to Peebles or Linlithgow, some means would speedily be found for putting an end to such an outrage of public decency. The public trusts the Sheriff to conduct the business of his Courts properly.

Here the defender never asked the Sheriff to remit the whole case to Peebles. I think the first plea in law bad. As to the second plea of not being properly cited, I am of opinion that as the execution bears that the defender was duly cited, and no steps have been taken to set aside execution, it also falls to be repelled. I consider the whole proceedings in this case idle.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK.—I am of the same opinion, but I would like to state further that I see no objection to the citation in this case.

LORD TRAYNER.—I agree with your Lordship upon all the grounds stated.

THE COURT adhered.

ANDREW TOSH, S.S.C.—MARCUS J. BROWN, S.S.C.—Agents.

No. 126. Mar. 3, 1891. Barbour v. Chalmers & Co.

A. H. F. BARBOUR AND ANOTHER, Pursuers (Respondents).—*M'Kechnie Howden.*

D. & J. CHALMERS & COMPANY, Defenders (Appellants).—*Jameson—Crole.*

Process—Appeal—Removing—Act 6 Geo. IV. cap. 120 (*Judicature Act*, 1[illegible] *sec.* 44.—Where a landlord obtained decree of removal against a tenant, on ground that he had no title to possess, an objection was taken to the competency of an appeal, on the ground that suspension in terms of the 44th section of Judicature Act was the only competent remedy. Objection *repelled.*

any question of the kind by an award of expenses. If he have such power, alleged inconvenience may prove more theoretical than actual. In this case Sheriff-substitute has himself granted warrant to cite the defender to lodge defences with the Sheriff-clerk at Edinburgh, and has decerned against because he did not appear, and I have not been able to discover any rea which appears to me sufficient for denying his right to exercise his undoul jurisdiction and power in that manner."

[1] Ersk. i. 4, 5.

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Lease—Proof of—Constitution—Period of endurance—Validity.—In an action praying for the removal of a tenant, on the ground that he had no title of possession, the defender founded on a written lease granted by a former proprietor, in which the term of endurance was mentioned only in a clause added at the end of the testing-clause, and on receipts for rent granted by the landlord, shewing that the defender had been in possession of the subjects.

Held that to instruct a valid contract of lease it was sufficient for the defender to prove that the writing had been delivered to him by the landlord in its present form, and that he was entitled to prove this *pro ut de jure*.

1ST DIVISION. Sheriff of the Lothians. M.

A PETITION was presented in the Sheriff Court of the Lothians by A. H. F. Barbour and Mrs Whyte, heritable proprietors of certain subjects in the Canongate, Edinburgh, praying for warrant "summarily to remove and eject" therefrom Messrs D. & J. Chalmers, and David Chalmers junior, the only known partner of the firm, on the ground that without right or title they were occupying the premises.

The defenders in answer produced a lease, dated 3d June 1885, between David Chalmers senior, who was then proprietor of the subjects, and the defenders. The body of the lease did not mention the term of endurance, but, following the testing-clause, there was this declaration:—"But declaring the term of lease to be for the term of nineteen years complete from the date hereof." The rent specified in the lease was £20, and receipts from David Chalmers for the half-yearly rents down to May 1889 were produced. It was stated that the lease had been intimated to the pursuers' authors, who had entered into possession of the subjects as heritable creditors under a bond, and to the pursuers themselves when they purchased the subjects from the heritable creditors in 1889 at a public sale. Further, the lease in question was produced at that sale.

The pursuers stated in answer that the alleged lease was null and void, in respect that it contained no clause specifying a period of endurance. They further stated that a peace-warning had been served upon the defenders on 10th March 1890, requiring them to flit and remove.

They pleaded, *inter alia*;—(5) No period of endurance being specified in the said lease, . . . it cannot be pleaded as a burden on the title of singular successor in the subjects.

The defenders pleaded, *inter alia*;—(4) The defenders being in possession under a valid current lease burdening the proprietors' title, the tenants are not liable to be summarily removed and ejected. (7) Even if the lease were defective, it has been validated by homologation and *rei interventu*.

The Sheriff-substitute (Hamilton), on 7th July 1890, sustained the fifth plea in law for the pursuers, repelled the defences, and granted warrant summarily to eject and remove the defenders.*

The Sheriff (Crichton), on 21st July 1890, dismissed an appeal.

The defenders appealed to the Court of Session.

The pursuers objected to the competency of the appeal, and the objection was heard along with the merits.

Argued for the defenders;—(1) The appeal was competent. This was not a case of removing a tenant whose lease had come to an end. The pursuers' position here was that the defenders had not, and never had had, any title to possess the subjects. In such circumstances an appeal had been allowed.[1] (2) The fact that the declaration regarding the term of

* "NOTE.—A glance at the document is sufficient to shew that it is not a good lease, no period of endurance being therein specified. That being so, the whole defence falls to the ground."

[1] Clark v. Clarkes, June 28, 1890, 17 R. 1064.

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the lease was not in the body of the deed, but was only to be found at the end of the testing-clause, did not invalidate the contract, provided it was inserted with consent of the granter of the deed and the deed was delivered. The opinions of the Judges of the First Division in the case of *Chambers*,[1] to the effect that the insertion of a substantial provision in the testing-clause was ineffectual, and that it could not be regarded as part of the deed, had been doubted when that case came to the House of Lords. Previous cases in which the validity of such a declaration had been sanctioned[2] were approved by Lord Gordon in that case. Further, even assuming that the lease was informal, the possession which had followed upon it and the actings of parties gave the declaration validity, and made the contract binding even upon singular successors like the pursuers.[3]

Argued for the pursuers;—(1) The appeal was incompetent. The only way of bringing up the judgment of an inferior Court in an action of removing was by suspension. This was clear from the terms of the 44th section of the Judicature Act, 1825 (6 Geo. IV. cap. 120), and from many decisions following upon it.[4] It was true that there was here a conclusion for ejection as well as for removal, but, on the other hand, removal, and not ejection, was the appropriate remedy, the lease being *prima facie* bad as against the pursuers, who had accordingly executed a peace-warning. (2) The duration of the lease was not specified in the contract, and this was fatal to it. It might have been different if the clause had been one which varied or qualified the provisions of the deed, but where as here it was an essential term of the contract which was added,—binding on both or on neither party,—it could not receive any effect.[5]

Lord President.—The petition in the Sheriff Court prayed the Court to grant a warrant summarily to remove and eject the defenders from the subjects in question, on the ground that the defenders had no title whatever to possess the subjects, and that they never had any—the lease under which they profess to possess having been defective in an essential particular, and not, therefore, being pleadable by the defenders. An objection has been taken to the competency of the appeal on the ground that the only remedy which the defenders had was by way of suspension in terms of the 44th section of the Judicature Act, 1825. I think it is only necessary to say that that section has no application to the circumstances of the present case. That section is intended to meet the case of a tenant whose lawful tenure of the subjects has come to an end, and who seeks to retain possession notwithstanding a warning to quit. The proceedings in the present case entirely exclude the application of that section.

The question which the Sheriff-substitute and the Sheriff have decided on the merits is, as the Sheriff-substitute's interlocutor bears, "Sustains the fifth plea in law for the pursuers: Repels the defences, and grants warrant to officers

[1] Chambers' Trustees v. Smith, Nov. 9, 1877, 5 R. 97, revd. April 15, 1878, 5 R. (H. L.) 151, Lord Gordon, p. 168.

[2] Johnstone v. Coldstream, June 30, 1843, 5 D. 1297, 15 Scot. Jur. 541; Dunlop v. Greenlees' Trustees, Nov. 2, 1863, 2 Macph. 1, 36 Scot. Jur. 5, affd. June 1865, 3 Macph. (H. L.) 46.

[3] Rankine on Leases, p. 101; M'Leod v. Urquhart, 1808, Hume's Decns. 84; Russell v. Freen, May 14, 1835, 13 S. 752, 7 Scot. Jur. 351; Wilson v. Mair, March 2, 1876, 3 R. 527.

[4] Ross v. Brims, March 14, 1878, 15 S. L. R. 438; Fletcher v. Davidson, Nov. 3, 1874, 2 R. 71; Roy v. Lord Wemyss, July 7, 1840, 2 D. 1345, 12 Scot. Jur. 622; Gibson v. Scott, Jan. 28, 1826, 4 S. 404.

[5] Arnott v. Calder, March 6, 1835, 13 S. 619, 7 Scot. Jur. 351, affd. July 1840, 1 Rob.'s Apps. 183.

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Court summarily to eject and remove the defenders as craved, and decerns." The Sheriff-substitute's ground of judgment is stated in a very short note, which is in these terms:—"A glance at the document is sufficient to shew that it is not a good lease, no period of endurance being therein specified. That being so, the whole defence falls to the ground." The Sheriff adopted the same view, and dismissed an appeal against the Sheriff-substitute's judgment. The fifth plea in law is, "No period of endurance being specified in the said lease . . . it cannot be pleaded as a burden on the title of a singular successor in the subjects." The matter of fact stands thus. In the ordinary place in which the term of endurance would fall to be inserted in the lease, there is no mention of it, but at the end of the testing-clause it is declared that the term of endurance is to be for nineteen years, and the Sheriff-substitute and Sheriff hold that this being the sole evidence of the term of endurance of the lease, it cannot be supplemented in any way, and that there therefore being no term fixed in the lease, the lease necessarily becomes a nullity.

I cannot agree with the Sheriffs. On the contrary, it appears to me that the duration of the lease, although writing is necessary as evidence of the contract, may be established by other modes of proof. That there was to be a lease is clear from the form of the document, in which the subject, the rent, and the terms of payment are all specified. The only thing which is awanting is the term of endurance. If a document of that kind was delivered by the landlord to the tenant, and was delivered in the condition in which it has now been produced by the tenant,—which has not been denied,—that would constitute on the part of the landlord an act confirmatory of the document, as a whole, including the addition to testing-clause, and accordingly would incorporate the term of endurance. The record is perhaps not well framed to bring out the matter of fact, but it is sufficiently clear to this extent, that the tenant obviously made a point of publishing to the world the fact that he held a lease. He made that known when the estate was brought to sale, and there is nothing alleged to the effect that the document is different now from what it was when delivered to his hands. In these circumstances, I think it is competent to the tenant to prove by parole that the term of endurance was inserted in the lease prior to it being delivered.

I am therefore of opinion that we ought to recall the interlocutors of the Sheriff-substitute and of the Sheriff, and allow the defenders to prove that the lease was delivered to them in its present state.

LORD ADAM.—The Sheriff-substitute and the Sheriff seem to have thought that this was a clear case. I agree with them in this, but I am led to an opposite conclusion from that to which they came, and I approve of the judgment which your Lordship proposes to pronounce.

The defenders were in possession of the subjects at the date of the action, which was brought for the purpose of having them removed and ejected therefrom. The ground upon which it was brought is thus stated by the pursuers, "The defenders, without right or title, occupy and possess the coach-houses and stables immediately below the tenement of houses lying at the foot of the Whitehorse Close, Canongate, belonging to the pursuers, and they refuse to quit possession," and when the case came before the Sheriff-substitute he granted warrant "summarily to eject and remove the defenders," and on appeal the Sheriff adhered.

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and if the deed of 16th December has not been destroyed—and the pursuers do not know whether it is destroyed or not—and if it is produced before the trial, they have a perfectly good title. The other is the title of heir-at-law, but they have a perfectly good title on which to try the question here. If the first deed had been the only title upon which the pursuers had to rely, I should, on the authority of the case of *Shaw* v. *Shaw's Trustees*, 3 R. 813, referred to by the Lord Ordinary, and on the principle of it, have had no doubt whatever that the course pursued by the Lord Ordinary was the right one, namely, that if that had been the sole title it would have been necessary to bring a proving of the tenor—either to produce it, or, if not recoverable, to proceed by way of proving the tenor first before they could go on with the action. But that is not the state of the title, for as I have already pointed out, the only effect of this first deed is not to destroy the pursuers' title to sue but to give another and equally good title to sue. If it is not produced or not proved, then they are respectively heir-at-law and next of kin.

That being so, I have come to the conclusion that the Lord Ordinary's interlocutor should be altered. I think in this case the pursuers have a perfectly good title to try the question here on issues in the usual form. It may be that after the leading conclusions of the action are decided in one way or another, it may be necessary for the further progress of this action then to have a proving of the tenor. That may be quite possible. If it should be that these deeds are set aside by the verdict of a jury, then it may be that the pursuers will not be enabled to go on with the declaratory and accounting conclusions without putting themselves in a position to insist in these. But if the main question is settled in one way or another, I think that will clear the way for the proper disposal of the remainder. I am therefore of opinion that the interlocutor should be altered, and the case tried by a jury.

Lord M'Laren.—If there had been no averment in this action as to the pursuers, that one of them stands in the relation of heir-at-law, and the other in that of next of kin to the defunct, I should have agreed with the Lord Ordinary that this action could not proceed without a proving of the tenor of the lost deed. position, for I think no one can pursue a reduction founding on the title of disponee without being liable to be called upon as a condition of prosecuting the case to produce the deed which he asserts to be his title. Admittedly the pursuers are not in a condition to produce the deed which they libel, because it has been destroyed—they say destroyed under circumstances which do not affect its validity, but that is a matter which I think would have to be investigated as a condition of establishing the title to sue in the character of disponee. Now when the summons was originally brought into Court, the character of disponee was the only title alleged by the pursuers. Since then they have apparently without objection amended their condescendence by asserting a title of heir-at-law and next of kin. I confess it would have been more satisfactory to my mind if that amendment had been made by leave of the Court, by minute of amendment and interlocutor following upon it. There has been an amendment of that nature made already, but that does not touch this question; it is an amendment having relation to the character of the defenders. But as I should at anyrate have been prepared to consent to such an amendment if it had been asked for, and as I understand your Lordships think it is within the power of the pursuer on revisal to make such an addition to his condescendence,

law allows great indulgence. There is no class of writing where the granter is so much held bound by unwritten evidence of consent as in the case of a lease. If there had been here no attestation clause, and at the end of the deed these words had occurred, "period of endurance, nineteen years," evidence of possession under the lease would have been sufficient to confirm it. The question is whether when such a declaration is found in the body of the testing-clause, it is to have less weight given to it. I do not think it should be less favourably dealt with on that account. The deed in my view belongs to the class of informal documents which are held to be confirmed by *interventus rei.*

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LORD KINNEAR.—I am of the same opinion. I do not think it necessary to determine whether this document by itself constitutes a complete and binding contract. If it were necessary to decide that point, it would probably require consideration, having regard to the observations of Lord Gordon in the House of Lords in the case of *Smith* v. *Chambers' Trustees.* But it is very familiar law that although a contract of lease for a period of years may not have been constituted by writing, but by a verbal bargain, it may still be perfectly effectual if the terms of the verbal bargain can be proved by writing, and if possession has followed. If a document such as that now before us has been subscribed by the landlord and the tenant, and has been delivered by the landlord to the tenant as a title of possession, that may or may not be a formal lease, but it is very good evidence in writing that a lease has been granted for nineteen years. If possession has followed, the declaration in the lease is to my mind conclusive evidence in writing of the term of endurance. If there be any question as to whether the declaration was inserted before or after subscription, I think this should be remitted to probation. But where the tenant produces the lease, and the landlord makes no allegation that the words in question have been inserted after delivery, or without his knowledge, it does not appear to me that there can be any room for doubt.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriffs: Find that the delivery of the lease by the landlord to the tenant in its present state may be competently proved *pro ut de jure:* Find the appellants entitled to expenses in this Court, and remit to the Sheriff to proceed."

WISHART & MACNAUGHTON, W.S.—EDWARD NISH, Solicitor—Agents.

TRUSTEES FOR THE RELIANCE MUTUAL LIFE ASSURANCE SOCIETY AND OTHERS, Pursuers (Reclaimers).— *D.-F. Balfour—Jameson.*
FRANCIS A. BRINGLOE (Halkett's Judicial Factor), Defender (Respondent). *—Johnston—Sym.*

No. 127.
Mar. 4, 1891.
Reliance Mutual Life Assurance Society v. Halkett's Factor.

Husband and Wife—Marriage-contract provision—Trust.—By antenuptial marriage-contract a wife conveyed her whole estate to trustees, *inter alia*, for payment to herself of the free income during the marriage, "such payment being made exclusive of the *jus mariti* and right of administration" of her husband, "and her own receipt being a sufficient discharge." The wife became a party to a bond and assignation granted by her husband in security of a loan, binding herself to the extent of her "own separate estate and effects all jointly and severally" to repay it.

In answer to an action by the creditors in the bond for payment of the free annual income of the wife's estate, it was pleaded that she could not validly convey it away to her own prejudice *stante matrimonio.* *Held* (*rev.* judgment

No. 125.

Feb. 28, 1891.
Tait v. Johnston.

GEORGE TAIT, Complainer (Reclaimer).—*Jameson—M'Lennan.*
JOHN JOHNSTON, Respondent.—*Shaw—A. S. D. Thomson.*

Process—Citation—Statute 1592, *cap.* 141—*Citation Amendment Act*, 1882 (45 *and* 46 *Vict. c.* 77), *secs.* 3, 4.—A service copy of a petition in a Sheriff Court was sent by registered letter to the defender, with a citation bearing *in gremio* to be executed by A B, a law-agent, but it was not signed by A B, but by C D, another law-agent, for A B. The execution returned upon the petition was in the statutory form, and was signed by A B.

In a suspension of a decree in absence obtained against the defender, he pleaded that the citation was invalid.

Held that as the execution returned upon the petition had not been reduced, the defender was barred from objecting to the citation.

Opinion (*per* Lord Rutherfurd Clark) that the citation was valid.

Sheriff—Jurisdiction—Process—Union of several counties into one sheriffdom—Sheriff Court Act, 1853 (16 *and* 17 *Vict. c.* 92), *sec.* 4—*Sheriffs Act*, 1870 (33 *and* 34 *Vict. c.* 86), *secs.* 4, 5, 6, 12.—In a sheriffdom in which several counties are combined the granting of a warrant to cite a defender to appear in a Court in a county which is not the county of his domicile, is a matter within the discretion of the Sheriff.

2D DIVISION. Lord Kincairney. M.

ON 7th August 1890 John Johnston, joiner, Innerleithen, raised an action for £50, 17s. 3d., as the amount of the balance of an account against George Tait, Woodside Cottage, Innerleithen, in the Sheriff Court of the Lothians and Peebles at Edinburgh.

A warrant to cite, dated 7th August 1890, was pronounced by the Sheriff-substitute of the Lothians and Peebles, at Edinburgh (Orphoot), ordaining Tait, if he intended to shew cause why the prayer of the petition should not be granted, to lodge appearance with the Clerk of Court at Edinburgh.

A copy of the petition and warrant was sent by post to Tait, with a schedule of citation bearing to be executed by Marcus J. Brown, S.S.C., law-agent, and to be signed for him by T. H. Lang Guthrie, solicitor. An execution in terms of the statutory schedule, written upon the principal petition, was signed by Marcus J. Brown.*

On 12th September 1890 decree in absence was taken against Tait, who had received the citation and had corresponded with Johnston's agent with regard to the claim, but had lodged no defences.

A charge on the decree was given.

On 13th October 1890 Tait brought a suspension of the decree and charge, on the grounds set forth in his pleas in law, which were;—1. The complainer having no residence or place of business within the county of Midlothian, is not subject to the jurisdiction of the Sheriff of the

* The Citation Amendment Act, 1882, enacts by sec. 3, " . . . In any civil action any summons or warrant of citation of any person . . . may be executed . . . . by an enrolled law-agent by sending to the known residence or place of business of the person upon whom such summons, warrant or judicial intimation is to be served, . . . a registered letter by post containing the copy of the summons, . . . with the proper citation or notice subjoined thereto, and such posting shall constitute a valid and legal citation."

Section 4 enacts, *inter alia*,—"(3) The execution to be returned by the officer or law-agent shall be accompanied by the post-office receipt for the registered letter: The execution returned by a law-agent shall for all purposes be equivalent to an execution by any officer of Court: The execution may be in the form contained in the first schedule hereto."

The schedule bears,—"This summons . . . executed by me, . . . law-agent . . . (*Signature of Agent.*)"

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contract estate, Colonel and Mrs Halkett being also called for their interest.

The summons concluded, in the first place, for declarator that the pursuers had acquired right from 3d October 1889, when the assignation was intimated, to the whole sums of money, as well capital as income, as were or might become payable to Colonel and Mrs Halkett under the marriage-contract; and in the second place the judicial factor was called upon to account for and pay to the pursuers the income of the trust-estate from 3d October 1889 annually until the whole sums due to them were paid off.

The whole sum alleged to be due to the pursuers at Martinmas 1890 amounted to £1665, 16s. 4d.

The pursuers pleaded;—(1) The interests of the defenders Frederick John Colin Halkett and Mrs Helen Margaret Fisher or Halkett under the marriage-contract having been validly transferred to and vested in the pursuers, decree should be granted as craved. (2) The defender Francis A Bringloe having intromitted with the funds of the estate transferred to the pursuers, and having such funds in his hands, he is bound to count and reckon with the pursuers therefor, in terms of the second conclusion of the summons.

Defences were lodged for the judicial factor and for Mrs Halkett, to whom a curator ad litem was appointed. They pleaded, *inter alia*;—(2) The estate of the defender Mrs Halkett having been conveyed to trustees for her protection, in terms of the antenuptial marriage-contract referred to, she could not validly and effectually convey away the same *stante matrimonio* to her own prejudice; and *separatim*, she could not do so in security of her husband's debts. (3) The defender F. A. Bringloe, as representing the trustees under said marriage-contract, is not entitled to act upon said bond and assignation in security and intimation thereof.

The Lord Ordinary (Low), on 5th February 1891, pronounced this interlocutor:—"Sustains the second and third pleas in law for the defenders; assoilzies the defender Bringloe from the petitory conclusions of the summons: *Quoad ultra* dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.*

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* "OPINION.— . . . It was explained that the question which the pursuers wished to have determined in the present action is their right, as Mrs Halkett's assignees, to the income of the trust-estate during the subsistence of the marriage. This was the only question argued before me.

"It was contended for the defenders that the provision in the second purpose of the trust, that the income of the trust-estate should be paid to Mrs Halkett during the subsistence of the marriage, was a proper contract provision, which she had no power either to renounce, or abandon, or assign while the marriage subsisted.

"The pursuers, on the other hand, contended that the income of the trust funds constitutes separate estate of the wife, with which she can deal in any way she chooses.

"There are three classes of cases in which the rights of a wife under an antenuptial marriage-contract have been defined by the Court.

"(1) If the wife's provision is not secured by a trust, she can deal with it as she pleases. For example, if she is infeft in a liferent of her husband's heritage, she can renounce or assign the liferent—(*Standard Property Investment Company* v. *Cowe*, 4 R. 695). It is clear that the present case does not fall under this category.

"(2) The mere fact of a wife having conveyed her portion to trustees under an antenuptial contract of marriage does not divest her of her rights as proprietor, unless the trustees are directed to hold and apply it for proper matrimonial purposes—(*Ramsay*, 10 Macph. 120, 44 Scot. Jur. 77, *Laidlaw*, 11 R. 481).

"(3) If, however, the wife's estate is conveyed to trustees for the purpose of

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The complainer reclaimed, and argued;—(1) The question raised was not merely one of jurisdiction. The complainer (assuming the jurisdic-

only two statutes recently passed on the subject. The first is the Sheriff Court Act, 1853, 16 and 17 Vict. cap. 92, by which the union of various counties is provided for when vacancies should occur, and sec. 4 provides that when a vacancy should occur in the sheriffdom of Peebles it should be united with the county of Midlothian into one sheriffdom. The later Act, which is the Act directly applicable, is the Sheriffs Act, 1870, 33 and 34 Vict. cap. 86. By secs. 4, 5, and 6 provision is made for the union of the counties of Midlothian, Linlithgow, Haddington, and Peebles into one sheriffdom, to be called the Sheriffdom of the Lothians and Peebles; and by sec. 12 it is enacted, that every union of counties into one sheriffdom 'shall be deemed to be a complete union to all intents and purposes, in so far as regards the jurisdiction, powers, and duties of the Sheriff and his Substitutes, and in so far as regards the powers, duties, rights, and privileges of procurators before the Courts of the Sheriff: And the several counties of any such united sheriffdom shall not be thereafter regarded as separate sheriffdoms or jurisdictions, in so far as regards the powers, duties, rights, and privileges of the Sheriff and his Substitutes, and the procurators of the Sheriff Court.'

"In the face of these absolute and comprehensive words it seems impossible to deny the jurisdiction of the Sheriff of the Lothians and Peebles in this case. Counsel for the complainer referred to sec. 6 of the Sheriff Court Act, 1876, 39 and 40 Vict. cap. 70, which provides that a person having a place of business in a county shall be subject to the jurisdiction of the Sheriff thereof, although domiciled in another county, if cited personally, or at his dwelling-place, with power to the Sheriff to remit such action 'to the Court of the defender's domicile in another sheriffdom,' and to sec. 12, which, by its first subsection, provides for citation in such cases.

"The argument, as I understood it, was, that because the word county was used and not sheriffdom it was to be inferred that but for the Act the Sheriff in one county, forming part of a united sheriffdom, would not have had jurisdiction over a defender who had a place of business in another county, forming part of the same sheriffdom. But I think the inference inadmissible. The statute does not profess to do more than confer jurisdiction. It says nothing about the seat of the Court at which the jurisdiction is to be exercised. It confers jurisdiction in language which is not a whit more clear or absolute than that of sec. 12 of the Act of 1870. I do not think it applies to the jurisdiction of a Sheriff over the divisions of a united county at all. If it does, it adds nothing in language or in substance to his power, and I think that the use of the word 'sheriffdom' at the close of the section shews that there was no intention of drawing any distinction between a county and a sheriffdom.

"Reference was made to *Edwards* v. *The Inverness and Aberdeen Railway Company*, 24th April 1862, 4 Irv. 185, where the Sheriff, sitting in the Small-Debt Court at Banff, dismissed an action of damages against the railway company on the ground of no jurisdiction. The statutory domicile of the railway company was Inverness, but it had been cited at Keith, in Banffshire. The pursuer appealed to the Circuit Court at Inverness, and seems to have argued that there was jurisdiction because Keith was a principal station. The appeal was dismissed. The grounds of judgment do not appear quite clearly. But it was pointed out that Lords Neaves and Ardmillan both indicated that there might have been a difference had the action been brought in the Sheriff Court at Elgin, in which county the injury happened; and it was argued that, as Elgin and Banff were united counties, it could, if the respondent's argument were sound, have made no difference as to the question of jurisdiction whether the action was brought at Banff or at Elgin. It does not appear, however, that the attention of the Judges was called to the point at all, and they do not purport to decide it, nor, indeed, allude to it.

"III. The further question is this, whether, admitting the jurisdiction of the Sheriff, it was competent to convene the defender to the Sheriff Court at

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tion) maintained that the only proper place at which to cite him was Peebles, the head burgh of his county, and that there only was he bound

Edinburgh, and entertain a cause against him in that Court, or, whether the complainer is now entitled to say that he was only bound to attend the Court of the Sheriff at Peebles, the head burgh of the county in which he was resident?

"This is not a question of jurisdiction exactly, but rather about the conditions of its exercise, and especially about the Court at which it can be competently exercised. It is not in this case complicated by any question as to the power of the Sheriff-clerk to sign the warrant of citation, because the warrant is signed by the Sheriff-substitute, about whose power there is no question. The point appears a difficult one, and there is, so far as I have been able to discover, hardly any authority in our books on the subject. The only similar reported case, so far as I am aware, is *Dowie* v. *Douglas*, 30th May 1817, Fac. Coll., which it may be worth while merely to refer to, but as I do not see that it can be used as an authority either way it is not necessary to advert to it further. I may refer also to Ersk. i. 4, 5, where he treats of the exercise of a Sheriff's jurisdiction at the head burgh of a county, or of the division of a county, and he gives as an example and illustration 'the shire of Clydesdale,' which in his time had been separated into three divisions, but he does not affirm that it would be competent to exercise jurisdiction at the head burgh of one division over an inhabitant of another division.

"Allusion may also be made to the Act for the regulation of the Commissary Courts, 1823, 4 Geo. IV. cap. 97, which by sec. 6 provides that where two counties are under the jurisdiction of one Sheriff they shall constitute one commissariot; and to 1 and 2 Vict. cap. 26, which authorises the Sheriff of two counties to hold Commissary Courts in both counties if he shall think proper. The inference is legitimate that he could, if he chose, exercise his jurisdiction, at least as commissary, in one of the counties over persons resident in another, and that seems simply in consequence of two commissariots being united.

"It is argued, on the one hand, that before the union of the counties it was a right of the defender to be convened at the Sheriff Court in his own county, and that there are no words in the statute to deprive him of that right; that the object of establishing resident Sheriff-substitutes and local Courts was just to make this right effectual; and that although there might be no great hardship in any case still there was some hardship, and the hardship would be very great if some of the northern counties it were held to be in the power of a pursuer to compel a defender to come from one county to another in the same sheriffdom.

"On the other hand, it was maintained that, seeing the complainer resided within the territory of the Sheriff, he was bound to obey his citation judicially given, and that there was neither principle nor authority for denying to the Sheriff the power to convene any person within his territory to any established seat of his Court; that it was within the power of a Sheriff, by an order of Court, to determine to what seat of Court persons resident in the different districts of his sheriffdom should be convened; that this was a matter safely left to his discretion and not vested in any other authority, and that that power of the Sheriff had been exercised in various cases in which more than one seat of Court had been established in a county; that the intention of the statute was to abolish all distinctions between the different counties united into one sheriffdom so far as the administration of the law was concerned.

"Having regard to the very comprehensive language of the statute uniting counties, I am unable to sustain the complainer's contention, or to restrict the Sheriff in the exercise of his jurisdiction without some definite authority, statutory, judicial, or institutional. It is true that it would be highly inconvenient if a pursuer were allowed to call a defender to the Court in a united sheriffdom most convenient to himself, without regard to the residence of the defender, but it is not necessary to hold that a pursuer has that power. The matter is under the control of the Sheriff, who can regulate it by an order of Court, and can, if he thinks fit, refuse to issue his warrant of citation against a defender more suitably amenable to another Court, or can perhaps deal with

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testamentary deeds executed by the deceased on the ground of facility and circumvention, and for declarator that the succession of the deceased was to be regulated by a prior testamentary deed under which they were residuary legatees, the pursuers did not produce the prior deed founded on, and the defenders alleged that it had been destroyed *animo revocandi*. The pursuers then added an averment that they were respectively heir-at-law and next of kin of the deceased. *Held* that having the alternative title of heirs *ab intestato* and disponees under the deed alleged to have been revoked, they had a title to sue a reduction of later deeds granted to their prejudice, and that the validity of these deeds fell to be decided in the first place (*rev.* judgment of Lord Wellwood (Ordinary), who had sisted process in order that a proving of the tenor of the prior deed might be brought).

1st Division. Ld. Wellwood. C.

On 1st July 1890 Mrs Agnes Kinnaird or Gilchrist, widow, and William and Jane Alexander Gilchrist, children, of the late John Gilchrist, Leith, brought an action against Mrs Jane Goodlet or Morrison, Leith, sole executor and universal legatory under a last will and testament bearing to be executed on 6th February 1890 by Mrs Jemima Gilchrist or Purdy, and general disponee and donee under disposition and deed of gift bearing to be executed on 6th February by the said Mrs Purdy, and also against William Rew, merchant, Leith, and William Asher S.S.C., Leith, trustees under a trust-disposition and settlement bearing to be executed by Mrs Purdy on 20th January 1890, concluding for reduction of the said three deeds, for declarator that a trust-disposition and settlement executed on 16th December 1889 by the said Mrs Jemima Gilchrist or Purdy was the deed by which the succession to the means and estate left by the said deceased Mrs Jemima Gilchrist or Purdy fell to be regulated, and that the pursuers were entitled to the provisions made in their favour by the said last mentioned trust-disposition and settlement; and for decree ordaining Mrs Morrison to count and reckon for her intromissions with the estate on that footing.

The pursuers stated (cond. 5), that Mrs Purdy, the deceased, was the elder daughter of the said John Gilchrist, the husband of the first named pursuer and father of the other pursuers. (Cond. 1) "About the middle of December [1889] she sent for the family law-agent, Mr Asher, and gave him instructions to make a fresh will, as she knew her illness was incurable, and she wished to make a final settlement of her affairs in prospect of an early death. Mr Asher accordingly prepared a trust-disposition and settlement, which was executed by her on the 16th day of December 1889, and by which she conveyed her whole means and estate to Mr Asher and his managing clerk, Mr John Rew, whom she appointed her trustees and executors." The substance of the will was payment of debts, &c., and of certain legacies, including one of £500 to the defender Mrs Morrison, and of the residue to the pursuer Mrs Gilchrist in liferent, and to the other pursuers in fee. "The said will was carefully prepared by the instructions of Mrs Purdy, and it was fully considered by her before she signed it. The said deed contained the real wishes of the testatrix with regard to the disposal of her estate after her death. A copy of the said trust-disposition and settlement is herewith produced." The pursuers then set forth the grounds of reduction of the deeds libelled (under which the pursuers were entirely excluded from the succession), which were facility and circumvention.

The pursuers pleaded;—(1) The deeds sought to be reduced not being the deeds of the late Mrs Purdy, ought to be set aside, in terms of the conclusions of the summons. (2) *Separatim*, The said deeds ought to be reduced, in respect that at the dates when the same were executed the deceased Mrs Purdy was weak and facile in mind and easily imposed upon, and that the said Mrs Morrison and John Goodlet, or one or other

them, taking advantage of her said weakness and facility, did by fraud or circumvention impetrate the said deeds from Mrs Purdy to her lesion. (3) The trust-disposition and settlement of 16th December 1889, being the deed regulating the succession to the deceased Mrs Purdy's means and estate, the pursuers are entitled to decree in terms of the conclusions of the summons.

The defenders lodged answers in which they denied the facility and circumvention alleged, and in answer to cond. 10 averred;—(Ans. 10) "The pursuers are called on to produce this deed or to prove that any such deed was executed and retained by Mrs Purdy as the final expression of her testamentary intentions. It is explained that on the 28th January 1890, the testatrix being then of sound disposing mind, and fully understanding and comprehending the legal results of such action, sent for Mr Peter Peterson Slater, solicitor and law-agent, and after requesting him to act as her agent, explained to him that the said trust-disposition and settlement in the said condescendence mentioned had been in fact revoked by the will prepared by Mr Asher, and executed on the 20th January, as mentioned in condescendence 13, and desired Mr Slater to destroy the same in her presence as useless and as not expressing her will, which Mr Slater accordingly did. Such destruction was deliberately done *animo revocandi*, and the said trust-disposition and settlement is not now in existence."

The defenders pleaded;—(1) No title to sue.

The pursuers at adjustment made this addition to cond. 10;—"With reference to the statement in answer, the pursuers have no knowledge whether the will in question was destroyed, or by whom it was destroyed. If Mrs Purdy destroyed it as stated by the defender, she did so in consequence of the defender having by fraud or circumvention induced her to do so while she was weak and facile and easily imposed upon. On the deeds under reduction being reduced, the pursuers will, if necessary, bring a proving of the tenor of the will in question."

The pursuers also made the following addition to their cond. 5;—"The pursuer William Gilchrist is Mrs Purdy's heir-at-law, and the pursuer Jane Alexander Gilchrist is one of her next of kin."

On 15th January the Lord Ordinary (Wellwood) pronounced the following interlocutor:—"Sists process *in hoc statu* in order that the pursuers may, if so advised, raise an action of proving the tenor of the trust-disposition and settlement executed on 16th December 1889 by Mrs Jemima Gilchrist or Purdy, upon which they found; meantime reserves all questions of expenses." *

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* "OPINION.—This action is laid entirely on the footing that the deed by which the succession to the means and estate of the deceased Mrs Purdy falls to be regulated is a trust-disposition and settlement dated 16th December 1889, under which the pursuers are beneficiaries to a large extent. The pursuers claim as beneficiaries under that deed, and the conclusions of the summons and the statements on record, especially those in condescendence 10, shew that that deed is the title on which they rely. It is true that they now state that the pursuer William Gilchrist is Mrs Purdy's heir-at-law; but so little was that in view when the action was raised that the fact was not stated in the original condescendence.

"Now the deed of 16th December 1889 is not forthcoming. It is stated by the defender, and there is little reason to doubt the truth of the statement so far, that it was destroyed on the 28th of January 1890, about a week after the execution by Mrs Purdy of a trust-disposition and settlement dated 20th January 1890, which is the first in date of the deeds under reduction. In these circumstances, I think it is necessary for the pursuers to prove the tenor of the deed

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The pursuers reclaimed, and argued;—The pursuers had a double title, as disponees under the deed alleged to have been destroyed, and as heirs of the deceased *ab intestato*. They were entitled to plead these titles alternatively to the effect of insisting on this reduction. That took the present case out of the principle of *Shaw*[1] referred to by the Lord Ordinary, for there the pursuer's only title was the lost deed. A proving of the tenor was not a suitable way of trying what would virtually be an issue of facility and circumvention, for the question in the proving would be the state of the mind of the deceased at the date of the alleged revocation. Such a question ought to be tried by a jury upon an issue in the usual terms. The proper course was to dispose of the validity of the deeds sought to be reduced first, for if they should be reduced the interest of the present parties was reversed, as Mrs Morrison was a beneficiary under the deed alleged to have been destroyed, and the pursuers as heirs *ab intestato* would have an interest to reduce that deed.

Argued for the defenders;—The action was laid upon a deed which was not in existence, and a proving of the tenor was an essential preliminary to any action on a lost document.[2] It could not be founded on as giving a title to sue. Nor could the pursuers plead their alleged title as heirs, for the title of heir became active only if there was no deed to displace it; under the former law, the heir could not have sued a reduction *ex capite lecti* if the effect of reduction was to set up a prior deed. The whole scheme of the present summons was that there was such a prior deed. The question whether a testamentary deed had been destroyed by the deceased *animo revocandi* could quite satisfactorily be disposed of in a proving of the tenor.[3]

At advising,—

Lord Adam.—In this case there is no question that the averments on record are sufficient to sustain the reductive conclusions. The only question is as to whether the pursuers have a title to sue. There is no doubt that when the action was brought into Court the pursuers thought the deed of 16th December 1889 was still in existence, or at least did not know whether it was destroyed or not, and there can be no doubt that that was the title on which the action was originally brought, and that accounts for the

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of 16th December 1889 on which they found. In doing this, they will have to prove the *casus amissionis*; and, if it is true that the will was destroyed by the orders of Mrs Purdy, to prove that she was not then in such a state of mind as to be capable of effectually cancelling or revoking it. The question to be tried in the action of proving the tenor will therefore practically be the same as that sought to be raised in this action. But an action of proving the tenor proceeds in the Inner-House; and therefore the present process must be sisted until the pursuers take steps to set up the deed of 16th December 1889—*Shaw* v. *Shaw's Trustees*, 3 R. 813, and *Bonthrone* v. *Ireland*, 10 R. 779.

"The pursuers strongly maintain that William Gilchrist, being heir-at-law, and entitled to succeed to the heritage left by Mrs Purdy if she died intestate, he is, in any case, entitled to sue the action, and challenge the deeds under reduction. As I have already indicated, the summons is so framed that I do not think it can proceed as an action at the instance of the heir. But, further, if the pursuers' averments are true, William Gilchrist, as heir-at-law, was cut out by the deed of 16th December 1889, and the parties really entitled to challenge the subsequent deeds are the disponees or beneficiaries under that deed."

[1] Shaw v. Shaw's Trustees, June 13, 1876, 3 R. 813.

[2] Gordon v. Robertson, Oct. 28, 1873, 11 S. L. R. 35.

[3] Bonthrone v. Ireland, March 15, 1883, 10 R. 779.

declaratory and accounting conclusions. However, when the case was brought into Court this explanation was made by the defenders,—"It is explained that on the 28th January 1890 the testatrix, being then of sound disposing mind, and fully understanding and comprehending the legal results of such action, sent for Mr Peter Peterson Slater, solicitor and law-agent, and after requesting him to act as her agent, explained to him that the said trust-disposition and settlement in the said condescendence mentioned had been in fact revoked by the will prepared by Mr Asher, and executed on the 20th January as mentioned in condescendence 13, and desired Mr Slater to destroy the same in her presence as useless, and as not expressing her will, which Mr Slater accordingly did. Such destruction was deliberately done *animo revocandi*, and the said trust-disposition and settlement is not now in existence." The reply made to that by the pursuers was this,—"With reference to the statement in answer, the pursuers have no knowledge whether the will in question was destroyed, or by whom it was destroyed. If Mrs Purdy destroyed it as stated by the defender, she did so in consequence of the defender having by fraud or circumvention induced her to do so while she was weak and facile and easily imposed upon." Upon these averments being made by the defender on record as to the destruction of this deed, which the pursuers supposed to be in existence when they brought this action, and which they do not now admit to be destroyed, this averment was put on record,—"The pursuer William Gilchrist is Mrs Purdy's heir-at-law, and the pursuer Jane Alexander Gilchrist is one of her next-of-kin"; and that averment is not disputed in point of fact.

Now, from what I have read of the record it is obvious that the real question at issue between the parties here is the state of the testatrix Mrs Purdy's mind at the date 20th January, when the first of the deeds sought to be reduced was executed, and on 6th February, when the two other deeds were executed. That is the real question at issue between the parties—whether or not these three deeds ought to be reduced on the ground stated. That is the real question with which we have to deal, and I think also that no one could doubt that that question would best be tried in the usual way before a jury with the issue, whether the deed has been obtained by fraud and circumvention in the usual terms. I think that unless there be some strong ground to the contrary, that would be the proper way to try the question at issue between the parties in this case, unless indeed the pursuer has no title to sue. I think that the case would be much better so tried than as the course indicated by the Lord Ordinary would point at, namely, incidentally merely in course of a proving of the tenor, which would go to shew the state of Mrs Purdy's mind on 28th January, when she is said to have destroyed the deed in question, and which, if that fact were established, would no doubt indicate her state of mind at or about the time when these deeds were destroyed, and might afford inference one way or other, but would not decide the question between the parties to this case, for it is not the state of mind on 28th January that is the question, but the state of mind on 20th January.

I think it is clear also that the pursuers have a double title to insist in this action. It is obvious and set forth in this record—and perfectly sufficiently set forth in this record—that the pursuer William Gilchrist is the heir-at-law, and that the pursuer, Miss Gilchrist, his sister, is one of the next of kin of Mrs Purdy. That being so, if the deed of 16th December is not in existence it is clear that they have a good title to try this case. That is quite clear,

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and if the deed of 16th December has not been destroyed—and the pursuers do not know whether it is destroyed or not—and if it is produced before the trial, they have a perfectly good title. The other is the title of heir-at-law, but they have a perfectly good title on which to try the question here. If the first deed had been the only title upon which the pursuers had to rely, I should, on the authority of the case of *Shaw* v. *Shaw's Trustees*, 3 R. 813, referred to by the Lord Ordinary, and on the principle of it, have had no doubt whatever that the course pursued by the Lord Ordinary was the right one, namely, that if that had been the sole title it would have been necessary to bring a proving of the tenor—either to produce it, or, if not recoverable, to proceed by way of proving the tenor first before they could go on with the action. But that is not the state of the title, for as I have already pointed out, the only effect of this first deed is not to destroy the pursuers' title to sue but to give another and equally good title to sue. If it is not produced or not proved, then they are respectively heir-at-law and next of kin.

That being so, I have come to the conclusion that the Lord Ordinary's interlocutor should be altered. I think in this case the pursuers have a perfectly good title to try the question here on issues in the usual form. It may be that after the leading conclusions of the action are decided in one way or another, it may be necessary for the further progress of this action then to have a proving of the tenor. That may be quite possible. If it should be that these deeds are set aside by the verdict of a jury, then it may be that the pursuers will not be enabled to go on with the declaratory and accounting conclusions without putting themselves in a position to insist in these. But if the main question is settled in one way or another, I think that will clear the way for the proper disposal of the remainder. I am therefore of opinion that the interlocutor should be altered, and the case tried by a jury.

Lord M'Laren.—If there had been no averment in this action as to the pursuers, that one of them stands in the relation of heir-at-law, and the other in that of next of kin to the defunct, I should have agreed with the Lord Ordinary that this action could not proceed without a proving of the tenor of the lost disposition, for I think no one can pursue a reduction founding on the title of disponee without being liable to be called upon as a condition of prosecuting the case to produce the deed which he asserts to be his title. Admittedly the pursuers are not in a condition to produce the deed which they libel, because it has been destroyed—they say destroyed under circumstances which do not affect its validity, but that is a matter which I think would have to be investigated as a condition of establishing the title to sue in the character of disponee. Now, when the summons was originally brought into Court, the character of disponee was the only title alleged by the pursuers. Since then they have apparently without objection amended their condescendence by asserting a title of heir-at-law and next of kin. I confess it would have been more satisfactory to my mind if that amendment had been made by leave of the Court, by minute of amendment and interlocutor following upon it. There has been an amendment of that nature made already, but that does not touch this question; it is an amendment having relation to the character of the defenders. But as I should at anyrate have been prepared to consent to such an amendment if it had been asked for, and as I understand your Lordships think it is within the power of the pursuer on revisal to make such an addition to his condescendence,

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the first set of conclusions in the summons; and (third) the goods mentioned in the summons, other than those referred to in the preceding pleas, having remained undelivered at the date of the sequestration, no valid security over them was constituted, and the pursuer is in right of them as trustee on James Cumming & Company's sequestrated estate.

The defenders pleaded;—(4) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the summons. (6) The goods in question were, in the circumstances, validly delivered by the bankrupts to the defenders by means of the said delivery-orders and entries in the warehouse register following thereon, and were thereafter in the custody of the officers of excise for behoof of, and subject to the exclusive control of the defenders. (7) The defenders having obtained corporeal possession of the goods in question, so far as removed by them from said warehouse within sixty days of Cumming & Company's bankruptcy, without the necessity of any act, voluntary or otherwise, on the part of the bankrupts, and, *separatim*, in implement of antecedent obligations undertaken by the bankrupts much more than sixty days before bankruptcy, the defenders are entitled to absolvitor, with expenses. (8) The goods still remaining in the said warehouse having been duly sold and transferred to the defenders, they are entitled to deal with the same as their own property.

At a proof Rhind deponed as to the transaction in question. Being shewn the invoice sent on 3d August—"That is the invoice which I sent. I am satisfied that that was a loan by the defenders to me against the security of goods. They never got the goods in that invoice out of my warehouse. Only part of the bill was repaid. When I required any of the goods I sent a cheque for them to the defenders, and took them out of bond; and then, when a renewal of the bill became due, those goods were deducted from the amount. I did not deal with those goods as the owner. The defenders held them for the money advanced to me. They removed some of the goods. . . . Cross.— . . . If I had been selling these goods to the defenders the transaction would just have taken the same form. (Q.) So in form the transaction was just that of an out-and-out sale? (A.) Yes, but the agreement was that it was not an out-and-out sale."

Mr Wightman deponed,—"We gave these advances on getting delivered to us in the ordinary way, by invoices and delivery-orders, certain stocks of spirits and wines. And these have remained the same throughout, with the exception of certain quantities which were given back by delivery-orders signed by our firm to Mr Rhind to enable him to use them in his trade, he paying for them in cash. Less these, and what we got in June, the balance remained in the warehouse at the time of the bankruptcy. It was on the faith of the documents I have spoken of that we made these advances to Mr Rhind. We believed we were getting a valid security, and that we were entitled to remove the goods when we pleased."

Evidence was led as to the practice of excise officers in charge of bonded warehouses. The outcome of that evidence is stated by the Lord Ordinary, but no argument was based on it by either side in the Inner-House.

On 13th November 1890, Lord Stormonth Darling (Ordinary) pronounced this interlocutor:—"Finds (1) that the defenders have no right of security over the goods mentioned in the summons which remained in the warehouse at the date of Robert Rhind's sequestration, in respect that the said Robert Rhind retained possession of the said goods down to the date of his sequestration; and (2) that as regards the goods mentioned in the summons, of which actual delivery was obtained by the defenders within sixty days of the said Robert Rhind's bankruptcy, the said delivery

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Feb. 28, 1891.
Tait v. Johnston.

GEORGE TAIT, Complainer (Reclaimer).—*Jameson*—*M'Lennan.*
JOHN JOHNSTON, Respondent.—*Shaw*—*A. S. D. Thomson.*

Process—Citation—Statute 1592, *cap.* 141—*Citation Amendment Act*, 1882 (45 *and* 46 *Vict. c.* 77), *secs.* 3, 4.—A service copy of a petition in a Sheriff Court was sent by registered letter to the defender, with a citation bearing to be *gremio* to be executed by A B, a law-agent, but it was not signed by A B, but by C D, another law-agent, for A B. The execution returned upon the petition was in the statutory form, and was signed by A B.

In a suspension of a decree in absence obtained against the defender, he pleaded that the citation was invalid.

Held that as the execution returned upon the petition had not been reduced, the defender was barred from objecting to the citation.

Opinion (*per* Lord Rutherfurd Clark) that the citation was valid.

Sheriff—Jurisdiction—Process—Union of several counties into one sheriffdom—Sheriff Court Act, 1853 (16 *and* 17 *Vict. c.* 92), *sec.* 4—*Sheriffs Act*, 1870 (33 *and* 34 *Vict. c.* 86), *secs.* 4, 5, 6, 12.—In a sheriffdom in which several counties are combined the granting of a warrant to cite a defender to appear at a Court in a county which is not the county of his domicile, is a matter within the discretion of the Sheriff.

2D DIVISION. Lord Kincairney. M.

ON 7th August 1890 John Johnston, joiner, Innerleithen, raised an action for £50, 17s. 3d., as the amount of the balance of an account, against George Tait, Woodside Cottage, Innerleithen, in the Sheriff Court of the Lothians and Peebles at Edinburgh.

A warrant to cite, dated 7th August 1890, was pronounced by the Sheriff-substitute of the Lothians and Peebles, at Edinburgh (Orphoot), ordaining Tait, if he intended to shew cause why the prayer of the petition should not be granted, to lodge appearance with the Clerk of Court at Edinburgh.

A copy of the petition and warrant was sent by post to Tait, with a schedule of citation bearing to be executed by Marcus J. Brown, S.S.C., law-agent, and to be signed for him by T. H. Lang Guthrie, solicitor. An execution in terms of the statutory schedule, written upon the principal petition, was signed by Marcus J. Brown.*

On 12th September 1890 decree in absence was taken against Tait, who had received the citation and had corresponded with Johnston's agent with regard to the claim, but had lodged no defences.

A charge on the decree was given.

On 13th October 1890 Tait brought a suspension of the decree and charge, on the grounds set forth in his pleas in law, which were;—1. The complainer having no residence or place of business within the county of Midlothian, is not subject to the jurisdiction of the Sheriff of the

* The Citation Amendment Act, 1882, enacts by sec. 3, " . . . In any civil action any summons or warrant of citation of any person . . . may be executed . . . . by an enrolled law-agent by sending to the known residence or place of business of the person upon whom such summons, warrant or judicial intimation is to be served, . . . a registered letter by post containing the copy of the summons, . . . with the proper citation or notice subjoined thereto, and such posting shall constitute a valid and legal citation."

Section 4 enacts, *inter alia*,—" (3) The execution to be returned by the officer or law-agent shall be accompanied by the post-office receipt for the registered letter: The execution returned by a law-agent shall for all purposes be equivalent to an execution by any officer of Court: The execution may be in the form contained in the first schedule hereto."

The schedule bears,—"This summons . . . executed by me, . . . law-agent . . . (*Signature of Agent.*)"

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The defenders reclaimed, and argued;—This was not in truth a sale, but it was so in form. [LORD RUTHERFURD CLARK.—Can you claim the benefit of the Mercantile Law Amendment Act without being the true buyer?] Yes, on the authority of *Allan's Trustees* v. *Gunn & Co.*[1] [LORD RUTHERFURD CLARK.—But what we held there was that the contract though suspicious was a contract of sale.] Again there was constructive if not

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transfer. But it is declared by the General Order of 10th August 1888 that 'the provisions of the General Order of the 18th March 1887 are not intended to affect the direct responsibility of the warehouse-keeper for the due security of goods deposited, or for the duties on such goods, as provided for by code, par. 73, nor to impose any responsibility upon the Crown as to the delivery to the proper owner of such goods when cleared from warehouse'; and par. 73 of the code is in these terms,—'The warehouse-keeper is alone answerable to the owner of any goods deposited in his warehouse for their safe custody, and for their proper delivery. He is also answerable to the Crown for the duties on such goods.' Such being the true position of the warehouse-keeper, it seems to me impossible to hold that the Commissioners of Inland Revenue assume any duty or responsibility towards the transferree of goods (who may or may not be the true owner), merely because, for the sake of convenience, transfers are recognised and entered in the officer's books. Moreover, I think when it is found that one of the necessary keys of the warehouse remained throughout in the hands of Rhind, enough has been established to shew that he never, in any real or effective sense, parted with the possession of the goods. This is brought out very forcibly by the fact that when the defenders obtained actual delivery of some of the goods in June 1889, they did so by the instrumentality of Rhind.

"It was urged for the defenders that formerly at all events goods bonded in the seller's own warehouse could be effectually sold although they remained in the warehouse, by the transfer being entered in a book to be kept for that purpose by the officer in charge; and reference was made to Bell's P., secs. 1306 and 1378. It is worthy of note that the Acts of 4 Geo. IV. c. 24, and 6 Geo. IV. c. 112, which contained these provisions, related exclusively to *bona fide* sales; and in any case, these Acts have been repealed. I cannot help thinking that now, at all events, the functions of excise officers are limited to the securing of the excise duties, as indicated by the Lord President in the case of the *Distillers' Company*, Feb. 9, 1889, at p. 486 of 16 R., and that, if the defenders' view of their functions had been correct, it would have formed an argument for the unsuccessful party in that case. It is true that the warehouse in question there was not 'a general warehouse,' but it is what is called a 'distillers' bonded warehouse,' and it is in evidence by Mr Charles F. Watson, and not, I think, disputed, that transfers are allowed in such warehouses.

"The second question between the parties relates to the parcels of wines and spirits which were actually delivered to the defenders on 15th June 1889. That was a date undoubtedly within sixty days of Rhind's bankruptcy, and the pursuer says that the delivery was therefore null under the Act 1696, c. 5. The defenders, on the other hand, maintain that the delivery was unobjectionable, because it was made in implement of an antecedent obligation. I think this agreement really depends on whether the transaction was truly a sale; for, if it was not, it cannot be said that the agreement provided for the actual delivery of any of the goods. I have already expressed the opinion that the transaction was not a sale. There may have been cases (like *Lindsay* v. *Shield*, March 19, 1862, 24 D. 821, 34 Scot. Jur. 416, and *Allan's Trustees* v. *Gunn & Company*, June 20, 1883, 10 R. 997), in which the transactions, though held to be sales, had a perilous similarity to securities, but the decisions in these cases proceeded on the footing that they were sales and not securities, and the present case seems to me to resemble much more nearly that of *Stiven* v. *Scott & Simson*, already cited, in which the transaction was held to be a security, and the delivery to be struck at by the Act 1696. On both questions, therefore, my opinion is in favour of the pursuer."

[1] 10 R. 997.

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Tait v. Johnston.

GEORGE TAIT, Complainer (Reclaimer).—*Jameson—M'Lennan.*
JOHN JOHNSTON, Respondent.—*Shaw—A. S. D. Thomson.*

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Held that as the execution returned upon the petition had not been reduced, the defender was barred from objecting to the citation.

Opinion (*per* Lord Rutherfurd Clark) that the citation was valid.

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the purpose of enabling him to protect the interests of the excise. In these circumstances there was no valid security created in favour of the defenders, the goods having remained in the possession of the debtor.

A certain part of the goods, however, were actually delivered to the defenders on the 15th June, that is, within sixty days of Rhind's bankruptcy. Such delivery was I think a delivery of goods struck at by the Act 1696, c. 5. It was a voluntary delivery of goods in satisfaction of a prior debt. There was no obligation on Rhind to give the defenders any security for their advances beyond that which had been arranged or stipulated for when the advances were made, and that merely amounted to this, that the goods should remain in Rhind's warehouse in the defenders' name and subject to their orders. On this part of the case, therefore, I think the pursuer is also entitled to prevail.

LORD RUTHERFURD CLARK.—I agree on both points. As to whether there was delivery, there is no question at all. As regards the question under the Act 1696, I think we are bound to follow *Stiven* v. *Scott*.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT refused the reclaiming note.

WILLIAM OFFICER, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

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Mar. 5, 1891.
National Bank of Australasia v. Turnbull & Co.

NATIONAL BANK OF AUSTRALASIA, Pursuers (Reclaimers).—*Guthrie Smith*—*A. S. D. Thomson.*
GEORGE V. TURNBULL & COMPANY, Defenders (Respondents).—*Asher*—*Deas.*

Bill of Exchange—Proof—Parole—Competency—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.—The Bills of Exchange Act, 1882, sec. 100, enacts,—"In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank-cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence."

The National Bank of Australasia, holders of a bill of exchange for value drawn upon Phipps, Turnbull, & Company of Melbourne, which Phipps, Turnbull, & Company had refused to accept, and which had been protested against the drawers for non-payment, brought an action on the bill against the drawers. The defenders averred that for many years prior to 1881 they had acted as agents in this country for Phipps, Turnbull, & Company for the purpose of procuring and forwarding consignments of such goods as Phipps, Turnbull, & Company desired for the Australian markets, and that all transactions were financed by bills drawn by the defenders upon Phipps, Turnbull, & Company under arrangement with the National Bank of Scotland, Limited, who agreed to discount all bills drawn by the defenders upon the said Phipps, Turnbull, & Company, on receiving indorsed the bills of lading of the various consignments, and to look to Phipps, Turnbull, & Company alone for payment; that in 1881 Phipps, Turnbull, & Company made similar arrangements with the pursuers' London office, and "explained to the pursuers that Phipps, Turnbull, & Company were alone to be liable on any bills discounted by the pursuers drawn by the defenders on them, on receipt of the bills of lading endorsed, which the pursuers agreed to. . . . At the date of said arrangement the defenders were wholly unknown to the pursuers. . . . Though the bills libelled bear to be drawn by the defenders, they personally received no value for them. It was a fact well known to the pursuers that the defenders were to act merely as the agents of Messrs Phipps, Turnbull, & Company, and it was agreed to by them that Messrs Phipps, Turnbull, & Company, on whom they relied solely for payment, were alone to be liable under the bills condescended on."

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The complainer reclaimed, and argued;—(1) The question raised was not merely one of jurisdiction. The complainer (assuming the jurisdic-

only two statutes recently passed on the subject. The first is the Sheriff Court Act, 1853, 16 and 17 Vict. cap. 92, by which the union of various counties is provided for when vacancies should occur, and sec. 4 provides that when a vacancy should occur in the sheriffdom of Peebles it should be united with the county of Midlothian into one sheriffdom. The later Act, which is the Act directly applicable, is the Sheriffs Act, 1870, 33 and 34 Vict. cap. 86. By secs. 4, 5, and 6 provision is made for the union of the counties of Midlothian, Linlithgow, Haddington, and Peebles into one sheriffdom, to be called the Sheriffdom of the Lothians and Peebles; and by sec. 12 it is enacted, that every union of counties into one sheriffdom 'shall be deemed to be a complete union to all intents and purposes, in so far as regards the jurisdiction, powers, and duties of the Sheriff and his Substitutes, and in so far as regards the powers, duties, rights, and privileges of procurators before the Courts of the Sheriff: And the several counties of any such united sheriffdom shall not be thereafter regarded as separate sheriffdoms or jurisdictions, in so far as regards the powers, duties, rights, and privileges of the Sheriff and his Substitutes, and the procurators of the Sheriff Court.'

"In the face of these absolute and comprehensive words it seems impossible to deny the jurisdiction of the Sheriff of the Lothians and Peebles in this case. Counsel for the complainer referred to sec. 6 of the Sheriff Court Act, 1876, 39 and 40 Vict. cap. 70, which provides that a person having a place of business in a county shall be subject to the jurisdiction of the Sheriff thereof, although domiciled in another county, if cited personally, or at his dwelling-place, with power to the Sheriff to remit such action 'to the Court of the defender's domicile in another sheriffdom,' and to sec. 12, which, by its first subsection, provides for citation in such cases.

"The argument, as I understood it, was, that because the word county was used and not sheriffdom it was to be inferred that but for the Act the Sheriff in one county, forming part of a united sheriffdom, would not have had jurisdiction over a defender who had a place of business in another county, forming part of the same sheriffdom. But I think the inference inadmissible. The statute does not profess to do more than confer jurisdiction. It says nothing about the seat of the Court at which the jurisdiction is to be exercised. It confers jurisdiction in language which is not a whit more clear or absolute than that of sec. 12 of the Act of 1870. I do not think it applies to the jurisdiction of a Sheriff over the divisions of a united county at all. If it does, it adds nothing in language or in substance to his power, and I think that the use of the word 'sheriffdom' at the close of the section shews that there was no intention of drawing any distinction between a county and a sheriffdom.

"Reference was made to *Edwards* v. *The Inverness and Aberdeen Railway Company*, 24th April 1862, 4 Irv. 185, where the Sheriff, sitting in the Small-Debt Court at Banff, dismissed an action of damages against the railway company on the ground of no jurisdiction. The statutory domicile of the railway company was Inverness, but it had been cited at Keith, in Banffshire. The pursuer appealed to the Circuit Court at Inverness, and seems to have argued that there was jurisdiction because Keith was a principal station. The appeal was dismissed. The grounds of judgment do not appear quite clearly. But it was pointed out that Lords Neaves and Ardmillan both indicated that there might have been a difference had the action been brought in the Sheriff Court at Elgin, in which county the injury happened; and it was argued that, as Elgin and Banff were united counties, it could, if the respondent's argument were sound, have made no difference as to the question of jurisdiction whether the action was brought at Banff or at Elgin. It does not appear, however, that the attention of the Judges was called to the point at all, and they do not purport to decide it, nor, indeed, allude to it.

"III. The further question is this, whether, admitting the jurisdiction of the Sheriff, it was competent to convene the defender to the Sheriff Court at

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ion) maintained that the only proper place at which to cite him was 'eebles, the head burgh of his county, and that there only was he bound

dinburgh, and entertain a cause against him in that Court, or, whether the complainer is now entitled to say that he was only bound to attend the Court of the heriff at Peebles, the head burgh of the county in which he was resident?

"This is not a question of jurisdiction exactly, but rather about the conditions of its exercise, and especially about the Court at which it can be competently exercised. It is not in this case complicated by any question as to the power of the Sheriff-clerk to sign the warrant of citation, because the warrant is igned by the Sheriff-substitute, about whose power there is no question. The oint appears a difficult one, and there is, so far as I have been able to discover, ardly any authority in our books on the subject. The only similar reported ase, so far as I am aware, is *Dowie* v. *Douglas*, 30th May 1817, Fac. Coll., hich it may be worth while merely to refer to, but as I do not see that it can e used as an authority either way it is not necessary to advert to it further. I ay refer also to Ersk. i. 4, 5, where he treats of the exercise of a Sheriff's jurisiction at the head burgh of a county, or of the division of a county, and he ives as an example and illustration 'the shire of Clydesdale,' which in his time ad been separated into three divisions, but he does not affirm that it would be ncompetent to exercise jurisdiction at the head burgh of one division over an nhabitant of another division.

"Allusion may also be made to the Act for the regulation of the Commissary Courts, 1823, 4 Geo. IV. cap. 97, which by sec. 6 provides that where two counties are under the jurisdiction of one Sheriff they shall constitute one commissariot; and to 1 and 2 Vict. cap. 26, which authorises the Sheriff of two counties to hold Commissary Courts in both counties if he shall think proper. The inference is legitimate that he could, if he chose, exercise his jurisdiction, t least as commissary, in one of the counties over persons resident in another, nd that seems simply in consequence of two commissariots being united.

"It is argued, on the one hand, that before the union of the counties it was he right of the defender to be convened at the Sheriff Court in his own county, nd that there are no words in the statute to deprive him of that right; that he object of establishing resident Sheriff-substitutes and local Courts was just to ake this right effectual; and that although there might be no great hardship in he case still there was some hardship, and the hardship would be very great if some of the northern counties it were held to be in the power of a pursuer to ompel a defender to come from one county to another in the same sheriffdom.

On the other hand, it was maintained that, seeing the complainer resided in the territory of the Sheriff, he was bound to obey his citation judicially en, and that there was neither principle nor authority for denying to the riff the power to convene any person within his territory to any established of his Court; that it was within the power of a Sheriff, by an order of rt, to determine to what seat of Court persons resident in the different dise of his sheriffdom should be convened; that this was a matter safely left his discretion and not vested in any other authority, and that that power of Sheriff had been exercised in various cases in which more than one seat of Court had been established in a county; that the intention of the statute to abolish all distinctions between the different counties united into one riffdom so far as the administration of the law was concerned.

Having regard to the very comprehensive language of the statute uniting counties, I am unable to sustain the complainer's contention, or to restrict Sheriff in the exercise of his jurisdiction without some definite authority, atory, judicial, or institutional. It is true that it would be highly inconient if a pursuer were allowed to call a defender to the Court in a united riffdom most convenient to himself, without regard to the residence of the fender, but it is not necessary to hold that a pursuer has that power. The tter is under the control of the Sheriff, who can regulate it by an order of rt, and can, if he thinks fit, refuse to issue his warrant of citation against a fender more suitably amenable to another Court, or can perhaps deal with

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testamentary deeds executed by the deceased on the ground of facility and circumvention, and for declarator that the succession of the deceased was to be regulated by a prior testamentary deed under which they were residuary legatees, the pursuers did not produce the prior deed founded on, and the defenders alleged that it had been destroyed *animo revocandi*. The pursuers then added an averment that they were respectively heir-at-law and next of kin of the deceased. *Held* that having the alternative title of heirs *ab intestato* and disponees under the deed alleged to have been revoked, they had a title to sue a reduction of later deeds granted to their prejudice, and that the validity of these deeds fell to be decided in the first place (*rev.* judgment of Lord Wellwood (Ordinary), who had sisted process in order that a proving of the tenor of the prior deed might be brought).

1st Division. Ld. Wellwood. C.

On 1st July 1890 Mrs Agnes Kinnaird or Gilchrist, widow, and William and Jane Alexander Gilchrist, children, of the late John Gilchrist, Leith, brought an action against Mrs Jane Goodlet or Morrison, Leith sole executor and universal legatory under a last will and testament bearing to be executed on 6th February 1890 by Mrs Jemima Gilchrist or Purdy, and general disponee and donee under disposition and deed of gift bearing to be executed on 6th February by the said Mrs Purdy, and also against William Rew, merchant, Leith, and William Asher S.S.C., Leith, trustees under a trust-disposition and settlement bearing to be executed by Mrs Purdy on 20th January 1890, concluding for reduction of the said three deeds, for declarator that a trust-disposition and settlement executed on 16th December 1889 by the said Mrs Jemima Gilchrist or Purdy was the deed by which the succession to the means and estate left by the said deceased Mrs Jemima Gilchrist or Purdy fell to be regulated, and that the pursuers were entitled to the provisions made in their favour by the said last mentioned trust-disposition and settlement; and for decree ordaining Mrs Morrison to count and reckon for her intromissions with the estate on that footing.

The pursuers stated (cond. 5), that Mrs Purdy, the deceased, was the elder daughter of the said John Gilchrist, the husband of the first named pursuer and father of the other pursuers. (Cond. 1) "About the middle of December [1889] she sent for the family law-agent, Mr Asher, and gave him instructions to make a fresh will, as she knew her illness was incurable, and she wished to make a final settlement of her affairs in prospect of an early death. Mr Asher accordingly prepared a trust-disposition and settlement, which was executed by her on the 16th day of December 1889, and by which she conveyed her whole means and estate to Mr Asher and his managing clerk, Mr John Rew, whom she appointed her trustees and executors." The substance of the will was payment of debts, &c., and of certain legacies, including one of £500 to the defender Mrs Morrison, and of the residue to the pursuer Mrs Gilchrist in liferent, and to the other pursuers in fee. "The said will was carefully prepared by the instructions of Mrs Purdy, and it was fully considered by her before she signed it. The said deed contained the real wishes of the testatrix with regard to the disposal of her estate after her death. A copy of the said trust-disposition and settlement is herewith produced." The pursuers then set forth the grounds of reduction of the deeds libelled (under which the pursuers were entirely excluded from the succession), which were facility and circumvention.

The pursuers pleaded;—(1) The deeds sought to be reduced not being the deeds of the late Mrs Purdy, ought to be set aside, in terms of the conclusions of the summons. (2) *Separatim*, The said deeds ought to be reduced, in respect that at the dates when the same were executed the deceased Mrs Purdy was weak and facile in mind and easily imposed upon, and that the said Mrs Morrison and John Goodlet, or one or other of

them, taking advantage of her said weakness and facility, did by fraud or circumvention impetrate the said deeds from Mrs Purdy to her lesion. (3) The trust-disposition and settlement of 16th December 1889, being the deed regulating the succession to the deceased Mrs Purdy's means and estate, the pursuers are entitled to decree in terms of the conclusions of the summons.

The defenders lodged answers in which they denied the facility and circumvention alleged, and in answer to cond. 10 averred;—(Ans. 10) "The pursuers are called on to produce this deed or to prove that any such deed was executed and retained by Mrs Purdy as the final expression of her testamentary intentions. It is explained that on the 28th January 1890, the testatrix being then of sound disposing mind, and fully understanding and comprehending the legal results of such action, sent for Mr Peter Peterson Slater, solicitor and law-agent, and after requesting him to act as her agent, explained to him that the said trust-disposition and settlement in the said condescendence mentioned had been in fact revoked by the will prepared by Mr Asher, and executed on the 20th January, as mentioned in condescendence 13, and desired Mr Slater to destroy the same in her presence as useless and as not expressing her will, which Mr Slater accordingly did. Such destruction was deliberately done *animo revocandi*, and the said trust-disposition and settlement is not now in existence."

The defenders pleaded;—(1) No title to sue.

The pursuers at adjustment made this addition to cond. 10;—"With reference to the statement in answer, the pursuers have no knowledge whether the will in question was destroyed, or by whom it was destroyed. If Mrs Purdy destroyed it as stated by the defender, she did so in consequence of the defender having by fraud or circumvention induced her to do so while she was weak and facile and easily imposed upon. On the deeds under reduction being reduced, the pursuers will, if necessary, bring a proving of the tenor of the will in question."

The pursuers also made the following addition to their cond. 5;—"The pursuer William Gilchrist is Mrs Purdy's heir-at-law, and the pursuer Jane Alexander Gilchrist is one of her next of kin."

On 15th January the Lord Ordinary (Wellwood) pronounced the following interlocutor:—"Sists process *in hoc statu* in order that the pursuers may, if so advised, raise an action of proving the tenor of the trust-disposition and settlement executed on 16th December 1889 by Mrs Jemima Gilchrist or Purdy, upon which they found; meantime reserves all questions of expenses." *

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* "OPINION.—This action is laid entirely on the footing that the deed by which the succession to the means and estate of the deceased Mrs Purdy falls to be regulated is a trust-disposition and settlement dated 16th December 1889, under which the pursuers are beneficiaries to a large extent. The pursuers claim as beneficiaries under that deed, and the conclusions of the summons and the statements on record, especially those in condescendence 10, shew that that deed is the title on which they rely. It is true that they now state that the pursuer William Gilchrist is Mrs Purdy's heir-at-law; but so little was that in view when the action was raised that the fact was not stated in the original condescendence.

"Now the deed of 16th December 1889 is not forthcoming. It is stated by the defender, and there is little reason to doubt the truth of the statement so far, that it was destroyed on the 28th of January 1890, about a week after the execution by Mrs Purdy of a trust-disposition and settlement dated 20th January 1890, which is the first in date of the deeds under reduction. In these circumstances, I think it is necessary for the pursuers to prove the tenor of the deed

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The pursuers reclaimed, and argued;—The pursuers had a double title, as disponees under the deed alleged to have been destroyed, and as heirs of the deceased *ab intestato*. They were entitled to plead these titles alternatively to the effect of insisting on this reduction. That took the present case out of the principle of *Shaw*[1] referred to by the Lord Ordinary, for there the pursuer's only title was the lost deed. A proving of the tenor was not a suitable way of trying what would virtually be an issue of facility and circumvention, for the question in the proving would be the state of the mind of the deceased at the date of the alleged revocation. Such a question ought to be tried by a jury upon an issue in the usual terms. The proper course was to dispose of the validity of the deeds sought to be reduced first, for if they should be reduced the interest of the present parties was reversed, as Mrs Morrison was a beneficiary under the deed alleged to have been destroyed, and the pursuers as heirs *ab intestato* would have an interest to reduce that deed.

Argued for the defenders;—The action was laid upon a deed which was not in existence, and a proving of the tenor was an essential preliminary to any action on a lost document.[2] It could not be founded on as giving a title to sue. Nor could the pursuers plead their alleged title as heirs, for the title of heir became active only if there was no deed to displace it; under the former law, the heir could not have sued a reduction *ex capite lecti* if the effect of reduction was to set up a prior deed. The whole scheme of the present summons was that there was such a prior deed. The question whether a testamentary deed had been destroyed by the deceased *animo revocandi* could quite satisfactorily be disposed of in a proving of the tenor.[3]

At advising,—

Lord Adam.—In this case there is no question that the averments on record are sufficient to sustain the reductive conclusions. The only question is as to whether the pursuers have a title to sue. There is no doubt that when the action was brought into Court the pursuers thought the deed of 16th December 1889 was still in existence, or at least did not know whether it was destroyed or not, and there can be no doubt that that was the title on which the action was originally brought, and that accounts for the

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of 16th December 1889 on which they found. In doing this, they will have to prove the *casus amissionis*; and, if it is true that the will was destroyed by the orders of Mrs Purdy, to prove that she was not then in such a state of mind as to be capable of effectually cancelling or revoking it. The question to be tried in the action of proving the tenor will therefore practically be the same as that sought to be raised in this action. But an action of proving the tenor proceeds in the Inner-House; and therefore the present process must be sisted until the pursuers take steps to set up the deed of 16th December 1889—*Shaw* v. *Shaw's Trustees*, 3 R. 813, and *Bonthrone* v. *Ireland*, 10 R. 779.

"The pursuers strongly maintain that William Gilchrist, being heir-at-law, and entitled to succeed to the heritage left by Mrs Purdy if she died intestate, he is, in any case, entitled to sue the action, and challenge the deeds under reduction. As I have already indicated, the summons is so framed that I do not think it can proceed as an action at the instance of the heir. But, further, if the pursuers' averments are true, William Gilchrist, as heir-at-law, was cut out by the deed of 16th December 1889, and the parties really entitled to challenge the subsequent deeds are the disponees or beneficiaries under that deed."

[1] Shaw v. Shaw's Trustees, June 13, 1876, 3 R. 813.

[2] Gordon v. Robertson, Oct. 28, 1873, 11 S. L. R. 35.

[3] Bonthrone v. Ireland, March 15, 1883, 10 R. 779.

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is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken."

This again is a declaration of the common law, and no novelty, and correctly defines the obligation of the drawer at the time of drawing. It shews that the obligation is unilateral, and that the payee has then no debtor under the written instrument but the drawer. But according to the contention of the defenders, the written contract may be entirely abrogated and superseded by a verbal agreement which becomes the substitute, and the only substitute, for the written contract.

It seems almost unnecessary to advert to the question how far parole evidence may be admitted to clear the question *quo animo* the delivery of a bill has been made. But as the Lord Ordinary has apparently attached some importance to the supposed analogy between such a case and the present, it may be as well to point out the essential distinction between the two. No written instrument containing contracts or obligations is complete until it has been delivered, *i.e.*, until the party who is bound by the contract or obligation has transferred the actual possession to another. But delivery, whether of goods or writing, is a matter of fact, and as proof *pro ut de jure* is admissible to instruct that fact, it seems to follow, of necessity, that the purpose for which the delivery is made may be proved in the same way. But no such proof will vary or affect the contracts or obligations expressed in a written instrument so conditionally or unconditionally delivered.

It has also been suggested that in accommodation bills it was competent to prove before the statute by writ or oath of the party, that the person who stood *ex facie* of the bill true debtor was not so in fact, and that under section 100 parole evidence may now be received in place of writ or oath of party. To this I assent. But the case of accommodation bills has no true analogy to the present. If the drawer of such a bill be truly the debtor, and not, as appears on the face of the bill, the creditor, that fact can be proved, and will be given effect to in a question between the true debtor and the true creditor. But this does not alter the contract expressed in the bill. Drawer and acceptor, whatever their true relation in accounting between one another, do not cease to be drawer and acceptor respectively, and liable as such to any *bona fide* holder for value. But if effect were given to the contention of the defenders in the present case, the bill would cease to exist as a document of debt altogether.

I am of opinion that the Lord Ordinary's interlocutor ought to be recalled, and that the pursuers should have decree for the contents of the two bills, with interest.

LORD ADAM.—The bills here were drawn by the defenders in favour of the pursuers upon Messrs Phipps, Turnbull, & Company, of Melbourne, the defenders' foreign principals, but in both cases acceptance was refused by the drawees. We have in the second article of the pursuers' statement, which is not disputed, the history of these bills and how they came to be granted. They say,—"Against a shipment of wood pulp to Messrs Phipps, Turnbull, & Company, merchants in Melbourne, the defenders on 15th November 1889 drew a bill on them in favour of the pursuers for £524, 15s. 10d., payable ninety days after sight. The pursuers bought the bill, and obtained therewith the bills of lading of said shipment duly endorsed by the defenders." It appears that the price of the goods ordered by the defenders for shipment to Phipps, Turnbull, & Company was

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and if the deed of 16th December has not been destroyed—and the pursuers do not know whether it is destroyed or not—and if it is produced before the trial, they have a perfectly good title. The other is the title of heir-at-law, but they have a perfectly good title on which to try the question here. If the first deed had been the only title upon which the pursuers had to rely, I should, on the authority of the case of *Shaw* v. *Shaw's Trustees*, 3 R. 813, referred to by the Lord Ordinary, and on the principle of it, have had no doubt whatever that the course pursued by the Lord Ordinary was the right one, namely, that if that had been the sole title it would have been necessary to bring a proving of the tenor—either to produce it, or, if not recoverable, to proceed by way of proving the tenor first before they could go on with the action. But that is not the state of the title, for as I have already pointed out, the only effect of this first deed is not to destroy the pursuers' title to sue but to give another and equally good title to sue. If it is not produced or not proved, then they are respectively heir-at-law and next of kin.

That being so, I have come to the conclusion that the Lord Ordinary's interlocutor should be altered. I think in this case the pursuers have a perfectly good title to try the question here on issues in the usual form. It may be that after the leading conclusions of the action are decided in one way or another, it may be necessary for the further progress of this action then to have a proving of the tenor. That may be quite possible. If it should be that these deeds are set aside by the verdict of a jury, then it may be that the pursuers will not be enabled to go on with the declaratory and accounting conclusions without putting themselves in a position to insist in these. But if the main question is settled in one way or another, I think that will clear the way for the proper disposal of the remainder. I am therefore of opinion that the interlocutor should be altered, and the case tried by a jury.

Lord M'Laren.—If there had been no averment in this action as to the pursuers, that one of them stands in the relation of heir-at-law, and the other is that of next of kin to the defunct, I should have agreed with the Lord Ordinary that this action could not proceed without a proving of the tenor of the lost disposition, for I think no one can pursue a reduction founding on the title of disponee without being liable to be called upon as a condition of prosecuting the case to produce the deed which he asserts to be his title. Admittedly the pursuers are not in a condition to produce the deed which they libel, because it has been destroyed—they say destroyed under circumstances which do not affect its validity, but that is a matter which I think would have to be investigated as a condition of establishing the title to sue in the character of disponee. Now, when the summons was originally brought into Court, the character of disponee was the only title alleged by the pursuers. Since then they have apparently without objection amended their condescendence by asserting a title of heir-at-law and next of kin. I confess it would have been more satisfactory to my mind if that amendment had been made by leave of the Court, by minute of amendment and interlocutor following upon it. There has been an amendment of that nature made already, but that does not touch this question; it is an amendment having relation to the character of the defenders. But as I should at anyrate have been prepared to consent to such an amendment if it had been asked for, and as I understand your Lordships think it is within the power of the pursuer on revisal to make such an addition to his condescendence,

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I am quite satisfied to deal with the case as one in which the pursuers now found on the double title of disponees and also of heirs *ab intestato*. In the second of these characters they are clearly entitled to follow out this action, because the title of heir and next of kin is always a good title to challenge any deed whatsoever alleged to be granted by a deceased person, and challengeable on these grounds. Therefore, while sympathising with the Lord Ordinary's desires to enforce strictness of pleading in matters of title, I think that the objection that seemed to his Lordship to be insuperable may be got over, and that this action ought to be allowed to proceed. I concur with Lord Adam in thinking that if it turns out that the real interests of the pursuers rest upon anything in the deed, it would then be necessary to set up the deed by some subsequent procedure before operative effect could be given to it.

LORD KINNEAR.—I concur.

LORD PRESIDENT.—I think that if the only title of the pursuers of this action had been that of disponees under the destroyed deed, the course which the Lord Ordinary has adopted would have been the right one, because until that deed was either produced or the tenor of it proved, they could not come to Court at all with a title to challenge what has been done. But the character of heir-at-law on the part of one pursuer, and that of one of the next of kin on the part of another, removes that difficulty altogether, because whether the destroyed deed is to be set up again or not, they are quite entitled to have the deed which has been granted by the deceased to their prejudice set aside if they can make out that the testatrix was not of sound disponing mind at the date of the deed, or was in a state of facility and was circumvented by the defender. The effect of a verdict setting aside the deeds made by the testatrix will be merely this, that these deeds will have no effect whatever; but that will not settle the question whether the deed which is said to have been destroyed, and of which the tenor is sought to be proved, is to be set up or not; but the parties, when decree of reduction has been pronounced, will be in a position then to reconsider their interest in the two events of the destroyed deed being set up, or of their acquiescing in its destruction. We do not know exactly what the interests of the pursuers are under that original destroyed disposition, but if there are interests created by that disposition which are adverse to the interest of the heir and next of kin it will then be a question whether the proving of the tenor might not settle the question between the parties; and therefore I think the logical order of the proceeding is to settle in the first place whether the testatrix was of sound disponing mind, or was circumvented in the granting of the deeds which are now maintained and set up by the defenders. And I therefore come to exactly the same conclusion as Lord Adam, that it is quite unnecessary to consider at present what the effect of a decree of reduction may be.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Lord Ordinary, and remit to adjust issues to try the question whether the deeds of 20th January and 6th February 1890 were not the deeds of the testatrix, or whether she was in a state of facility and weakness and was circumvented by the defender."

STUART & STUART, W.S.—SNODY & ASHER, S.S.C.—Agents.

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GEORGE TAIT, Complainer (Reclaimer).—*Jameson*—*M'Lennan.*
JOHN JOHNSTON, Respondent.—*Shaw*—*A. S. D. Thomson.*

Process—Citation—Statute 1592, *cap.* 141—*Citation Amendment Act*, 1882 (45 *and* 46 *Vict. c.* 77), *secs.* 3, 4.—A service copy of a petition in a Sheriff Court was sent by registered letter to the defender, with a citation bearing *in gremio* to be executed by A B, a law-agent, but it was not signed by A B, but by C D, another law-agent, for A B. The execution returned upon the petition was in the statutory form, and was signed by A B.

In a suspension of a decree in absence obtained against the defender, he pleaded that the citation was invalid.

Held that as the execution returned upon the petition had not been reduced, the defender was barred from objecting to the citation.

Opinion (*per* Lord Rutherfurd Clark) that the citation was valid.

Sheriff—Jurisdiction—Process—Union of several counties into one sheriffdom—Sheriff Court Act, 1853 (16 *and* 17 *Vict. c.* 92), *sec.* 4—*Sheriffs Act*, 1870 (33 *and* 34 *Vict. c.* 86), *secs.* 4, 5, 6, 12.—In a sheriffdom in which several counties are combined the granting of a warrant to cite a defender to appear in a Court in a county which is not the county of his domicile, is a matter within the discretion of the Sheriff.

2D DIVISION. Lord Kincairney. M.

ON 7th August 1890 John Johnston, joiner, Innerleithen, raised an action for £50, 17s. 3d., as the amount of the balance of an account against George Tait, Woodside Cottage, Innerleithen, in the Sheriff Court of the Lothians and Peebles at Edinburgh.

A warrant to cite, dated 7th August 1890, was pronounced by the Sheriff-substitute of the Lothians and Peebles, at Edinburgh (Orphoot), ordaining Tait, if he intended to shew cause why the prayer of the petition should not be granted, to lodge appearance with the Clerk of Court at Edinburgh.

A copy of the petition and warrant was sent by post to Tait, with a schedule of citation bearing to be executed by Marcus J. Brown, S.S.C., law-agent, and to be signed for him by T. H. Lang Guthrie, solicitor. An execution in terms of the statutory schedule, written upon the principal petition, was signed by Marcus J. Brown.*

On 12th September 1890 decree in absence was taken against Tait, who had received the citation and had corresponded with Johnston's agent with regard to the claim, but had lodged no defences.

A charge on the decree was given.

On 13th October 1890 Tait brought a suspension of the decree and charge, on the grounds set forth in his pleas in law, which were;—1. The complainer having no residence or place of business within the county of Midlothian, is not subject to the jurisdiction of the Sheriff of the

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* The Citation Amendment Act, 1882, enacts by sec. 3, " . . . In any civil action any summons or warrant of citation of any person . . . may be executed . . . . by an enrolled law-agent by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, . . . a registered letter by post containing the copy of the summons, . . . with the proper citation or notice subjoined thereto, and such posting shall constitute a valid and legal citation."

Section 4 enacts, *inter alia*,—"(3) The execution to be returned by the officer or law-agent shall be accompanied by the post-office receipt for the registered letter: The execution returned by a law-agent shall for all purposes be equivalent to an execution by any officer of Court: The execution may be in the form contained in the first schedule hereto."

The schedule bears,—"This summons . . . executed by me, . . . law-agent . . . (*Signature of Agent.*)"

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is also an undertaking on the part of the acceptor that he will pay the sum contained in the bill. By these undertakings the parties are bound absolutely. But it does not appear on the face of the bill what is the nature of the antecedent arrangement between the drawer and the acceptor. The arrangement may be that the acceptor shall give credit to the drawer to a certain extent, and that to the agreed extent the credit may be drawn upon. Or the arrangement may be, that the drawer shall only draw against cash in the acceptor's hands. Either arrangement is consistent with the purposes for which bills of exchange are granted, and with the form of the instrument; because the bill does not affirm that the acceptor is the drawer's debtor.

Accordingly, where a drawer has paid his bill and is seeking to charge the acceptor, the question of liability generally resolves into an inquiry as to the state of the account between the drawer and the acceptor. Opinions may differ as to the best way of conducting such an inquiry. Under our customary law, evidence was confined to writ or oath. By statute parole evidence is now admissible. But in any case the proof could have no effect in restricting the obligations of the subscribing parties to a holder of the bill for value, and it is therefore distinguishable in principle from the proof which the Lord Ordinary proposes to allow. I concur in the opinion of your Lordship in the chair as to the true principle of construction of the 100th section of the Bills of Exchange Act, and as to the application of that principle to the facts of this case, and it follows that the pursuers are entitled to recover in terms of the bill under deduction of any sum which they may have received out of the proceeds of the sale of the goods.

Lord Kinnear.—I agree with all your Lordships that the defenders' statement contains no relevant averments which can be remitted to proof. Their statement as to the way in which the bills in question came to be granted and discounted by the pursuers is clear enough. They say that there had been for fifteen or twenty years a course of business between them and their correspondents in Australia, by which the defenders were in the habit of consigning goods to the Australian firm of Phipps, Turnbull, & Company, and drawing bills upon the consignees which they discounted with a London bank. Then they say that in 1888, in accordance with the ordinary course of transactions, they consigned certain quantities of wood pulp to Phipps, Turnbull, & Company, upon their order. Payment of these they say was made by drafts on the pursuers which were met by bills drawn by the defenders on their principals Phipps, Turnbull, & Company, payable to the pursuers. They go on to say that trade in Australia having become bad their correspondents there wrote cancelling further consignments, but that before that letter had been received they had despatched two consignments for which they had drawn bills in the ordinary way. They say,—"Two consignments, however, one for fifty tons of pulp, and the other for ten tons thereof, could not be cancelled. Payment of these two consignments was made by the pursuers, which payment was made by bills drawn on Messrs Phipps, Turnbull, & Company, and payable to the pursuers in the ordinary way." Then they state the sums contained in these two bills which are the subject of this action. Now, that is an averment that the pursuers gave value to the defenders for these bills. The defenders indeed say in the next article of their statement that they personally received no value; but that is quite inconsistent with the facts as they have themselves stated them, because the

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The complainer reclaimed, and argued;—(1) The question raised was not merely one of jurisdiction. The complainer (assuming the jurisdic-

only two statutes recently passed on the subject. The first is the Sheriff Court Act, 1853, 16 and 17 Vict. cap. 92, by which the union of various counties is provided for when vacancies should occur, and sec. 4 provides that when a vacancy should occur in the sheriffdom of Peebles it should be united with the county of Midlothian into one sheriffdom. The later Act, which is the Act directly applicable, is the Sheriffs Act, 1870, 33 and 34 Vict. cap. 86. By secs. 4, 5, and 6 provision is made for the union of the counties of Midlothian, Linlithgow, Haddington, and Peebles into one sheriffdom, to be called the Sheriffdom of the Lothians and Peebles; and by sec. 12 it is enacted, that every union of counties into one sheriffdom 'shall be deemed to be a complete union to all intents and purposes, in so far as regards the jurisdiction, powers, and duties of the Sheriff and his Substitutes, and in so far as regards the powers, duties, rights, and privileges of procurators before the Courts of the Sheriff: And the several counties of any such united sheriffdom shall not be thereafter regarded as separate sheriffdoms or jurisdictions, in so far as regards the powers, duties, rights, and privileges of the Sheriff and his Substitutes, and the procurators of the Sheriff Court.'

"In the face of these absolute and comprehensive words it seems impossible to deny the jurisdiction of the Sheriff of the Lothians and Peebles in this case. Counsel for the complainer referred to sec. 6 of the Sheriff Court Act, 1876, 39 and 40 Vict. cap. 70, which provides that a person having a place of business in a county shall be subject to the jurisdiction of the Sheriff thereof, although domiciled in another county, if cited personally, or at his dwelling-place, with power to the Sheriff to remit such action 'to the Court of the defender's domicile in another sheriffdom,' and to sec. 12, which, by its first subsection, provides for citation in such cases.

"The argument, as I understood it, was, that because the word county was used and not sheriffdom it was to be inferred that but for the Act the Sheriff in one county, forming part of a united sheriffdom, would not have had jurisdiction over a defender who had a place of business in another county, forming part of the same sheriffdom. But I think the inference inadmissible. The statute does not profess to do more than confer jurisdiction. It says nothing about the seat of the Court at which the jurisdiction is to be exercised. It confers jurisdiction in language which is not a whit more clear or absolute than that of sec. 12 of the Act of 1870. I do not think it applies to the jurisdiction of a Sheriff over the divisions of a united county at all. If it does, it adds nothing in language or in substance to his power, and I think that the use of the word 'sheriffdom' at the close of the section shews that there was no intention of drawing any distinction between a county and a sheriffdom.

"Reference was made to *Edwards* v. *The Inverness and Aberdeen Railway Company*, 24th April 1862, 4 Irv. 185, where the Sheriff, sitting in the Small-Debt Court at Banff, dismissed an action of damages against the railway company on the ground of no jurisdiction. The statutory domicile of the railway company was Inverness, but it had been cited at Keith, in Banffshire. The pursuer appealed to the Circuit Court at Inverness, and seems to have argued that there was jurisdiction because Keith was a principal station. The appeal was dismissed. The grounds of judgment do not appear quite clearly. But it was pointed out that Lords Neaves and Ardmillan both indicated that there might have been a difference had the action been brought in the Sheriff Court at Elgin, in which county the injury happened; and it was argued that, as Elgin and Banff were united counties, it could, if the respondent's argument were sound, have made no difference as to the question of jurisdiction whether the action was brought at Banff or at Elgin. It does not appear, however, that the attention of the Judges was called to the point at all, and they do not purport to decide it, nor, indeed, allude to it.

"III. The further question is this, whether, admitting the jurisdiction of the Sheriff, it was competent to convene the defender to the Sheriff Court at

tions being entered into at all, and it would appear to me to come to this, that the bank are said to have agreed with Phipps, Turnbull, & Company that they would discount bills drawn upon them upon which they alone should be liable. I cannot extract any other meaning from the statement than that. And accordingly it would appear to me that if that agreement had been carried out, and the defenders had drawn upon Phipps, Turnbull, & Company, as they might easily have done, in terms which should exclude recourse against them, the agreement would have been carried out if the London bank had discounted these bills. But the agreement was not carried out, because what was done was not to present to the bank for discount any bill which would give effect to that antecedent parole agreement. The Bills of Exchange Act enables that to be done by the provisions of the 16th section, in which it is provided that the drawer of a bill may insert an "express stipulation negativing or limiting his own liability to the holder." And therefore there would have been no difficulty in carrying out the supposed agreement if the bank and the defenders had acted upon it. But they did not present such a bill, but, on the contrary, asked the bank to discount for value a bill drawn in ordinary terms containing no restriction or limitation whatever. It would rather appear to me that if that bill had been accepted, and the action had been brought against the defenders as drawers in respect of the drawees' failure to pay, the answer the bank would have made to the defence, which would have been set up in the same terms as now, would have been conclusive, because it would have been obvious, that the whole arrangements had been displaced by written contracts passing between the parties, in the course of carrying out the transactions to which the antecedent arrangement had referred. The defence in that case would have been an attempt to displace the plain legal effect and import of a written contract by antecedent communings, not between the parties to the contract, but between one of them and somebody else. And apart altogether from any difficulty arising on the construction of the Bills of Exchange Act, I should as at present advised have great difficulty in holding that such an averment would have been relevant in an action of the kind I am supposing.

But I agree with Lord Adam that it is unnecessary to consider how an agreement of that kind would have been proved, because that is not an agreement that would go to affect the defenders' liability in this case. The meaning of the bill is that the defenders undertake that the drawee shall accept. Now, it is not alleged that there was any obligation on the part of the bank to discharge the drawers' liability if the drawees refused to accept. It is quite impossible to read the statement of the arrangements that took place between Mr Smith, on the part of the drawers, and the London bank as containing any agreement which did not assume that the drawers had undertaken liability upon the bills to which the agreement referred. It cannot possibly import an agreement that Phipps, Turnbull, & Company were to be liable, and were to be exclusively liable, upon bills to which they had refused to become parties. But that is the import which we are asked to put upon that agreement. If it did not mean that, it would be quite irrelevant to any question arising in this case. And therefore the defenders' reading of this statement comes to this, that it means that there was a contract between the payees upon these bills and the persons upon whom the bills were drawn, that if those persons should refuse to accept them, the payees should have no action against the drawers to whom they had given value for them. That would be certainly a very singular arrangement,

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to answer the citation.[1] Were it otherwise, a pursuer who resided in Shetland might convene a defender also residing there to appear at Wick. A defender was not bound to submit to that. (2) A citation must be made by the agent who returned the execution, and by no other. Here it was not so, and this was so plainly a null citation that no reduction was necessary.

Counsel for respondent was not called upon.

LORD JUSTICE-CLERK.—When a statute enacts that certain counties named are to be united into one sheriffdom, and are not thereafter to be regarded as separate sheriffdoms or jurisdictions, it is perfectly clear on the face of it that a citation by the Sheriff to the head burgh of the principal of the counties united cannot be bad, although it may be inconvenient for a defender residing in another part of the jurisdiction to be cited there. At the same time, no one can doubt that the Sheriff, upon a representation being made to him that it would seriously inconvenience the defender to defend the action in the place to which he has been cited, would consider that objection and dispose of it. It is not to be assumed that the Sheriff exercises his powers in an unreasonable manner. If all the business of Edinburgh were attempted to be removed to Peebles or Linlithgow, some means would speedily be found for putting an end to such an outrage of public decency. The public trusts the Sheriff to conduct the business of his Courts properly.

Here the defender never asked the Sheriff to remit the whole case to Peebles. I think the first plea in law bad. As to the second plea of not being properly cited, I am of opinion that as the execution bears that the defender was duly cited, and no steps have been taken to set aside execution, it also falls to be repelled. I consider the whole proceedings in this case idle.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK.—I am of the same opinion, but I would like to state further that I see no objection to the citation in this case.

LORD TRAYNER.—I agree with your Lordship upon all the grounds stated.

THE COURT adhered.

ANDREW TOSH, S.S.C.—MARCUS J. BROWN, S.S.C.—Agents.

No. 126. Mar. 3, 1891. Barbour v. Chalmers & Co.

A. H. F. BARBOUR AND ANOTHER, Pursuers (Respondents).—*M'Kechnie—Howden.*

D. & J. CHALMERS & COMPANY, Defenders (Appellants).—*Jameson—Crole.*

Process—Appeal—Removing—Act 6 Geo. IV. cap. 120 (*Judicature Act*, 18[illegible] *sec.* 44.—Where a landlord obtained decree of removal against a tenant, on the ground that he had no title to possess, an objection was taken to the competency of an appeal, on the ground that suspension in terms of the 44th section of the Judicature Act was the only competent remedy. Objection *repelled.*

any question of the kind by an award of expenses. If he have such power, the alleged inconvenience may prove more theoretical than actual. In this case the Sheriff-substitute has himself granted warrant to cite the defender to lodge his defences with the Sheriff-clerk at Edinburgh, and has decerned against him because he did not appear, and I have not been able to discover any reason which appears to me sufficient for denying his right to exercise his undoubted jurisdiction and power in that manner."

[1] Ersk. i. 4, 5.

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on either side as respondents, craving a lining and authority to take down certain buildings on his ground and to erect others in their stead. The burgh surveyor and one of the other respondents appeared, and objected.

The Dean on 29th November found that the proposed buildings were in contravention of clause 177 of the General Police and Improvement Act of 1862,* and therefore refused the petition. This judgment was pronounced without any record having been made up, but merely on an inspection of the petitioner's plans. The plans shewed that the petitioner's ground was a rectangular piece of ground between two parallel streets, Main Street and Whitelaw Street. The frontages to both streets were fully occupied by buildings, and the space between the backs of the houses facing Main Street and the backs of those facing Whitelaw Street was 124 feet.

The petitioner proposed to interject a row of houses consisting of four tenements, to be occupied as sixteen dwellings of one apartment, and twenty-four dwellings each containing one room and kitchen, in all forty dwellings, parallel to the other streets, with a vacant space 40 feet in width between them and the back of Main Street, and a vacant space 35 feet in width between them and the back of Whitelaw Street. The plans shewed that the pursuer proposed to rebuild the houses fronting Main Street, leaving a space at the end 6 feet in width as an entrance to the back houses.

The grounds on which the magistrates proceeded, as stated in the note appended to their judgment, were two, viz.:—(1) That the 177th section would be transgressed in respect that the width of the proposed court, measuring to the back of the tenements in Main Street, would only be 40 feet, whereas, according to that section, as there were forty houses, *i.e.*, dwellings, in the block, there must be a width of 47 feet, 15 feet for the first eight houses, *plus* an additional width of 1 foot for each of the remaining thirty-two houses, making a total width of 47 feet. (2) That the entrance must also be 47 feet in width, whereas the only entrance, so long as the existing houses fronting Main Street and Whitelaw Street were allowed to remain, was by two covered closes, while by the proposed plans which contemplated the rebuilding of the houses fronting Main Street, the proposed entrance to the back buildings was only 6 feet.

The petitioner appealed, and argued;—(1) The 177th section did not apply, because the space in question was private property, and the public had no right of entrance to it. The Act made special provisions for private courts. (2) Assuming that the section applied, the Dean of Guild had gone wrong in holding that the word "houses," as used in the section, meant "dwellings," it clearly meant "tenements." †

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* 25 and 26 Vict. c. 101, sec. 177,—"It shall not be lawful to form, lay out, or build any court unless the same shall be of a clear width of 15 feet, measuring from the buildings or intended buildings therein, provided always, that to any such court in which there shall be more than eight houses there shall be an additional width of 1 foot for every such additional house; provided also, that there shall be an entrance to every such court of the full width thereof, and open from the ground upwards."

† The appellant referred on the first point to sec. 142, and on the second to secs. 158, 162, 178, and 212; the respondent to section 213. These are in the following terms, viz.:—

Sec. 142.—"All private courts . . . shall be kept clean."

Sec. 158.—"The Commissioners shall, from time to time, cause the houses and buildings in all or any of the streets, public or private, to be marked with numbers," &c.

Sec. 162.—"When any house or building, any part of which projects beyond

No. 130. At advising,—

Mar. 6, 1891. Couper v. Surveyor of Maryhill.

LORD JUSTICE-CLERK.—This case is one of general importance, although I must say that in the particular case it does not look so important from a sanitary point of view as it may be in many other cases—this ground, on which it is proposed to erect what is called a mid-tenement, being so much on the slope of a hill that the buildings cannot be said to obstruct one another as regards light and air in any substantial degree at all. But that does not affect the principle,—the statute with which we have to deal, the Police and Improvement Act of 1862, not making any difference between sloping ground and level ground.

The question which we have to decide is whether or not the authority in Maryhill which controls the laying out of buildings and authorises or refuses authority to their construction has been right in this case in refusing to allow the complainer to build between two tenements, one facing Main Street and the other facing Whitelaw Street, a mid-tenement on the back ground.

Now, there are two substantial grounds on which objection is taken by the surveyor for the burgh. In the first place, he says that this proposed mid-tenement or row of houses is too near the existing houses under the statutory rules, and these rules are contained in clauses 177, 178, and 179 of the Act. Clause 177 enacts,—"It shall not be lawful to form, lay out, or build any court unless the same shall be of a clear width of 15 feet, measuring from the buildings or intended buildings therein, provided always, that to any such court in which there shall be more than eight houses there shall be an additional width of 1 foot for every such additional house; provided also, that there shall be an entrance to every such court of the full width thereof, and open from the ground upwards." Clause 178 relates to the height of houses in a court, and I do not think any case under that clause arises here. Then clause 179 is for the purpose of fixing the penalties for breach of the rules contained in clauses 177 and 178. Therefore it is upon clause 177 that this case really turns. There are two points in it. There is the point as regards the space to be left between the buildings to be erected, which will create the "court," and the nearest buildings, and there is the point about keeping the passage into the court open, and that that passage must be of the full width of the court.

The first question is a difficult one, and depends upon the interpretation to be put upon the word "house" in the Act of Parliament, and it is rendered doubly difficult by the fact that although this is a statute which in a very large number of its provisions relates directly to houses, there is no definition whatever in the statute of the word "house." The burgh surveyor maintains that the word "house" means every place occupied or to be occupied as a separate dwelling. The appellant, on the other hand, who objects to the decision of the Court below, maintains that "house" means tenement, that is to say, a house erected within four walls, consisting it may be of only one dwelling or many dwellings.

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the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered," &c.

Sec. 178.—"It shall not be lawful to build any houses in any court which shall be of greater height than 30 feet, nor shall any houses in any court contain more than two flats above the ground flat," &c.

Sec. 212.—"It shall be lawful for the owners of any one or more floors or storeys of any house or other building within the burgh," &c.

Sec. 213.—"Where there are two or more houses in any tenement, the owner and occupier of each house shall permit," &c.

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ccording to the convenience of the locality. Now, in this case it is not necesary for us to decide that question, because I think the case can be decided quite fficiently upon the second part of clause 177. But I think it would be hardly ir in a case of this importance to pass over that point altogether, although it not necessary to give an authoritative decision upon it. I am inclined to state hat my view of it is, viz., that the word "house" does not mean any part of a uilding that is occupied as a separate dwelling, but means a house in a building nse—that is, the tenement contained within the four walls which constitute e building. I find that in other clauses of the Act it is quite plain that that the meaning. Section 210 speaks separately of a house and of part of a house parately occupied. That section plainly indicates that the statute recognises at part of a house, although occupied by a separate family, is to be taken as a fferent thing from a house. Then clause 212 speaks separately of the parts of house. Section 213, which is the only one in which there is some ambiguity, ludes to where there are two or more houses in any tenement. I take that to ean that you may have a separate house altogether, though in the same tenement and within the same walls. It is a very common thing in Glasgow to have entirely separate house on the ground, opening separately from the street, ough within the same four walls as the rest of the house which contains a mmon stair above. Therefore, the leaning of my opinion would certainly be to this effect, that if the appellant here satisfies the statute as regards his houses by leaving a clear width of 15 feet between the houses and the other side of the urt, he is not liable to add an additional foot unless there are more than eight parate houses in what he is building.

But, as I said before, it is not necessary in this case to decide that, because I nk the decision of the Commissioners is right upon another point, viz., the ond proviso of clause 177, by which it is enacted that there shall be an rance to every such court of the full width thereof, open from the ground wards.

We are told here—and we see it for ourselves—that the plans shew a passage the front tenement in Main Street into this court of only 6 feet wide. Then is not an entrance of the full width of the court which is to be formed, and fore I think that the burgh authority of Maryhill was right in refusing to the erection of this mid-tenement on that ground. Therefore I think we affirm the decision of the Dean of Guild.

Whether or not the appellant, if he alters his plans so as to give the full width the court from the entrance in Main Street backwards, will be entitled to proed with his buildings is a question which depends on the interpretation to be upon the first part of clause 177, as to which I have indicated my opinion; in the meantime the decision will go, as I understand, upon the second half the clause, that he has not kept the passage opening out to the street of the width required by statute. It is quite obvious that the reason for that proion in the statute is that there may be a proper access for air on the level of ground of sufficient width to properly air the court, but whatever the ground is, the provision of section 177 is so distinctly clear that I think there can no doubt as to the decision we must pronounce.

Lord Rutherfurd Clark.—The appellant admitted—and I think very proly admitted—that if the 177th section of the statute applied to this case, the peal could not be sustained. I am of opinion that it does apply to the case,

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and therefore upon that ground I affirm the judgment. I do not give any further opinion.

LORD TRAYNER.—The determination of the question raised by this appeal turns, as your Lordship has said, on the construction to be put on the 177th section of the General Police and Improvement Act of 1862, and the construction of that clause appears to me to be a matter of considerable difficulty. In this respect it is similar to many other clauses in the same statute, but one must endeavour to get at its meaning as best one can.

Now, the clause provides a certain restriction upon the use to be made of courts, and the first question that troubled me was whether that section did not apply entirely to courts to be formed without any application to courts already existing, and that for the reason that the clause begins, "It shall not be lawful to form, lay out, or build any court," which rather looks as if it refers to something to be done in the formation of a court, and that is in one sense a new creation, but I am satisfied, on giving the clause some consideration, that that would be to restrict its application unduly, and I think it is applicable to courts that are being made or courts that exist at the time the question concerning the court arises. Forming a court undoubtedly has reference to a thing not existing but to be formed, but the words "lay out or build any court" seem to me to refer to operations upon an existing court—at least the words may certainly be so read without doing them any violence.

I think it may fairly enough be said that the proceedings of the appellant are of the nature described in the section, as laying out or building this court. "Building a court" is an unfortunate expression, because a court, which is an area of uncovered ground, cannot be built in any proper sense, but I think the statute means building round a piece of uncovered ground so as to form it into a court or building upon a piece of uncovered ground. Now, taking it in that sense, I think the section I have alluded to has a distinct application to the case in question. I think the petitioner is endeavouring to lay out and build upon this court in a way which the statute, in the section I am reading, does not permit.

The two questions that your Lordship in the chair has alluded to—one of them perfectly free from doubt, and the other involved in some difficulty—are of importance, and I am inclined with your Lordship to indicate an opinion upon them. I think the word "house" in section 177 means tenement, and not a separate dwelling-place, and I think so for this reason, among others, that the immediately following section uses the same word "house" or "houses" in a sense which, from its context, must mean tenement. Therefore I am disposed to read in section 177 the word "house" in the same way as it obviously is intended to be read in section 178,—and the other sections that your Lordship referred to I think make this still clearer,—and that is in the sense of its being tenement, and not a separate dwelling-house.

But I agree with your Lordship that it is enough for the decision of this case to apply the last proviso of section 177, with regard to the passage to the court which has to be open to the full width of the court. Upon that ground I think the Dean of Guild was quite right in holding that the proposed buildings were in violation of that section, and consequently that his judgment to that effect ought to be affirmed.

THE COURT refused the appeal.

JAMES SKINNER, S.S.C.—MAITLAND & LYON, W.S.—Agents.

THE SCHOOL BOARD OF BARVAS AND OTHERS, Pursuers (Respondents).—*M'Kechnie—M'Lennan.*
DONALD MACGREGOR, Defender (Appellant).—*Strachan—John Wilson.*

No. 131.
Mar. 10, 1891.
School Board of Barvas v. Macgregor.

School—Dismissal of teacher—Ultra vires—Committee of Council on Education—Public Teachers Act, 1882 (45 *and* 46 *Vict. cap.* 18), *sec.* 3, *subsec.* 2.—The Public Teachers Act, 1882, sec. 3, subsec. 2, enacts that "No resolution of a school board for dismissal of a certificated teacher shall be valid unless agreed to by a majority of the full number of members of such school board."

In 1888 the Committee of Council on Education in Scotland resolved to give assistance to certain school boards in Scotland on condition, *inter alia*, that the board accepting the assistance should commit the management of their school to three managers, of whom one should be Her Majesty's inspector of schools for the district, which managers should have full power to dismiss the teacher.

The School Board of B. adopted this arrangement, and appointed M. and H., two of their number, to be managers along with the inspector of schools for the district.

In 1890 the School Board of B., by a majority of the whole members, passed a resolution dismissing the school teacher on three months' notice, the minute of the board bearing that "Mr R., Her Majesty's inspector, and Mr M., in their capacity as managers, concurred in and agreed to the dismissal. Mr H., in his capacity as manager, opposed the same."

The teacher having refused to remove from the schoolmaster's house (which formed part of his emoluments) on the ground that his dismissal was illegal, in respect that if the power of dismissal had been validly delegated to the managers, they had not competently exercised it, and that if the power of dismissal remained in the school board it had been invalidly exercised by the inspector taking part in the proceedings, the board brought an action for ejectment. *Held* that the dismissal was valid.

Opinion that the regulation of the Committee of Council making it a condition of giving assistance to school boards that the power of dismissing the teacher should be in the hands of the managers was *ultra vires*, as being inconsistent with the Public School Teachers Act, 1882, sec. 3, subsec. 2.

1ST DIVISION. Sheriff of Ross, Cromarty, and Sutherland. C.

ON 10th June 1885 Donald Macgregor, certificated teacher, was appointed by the School Board of the parish of Barvas, in the island of Lews, to be headmaster of the Lionel Public School in that parish. By the terms of his appointment he was to have, *inter alia*, a free house and garden, and three months' notice was to be given on either side of the termination of the engagement.

In December 1888 the Committee of Council on Education in Scotland resolved to give assistance to certain parishes in the Highlands on, *inter alia*, the following conditions:—"1. The school board shall, in pursuance of section 22 of the Education (Scotland) Act, 1872, commit the management of each school under their charge to three managers, of whom one shall be Her Majesty's inspector in charge of the district. 2. To such managers shall be committed full powers of appointing and dismissing the teachers of the school under their management, of deciding as to the organisation of the school, the salaries of the staff, the fees to be exacted, and all items of expenditure in regard to the school, including lighting, heating, cleaning, and repairs."

In January 1889 the School Board of Barvas adopted this arrangement, and appointed Mr Maclennan (their chairman) and Mr Helm, one of their number, to be the managers of the Lionel School along with Mr Robertson, Her Majesty's inspector for the district.

On 26th May the clerk to the school board sent the following letter to Mr Macgregor:—"School Board of Barvas, Stornoway, 26th May 1890.—Dear Sir,—Lionel Public School,—I enclose extract from minutes of a

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meeting of this board, held to-day.* The extract contains intimation of your dismissal from office, and the dismissal will take effect on the expiry of three months from this date. Please acknowledge receipt hereof."

Mr Macgregor having disputed the legality of his dismissal, and having refused to remove from the schoolmaster's house, the School Board and Mr Robertson and Mr Maclennan, managers, brought an action of removing in the Sheriff Court at Stornoway.

The pursuers pleaded;—The defender's right of occupancy of the said dwelling-house being to cease and expire on 26th August 1890, and it being the pursuers' desire that he shall remove therefrom on that date, decree ought to be granted as prayed for.

The defender pleaded;—(4) The defender not having been validly or legally dismissed from the office of teacher of Lionel Public School, is not bound to remove from the dwelling-house attached thereto.

On 15th November 1890 the Sheriff-substitute (Davidson) pronounced an interlocutor in which, after findings in fact, he found in law "that said resolution was valid, in terms of the Public Schools (Scotland) Teachers Act, 1882, and the notice thereof given to the defender was sufficient compliance with the terms of the agreement between the School Board and the defender," and granted warrant to eject as craved.

The Sheriff (Jameson) on appeal adhered on 26th December.

The defender appealed, and argued;—The defender's dismissal was invalid. If it was held to be the act of the managers it was invalid in respect that no notice was given by the managers of their intention to dismiss, and the minutes bearing to record the dismissal were those of the

* "Extract from Minutes of Meeting of the School Board for the parish of Barvas and Managers, held at Barvas on 26th May 1890.—Present: Messrs William Maclennan, James Paul Helm, Rev. D. Macbeath, Colin Morison, Murdo Macfarquhar, Roderick Macleod, Robert Hunter. Present also, J. L. Robertson, Esq., H.M.I.—Lionel School.—The clerk read a correspondence which had taken place since last meeting between himself and Mr Donald Macgregor, head master of Lionel Public School, from which it appeared that Mr Macgregor refused or delayed to tender his resignation of office, and that the following notice had been accordingly sent to Mr Macgregor, in terms of the Public Schools (Scotland) Teachers Act, 1882, viz.:—'School Board of Barvas, Stornoway, 2d May 1890.—Dear Sir,—Lionel Public School,—I hereby give you notice, that at a meeting of the School Board for the parish of Barvas and managers, to be held within Barvas Inn, on Monday, 26th May current, at 1 o'clock P.M., a motion for your dismissal from the office of teacher of Lionel Public School will be considered. Please acknowledge the receipt of this notice. Yours truly, JOHN ROSS, Clerk.—Mr Donald Macgregor, teacher, Lionel,'—to which the following unsigned reply had been received:—'Lionel Schoolhouse, 5th May 1890.—J. Ross, Esq., Clk. to Barvas S. Board and Managers.—Dear Sir,—I received your notice of 2d instant. I consider it is illegal.' The Rev. Duncan Macbeath thereupon moved, that Mr Macgregor be dismissed from the office of headmaster of Lionel Public School at the expiry of three months from this date. The motion was seconded by Mr Murdo Macfarquhar. Mr James Paul Helm moved as an amendment that Mr Macgregor be not dismissed from office. The amendment was seconded by Mr Roderick Macleod. The amendment and motion having been put to the vote, the former was not further supported. The motion for dismissal was concurred in and agreed to by Mr Robert Hunter and the chairman, and it accordingly became the finding of the meeting. Mr Colin Morison declined to vote. Mr Macgregor is accordingly dismissed from office, the dismissal to take effect on the expiry of three months from this date. Mr Robertson, H.M.I., and Mr Maclennan, in their capacity as managers of Lionel School, concurred in and agreed to the dismissal. Mr Helm, in his capacity as manager, opposed the same. A true extract. JOHN Ross, Clerk."

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hool Board, not of the managers. The motion to dismiss was made and onded by members of the School Board who were not managers. rther, the managers had no power to act by a majority, and they were unanimous. Probably the defender's better ground of defence was t the dismissal was the act of the managers. It was true that under Public Schools Teachers Act, 1882,* a school board had probably no ver to delegate the power to dismiss teachers as it had under the Act 1872,† but if the teacher consented to such delegation that took the e out of the Act; and it was to be inferred here that the defender had consented. If, however, the delegation was held to be *ultra vires* of Board the dismissal by the Board was illegal by reason of the pre-ce of the inspector of schools, who took part in the meeting, although a member of the Board.[1]

The pursuers were not called on.

LORD ADAM.—The question which we have here to consider is whether the nissal of the appellant, Mr Macgregor, from his office of headmaster of the nel Public School in the parish of Barvas was a good dismissal or a bad nissal. Mr Macgregor says it was a bad one, in respect that the power of nissal was delegated to the managers of the school, and that they, and they ne, had power to dismiss him, and therefore that a combined meeting of the nagers and the School Board rendered the dismissal null, as the managers ht have been influenced by the pressure of the members of School Board who e not managers. He also maintains alternatively that if the School Board not the managers had the power of dismissal, then the dismissal was null espect of the presence of Mr Robertson, one of Her Majesty's inspectors of ools, who was a manager but not a member of the School Board.

Now, the question arises in this way as to the powers of these two bodies. ppears to be clear that by the 22d section of the Education Act, 1872, a ol board could delegate any of its powers except that of raising money. then we have the Act of 1882, which in its 3d section, subsection 2, pro-es that,—"No resolution of a school board for the dismissal of a certificated her shall be valid unless agreed to by a majority of the full number of mem-of such school board." It would rather appear from these words that a lution by a majority of the whole school board is necessary to the dismissal teacher, and it seems to follow that the power of dismissal cannot be dele-d by the school board to managers. But this further matter occurs. The ication Department for Scotland, finding it necessary to come to the assistance chool boards in certain cases where difficulties had arisen as to school pro-on, made certain arrangements to help the boards upon certain conditions. se conditions are set forth in a minute of Committee of Council on Education Scotland dated 21st December 1888. One of these conditions is expressed these terms:—"The school board shall in pursuance of section 22 of the ication (Scotland) Act, 1872, commit the management of each school under ir charge to three managers, of whom one shall be Her Majesty's inspector

* The Public School (Scotland) Teachers Act, 1882 (45 and 46 Vict. c. 18), vides, section 3, subsection (2), that "no resolution of a school board for the nissal of a certificated teacher shall be valid unless agreed to by a majority of full number of members of such school board."

† By the 22d section of the Education (Scotland) Act, 1872 (35 and 36 Vict. 62), power was given to school boards to delegate any of their powers to nagers of schools appointed by them, except the power of raising money.

[1] Queen v. Justices of Hertfordshire, 1845, 6 Ad. and Ell. (Queen's Bench) 753.

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in charge of the district." Then there follows a resolution to the effect that the managers shall have the full power of appointing and dismissing the teachers of schools under their management, and of deciding on various other matters.

Now, it appears by the minutes of the School Board of Barvas that they agreed to accept the assistance of the Education Department on the terms set forth in the minute of the department to which I have referred, and to appoint three managers upon the conditions mentioned, and they accordingly appointed the chairman of the board, Mr William Maclennan, and Mr Helm, another member of the board, together with Mr Robertson, Her Majesty's inspector, to be managers of the Lionel School, and it is this that raises the present question: for while the School Board have accepted the grant upon the conditions stipulated by the Education Committee, one of these conditions is that the managers shall have full power of dismissal, while it is said that under the 3d section of the Act of 1882, the School Board are debarred from delegating their powers in this matter. This raises a somewhat novel question.

Mr Wilson has contended that the dismissal was bad because the power was vested in the managers. It is said by the Sheriff that such a delegation was *ultra vires*, and I am disposed to think that it was. What is the alternative? That the power of dismissal remained where it was, viz., in the School Board.

The defender appears to me to be on the horns of a dilemma. If the delegation to the managers of the power to dismiss teachers was *ultra vires* of the Board, the power remained in the School Board, and was well exercised by them: if, on the other hand, the delegation to the managers was valid, then the defender was validly dismissed by them, as they were entitled to act by a majority as much as any other body. It was argued, however, on the authority of the well-known case of the *Queen* v. *The Justices of Hertfordshire*, 6 Ad. and E. 753, that whichever body had the power of dismissal, its decision was invalidated by reason of the presence of persons who did not belong to it, for, as there, Mr Robertson, though a manager, was not a member of the school board, and only two members of the board were managers. But I think that that case was quite different in its circumstances from the present, and in no way rules it. On the whole matter I think the dismissal of the defender was valid, and that we should adhere to the judgment of the Sheriff.

Lord M'Laren.—The question here is whether the employment of the defender as schoolmaster of the Lionel Public School in the parish of Barvas was terminated in respect of his lawful dismissal from office, because of course if it was, the School Board is entitled to evict him from the dwelling-house attached to the school. That question of dismissal depends on the further question what body in Barvas is entitled to dismiss the schoolmaster of the Lionel School. Is it the School Board or is it the managers of the school, one of whom is not a member of the School Board, but is one of Her Majesty's inspectors of schools? That question appears to depend on the construction of clauses in two Acts of Parliament. The earlier of these Acts—the Act of 1872—permits school boards to delegate all their powers except that of raising money, but by the Act of 1882 a restriction was placed on this power of delegation, and it was provided that no teacher should be dismissed except on a certain premonition and by an absolute majority of the whole school board. I have been unable to see why the Act of 1882 should not be held to apply to the parish of Barvas, but apparently the question was regarded as one of difficulty, for the argument before the

Sheriff seems to have turned upon the question whether the delegation of the power of dismissal to the managers was legal. The Sheriff held that it was not legal, and I agree with him. I certainly think that, since the passing of the Act of 1882, no authority except that of an absolute majority of the school board can bring about the dismissal of a teacher.

In the argument which we had here, the defender appeared to admit that his dismissal was the act of the School Board and not of the managers, but he contended that that dismissal was illegal, because one of Her Majesty's inspectors of schools was present at the meeting of the Board which passed the resolution to dismiss the defender, and concurred in the resolution in his capacity of manager. I confess I am unable to follow that argument, and I agree with Lord Adam that there is a clear distinction between such a case and cases like that of the *Queen* v. *The Justices of Hertford*. Justices of the Peace act judicially in all matters brought before them in their official capacity, and it is an invariable rule in the administration of justice that no outside advice or assistance shall be permitted. Justice of the Peace Courts, as much as tribunals of a higher order, are not entitled to take advice or assistance except from the parties themselves, or from procurators duly qualified and authorised to represent the parties. School boards are in quite a different position. They are not judicial, but are purely administrative bodies, and are entitled to take advice from any quarter they please. Indeed, I doubt whether the members of a school board would be rightly discharging their duties if they shut their ears to the advice and opinions of their constituents, or of other persons qualified to give assistance; and to say that the only persons from whom a school board may not take advice are the inspectors of schools is sufficient to shew the unsoundness of the proposition for which the defender contends.

I am therefore of opinion that on whichever ground the defender bases his case it is untenable, and I concur with your Lordship in holding that the appeal ought to be dismissed.

LORD KINNEAR.—I am of the same opinion. By the terms of the defender's appointment three months' notice was to be given by either party of the termination of the engagement; and therefore he was liable by the terms of his appointment to be dismissed, or to have his appointment brought to an end, at any time on three months' notice. But then he is entitled to the protection of the Act of 1882. That Act did not restrict the title of the School Board to terminate the defender's appointment according to its conditions, but did provide that they should not do so without due notice and deliberation, and that he could only be dismissed by the decision of an absolute majority of the board. He was therefore liable to dismissal on three months' notice by an absolute majority of the whole Board.

Now, a majority of the board have resolved upon his dismissal, and I think that that is sufficient for the decision of the case, for I am unable to see how any arrangement by the Scotch Education Department can deprive the defender of the protection of the Act of 1882, unless he consented to it. It was put in argument as if a new contract had been made by which the defender agreed to accept dismissal at the hands of the managers. There is no evidence of that, and it is impossible to accept that view, because there is no evidence that the defender knew of the arrangement between the Scotch Education Department and the School Board. I am quite unable to see any indication that the

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conditions of the defender's appointment were altered by that arrangement, and am therefore of opinion that the Board were not in a position to dismiss the defender save by the vote of a majority of the whole Board.

But although I have thought it right to express my opinion upon that point, I think it is of very little importance to the defender, because it is not disputed that he was dismissed by a majority of the full Board, and that the procedure required by the Act was duly followed out.

I agree with both your Lordships that the case of the *Justices of Hertfordshire* has no bearing on this question, and I think that a school board would be very far from conforming with the directions of the statute, if, when there was a question of dismissing the teacher of a school, they failed to consult those of their body who happened to be managers of the school, and also Her Majesty's Inspector, if they were able to get his advice.

I think, therefore, the defender's dismissal is quite competent.

The LORD PRESIDENT was absent.

THE COURT dismissed the appeal.

STUART & STUART, W.S.—JOHN ELDER, S.S.C.—Agents.

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THOMAS CLAVERING, SON, & COMPANY, Pursuers (Respondents).—*Johnston—Dickson.*

GOODWINS, JARDINE, & COMPANY, Defenders (Reclaimers).—*Murray—Ure.*

Company—Shares—Certificates fraudulently issued by secretary of the company—Right of bona fide holder for value—Damages for failure to place on register.—A person advanced money to B on the security of share certificates bearing that B had a certain number of fully paid £10 shares in a limited company. The certificates bore the common seal of the company, and the signatures of two directors and of the secretary.

In an action by the lender against the company for damages arising from their refusing to register the shares in terms of the certificates, the company pleaded that B had only paid £1 per share, that the certificates had been issued by the secretary without the authority of the company, that he had fraudulently allowed them to remain in B's hands, and that B was a party to the fraud.

Held that the objection could not be sustained, as the pursuer was entitled to rely upon the validity of the certificates.

2D DIVISION. Ld. Kyllachy. M.

ON 17th September 1890 Thomas Clavering, Son, & Company, merchants and bankers, Glasgow, and Thomas Clavering, individual partner of the firm, raised this action against Goodwins, Jardine, & Company, Limited, iron and steel manufacturers, incorporated under the Companies Acts 1862 to 1886, having their registered office at 79½ Gracechurch Street, London.

The conclusion of the summons (as restricted) was for payment to the pursuers of the sum of £7000 as damages in respect of the defenders' failure to place the pursuer Thomas Clavering on their register, as transferee of 640 seven per cent fully paid preference shares of £10 each, in terms of their certificate.

The circumstances which gave rise to the action were as follows:—

In September 1889 William Jardine, one of the managing directors of the defenders' company, who held certain debentures and shares in the company, including 140 fully paid-up £10 shares, and 500 £10 shares

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on which only £1 a share had been paid up, wrote to Mr Francis Stobbs, secretary of the company, asking him to send him certificates applicable to those debentures and shares. It appeared that the whole £10 per re payable on the unpaid-up shares had become due in June, and the ectors and secretary had, in view of the shareholders paying their calls taking up their scrip, sealed and signed the share certificates by anpation, leaving them in a book attached to counterfoils, from which y fell to be separated as payment was made by the several shareholders. e clerk, omitting to notice that Mr Jardine's 500 shares were not fully d up, sent him the certificates applicable to these shares along with the enture certificates and the certificates of the fully paid-up shares. The ificate as regarded the 500 shares, which was dated 29th June 1889, ified that "William Jardine . . . was proprietor of 500 preence shares of £10 each, fully paid up . . . in Goodwins, Jare, & Company," and it was sealed and signed by two directors and the etary.

n 5th September 1889, Jardine wrote to Stobbs as follows:—"My r Sir,—In sending me debenture certificates, you have enclosed certie for 500 preference shares, on which I have as yet only paid £500. t is not asking too much, I would like to retain the certificate for a e, as I think I might with it and my other certificates raise £4500, let you have same by end of month. This would give you plenty of ls for dividend," &c.

t the same time Jardine sent Stobbs two cheques post-dated 30th tember 1889, for the sum of £4500 in payment of the amount due to e these shares fully paid up, but instructed Stobbs that the cheques e not to be used until permission was given him to use them. Stobbs ined the cheques in his private drawer, and, without consulting his ctors, he allowed Jardine to keep the certificates. The cheques were equently dishonoured.

n 13th September Jardine obtained a cash advance of £4500 from srs Clavering, Son, & Company, and in security he executed and dered to them a transfer of the 640 shares in favour of Thomas Clavering, he also delivered to them the certificates which he held for these es, under an agreement that if the advance was not repaid within a th they were to be at liberty to sell the shares.

pon 24th October 1889, the loan not having been repaid within the ulated time, Thomas Clavering wrote the following letter to Stobbs:—erewith I enclose you transfer by Wm. Jardine in my favour for six dred and forty (640) 7 per cent pref. shares of £10 each fully paid in r company, and certificates for same as per note at foot. Have the dness to mark receipt of same as having been lodged with you on the gin of the transfer, and return same to me in course of post."

n 25th October Stobbs returned the transfer with the following docquet ched to it,—"Certificates of 640 shares at office, 79½ Gracechurch et, London, E.C. . . . F. Stobbs, Secy. 25/10/89."

n 2d November Clavering wrote to Stobbs,—"Please take note that aim the dividend on the 640 shares in your company sent you 24th

tobbs replied on 5th November,—"Referring to your esteemed favour he 2d inst., I note that you claim the dividend on 640 shares, as per nsfer certified by me on the 25th ult."

n 20th November Clavering again wrote for payment of the divid, and he enclosed the certified transfer of the 640 shares, requesting they should be registered, and certificates therefor be sent in due rse.

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No satisfactory reply to this letter was received, but Stobbs wrote on 17th December to say that he was under the impression that Jardine had arranged with Clavering that the shares were not to be registered out of his (Jardine's) name, "and that only the transfers were to be lodged here, as a notice that they were to be so dealt with."

On 6th February Clavering wrote to Stobbs,—"Referring to your letter of the 17th December, please hand me in course certificate for the 640 shares your hold for me."

Stobbs continued to make excuses throughout March and April for not sending the certificate in answer to Clavering's letters, till on 27th May the defenders' law-agents wrote the following letter to Clavering:—"By instructions of the board of directors which met yesterday, we beg to inform you that the company decline to recognise the alleged transfer by Mr William Jardine in your favour, dated 13th September 1889, of 640 preference shares of £10 each, therein described as fully paid, in respect that only 140 of the shares therein mentioned were fully paid, and upon the remaining 500 only £1 per share had been paid; as also that the secretary had no power to give, and Jardine had no right to get, delivery of fully paid certificates where full payment had not been made; that the delivery was illegal and contrary to orders; that the company cannot recognise certificates unlawfully obtained, nor can they recognise the marking on the transfer indicating lodgment of the certificates. We are to add that the board were entirely ignorant of these proceedings until a few days ago."

The pursuers averred that, at the date when they acquired the shares, they were of the full value appearing on the face of the certificates, viz., £6400. Two dividends payable at 11th November 1889 and 1st July 1890 had since been declared, amounting together to the sum of £448. The estates of William Jardine were sequestrated on 9th April 1890, and he was then owing the pursuers the sum of over £9000 (including the sum of £4500), and they were entitled to hold the shares and produce thereof when sold against the whole of the debt. (Cond. 10) "Owing to the refusal of the defenders to register the said transfer, and to issue new certificates, as they were bound to do, the pursuers were prevented from selling the said shares as they were entitled to do, and would have done if they had had the certificates. The shares have now greatly depreciated in value, and the pursuers have, through the defenders' illegal and unwarrantable refusal to register the transfer of said shares in favour of Mr Clavering, and to issue certificates therefor, sustained loss and damage to the extent of £7000. The pursuers, in the event of share certificates being now delivered to them, are willing (under reservation of their whole pleas if immediate delivery is not made) to deduct the value of the said shares at the time of such delivery from the sum to be recovered under the present action."

The defenders averred that Stobbs acted fraudulently and outwith the scope of his duty in permitting Jardine to keep the certificates which he had obtained by mistake and inadvertence. Stobbs had been dismissed for his fraudulent conduct, and Jardine being bankrupt had been interdicted from acting as managing director of the company. Until the end of May 1890, the defenders had no knowledge whatever of the transactions in question. They were willing to deliver to the pursuers the certificates for the 140 shares which were fully paid up.

The pursuers pleaded;—(1) The pursuers having made the advances referred to on the faith of the said share certificates issued by the defenders to the said William Jardine for the shares referred to in the summons, and of the transfer of said shares granted by him in favour of the

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l Thomas Clavering, they are entitled to decree in terms of the first clusion of the summons. (2) The defenders having illegally and unrantably refused to register the said transfer and issue share certificates the shares so transferred to Mr Clavering for the pursuers' behoof, y are liable to the pursuers in damages.

The defenders pleaded;—(3) The said 500 shares being paid up only he extent of £1 on each, the pursuers are not entitled to claim delivery he certificate thereof as of fully paid-up shares, or to be entered in the ister of shareholders of the defenders' company as holders of the same. The actings of the said F. Stobbs having been fraudulent and outwith scope of his duty as the defenders' secretary, the defenders are not in way bound thereby.

At a proof the above facts were established. As regarded the value of shares, Clavering deponed that, at the date of his purchase from Jare (September 1889), he considered the shares to be worth from £9 to each, and that he could have sold them judiciously and by degrees extinction of the debt. He further deponed that the shares depreed in value in April 1890, after Jardine's bankruptcy, being worth in nt of fact at that date about £3 each. In December 1890, they were ted at 24s. or 25s. on the Stock Exchange.

The defenders led evidence to shew that in September 1890 the price he shares ranged from £5 to £6, 10s.

On 20th December 1890, the Lord Ordinary (Kyllachy) decerned inst the defenders for the sum of £4000, with interest at the rate of 5 cent from 6th February 1890 until payment, the pursuers being bound exchange for said payment to transfer to the defenders, or their inee or nominees, the 500 £1 paid shares, and the 140 fully paid res mentioned on record.*

"OPINION.—The pursuer of this action lent to Mr W. Jardine in Septber 1889 a sum of £4500, on the security, as he believed, of, *inter alia*, 500 paid £10 preference shares in the defenders' company. He subsequently overed that these shares were not fully paid, being in fact paid up only to extent of £1 per share. But, having had handed to him at the time of the a certificate under the company's seal, and signed in terms of its articles, ing that the shares stood registered as fully paid shares in the borrower's e, he brings the present action against the company, seeking damages for company's failure (or inability) to place him on the register as transferee of fully paid shares, in terms of the certificate. The leading conclusion of the mons is for registration in his name of the shares as fully paid. But it was ceded at the debate that this would be *ultra vires* of the company, and rdingly the demand is, as I have said, restricted to a demand for damages, measure of the damage being said to be the market value of the company's paid shares at the date when the company were called on to register the sfer in the pursuer's favour.

A proof has been led, from which it appears that the history of the certifi and the manner in which it found its way into Mr Jardine's hands was as ows:—Mr Jardine was one of the managing directors of the defenders' comy, and he and his relatives held a number of debentures and fully paid es in the company, distinct altogether from the shares in question. In Septber 1889 he wrote asking the secretary of the company to send him certifis applicable to those debentures and shares, and, by what appears to have n the mistake of a clerk, there was at the same time sent him a certificate for 500 shares now in question, for which certificate he did not ask, and which ht not to have been sent him until he had paid up the £9 per share still due those shares. The mistake arose, or rather became possible, in this way. whole £10 per share payable on the company's preference shares was, it ears, due, and had been so, since the month of June 1889, and in June

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The defenders reclaimed, and argued;—(1) Stobbs had, from first to last, acted solely in the interests of Jardine. He had not only acted

1889, in anticipation of Mr Jardine and the other shareholders paying their calls and taking up their scrip, the directors and secretary had (following, they say, a usual practice) sealed and signed the share certificates by anticipation, leaving them in a book, attached to counterfoils, from which they fell to be separated as payment was made by the several shareholders. The clerk who was directed to send the share and debenture certificates for which Mr Jardine asked, omitted to notice that the 500 shares in question were in a different position, and accordingly Mr Jardine was, by the carelessness of the company, or one of its officers, put in possession, not only of the certificates to which he was entitled, but also of the certificate in question, applying to these 500 shares, which certificate should not of course have been issued to him until he had paid the full amount of his calls.

"Had matters stopped here—that is to say, had Mr Jardine gone straightway to the pursuer, and making a fraudulent use of the certificate which he had thus got, obtained the loan which has given rise to the action, the question between the pursuer and the company might not have been clear, but it would have been considerably simplified. It happened, however, that the affair took a further turn. Mr Jardine at once discovered the mistake, but, instead of at once returning the certificate, he wrote the following letter to Mr Stobbs, the secretary:—(His Lordship here quoted the letter of 5th September 1889, *supra*). The secretary unfortunately had not the moral courage to deal with this proposal as he ought. He looked to Mr Jardine as his superior, and did not, as was his clear duty, communicate with the other directors or insist personally on the immediate return of the certificate. On the contrary, he allowed Mr Jardine to retain the certificate, having apparently had his scruples satisfied in a very inadequate manner by the receipt from Mr Jardine of a cheque for the amount of his calls, which cheque, however, he was requested not to cash until Mr Jardine gave him leave. The result was that Mr Jardine was allowed to keep the certificate, that the cheque remained in the secretary's private drawer till Mr Jardine became bankrupt in the following April, and that in the meantime Mr Jardine made the use of the certificate which has given rise to the present action.

"In these circumstances, the question to be decided is—What are the pursuer's rights as against the company, having in view the terms of the certificate, but having also in view that those terms are inconsistent with the share register, and that the certificate left the hands of the company in the manner which I have just described?

"It will be, in the first place, convenient to see what are the relative rights which arise upon the issue in regular course of a certificate of shares or stock in a limited company.

"Such certificate, it will be observed, is a statutory document—that is to say, it is recognised by the Companies Acts. By section 31 of the Act of 1862 it is provided, 'A certificate under the common seal of the company specifying any share or shares or stock held by any member of a company shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified.'

"And by the articles of association of this (the defender's) company, section 11, it is provided, 'Every member shall be entitled to receive, gratis, a certificate under the common seal of the company, specifying the share or shares held by him, and the amount paid up thereon.'

"The certificate here, therefore, is a certificate by the company, and is a document by which the company is bound as by any other document issued in the course of its business. And, looking to the terms of the document, there seems no difficulty in carrying its operation and effect at least this length, that it implied, if it did not express, a contract as between the company and the person to whom the certificate was issued that the company should recognise the latter as a shareholder to the extent set forth in the certificate, or otherwise, should

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dulently, but entirely outwith the scope of his employment.[1] He had ctically issued the company's shares at a discount, a transaction which e good to him the pecuniary value of that position. In short, as between company and the recipient of the certificate in regular course, it seems not btful that the company impliedly warrants the facts set forth in the certifi- On the other hand, of course, the recipient is open to all exceptions ng from his own conduct or his own knowledge. If, for example, as has pened—(see *Simm and Others* v. *The Anglo-American Telegraph Company*, R., 5 Q. B. Div. 188), the transfer in his (the recipient's) favour, on the of which he has been registered and obtained his certificate, turns out, ough unknown to him to be a forgery, or if he has obtained the issue of the ficate by fraud, or if he is in any way open to any other personal exception, all such cases the company is free, and has a good answer to any action at instance of the recipient of the certificate. All this is probably clear gh.

But *quid juris* when the question arises, not with the recipient of the ficate, but as here, with a second transferree—a third party—to whom the ficate has not been issued, who has had no communication with the com-, but to whom the certificate has been handed or exhibited, and who in nce thereon and the relative transfer—and in good faith—has made an nce of money—is he, when he lodges his transfer and demands registration rding to the certificate, to be held open to all the exceptions pleadable st his transferrer? Is he, in other words, to be treated as an ordinary nee having no higher rights than his cedent? or is he, on the other hand, e position of having an independent claim against the company, founded e certificate as a document addressed to all the world and warranting to body concerned that the shares mentioned exist and are held as mentioned e certificate?

On principle, and if the question were open, I acknowledge that there s much to be said against putting a certificate of shares in the position ically of a negotiable instrument. The statute only declares that it shall *ima facie* evidence, and it may be doubted whether a proposed transferree t to be in safety to rely on such *prima facie* evidence, and ought not to be red for his safety to take the precaution of consulting the company's register. t appears, however, to be settled by a long course of decisions in England, s I see no reason to doubt, on sound views of commercial expediency, that tificate of shares, once regularly issued, is a document binding the company ke good its representation to any *bona fide* transferree for value into whose s it (the certificate) comes. The way it is expressed is that the company is pped' in a question with such transferree from disputing the truth of the ficate, and the translation of that seems to be that the company is held to nt the truth of the statements which the certificate makes, and so to be *ex contractu*, in specific performance, if that is possible, or in pecuniary ation if that is impossible. The cases referred to are noted below. They be found collected in Lindley, I., 145, and Buckley's Notes, to section the Companies Act. *Shaw* v. *The Port Philip and Colonial Gold Mining Limited*, 13 Q. B. Div. 103; *Bahia and San Francisco Railway Co.*, L. R., B. 584; *British Mutual Banking Co., Limited*, v. *Charnwood Forest Rail-Co.*, L. R., 18 Q. B. D. 714; *Bishop* v. *The Balkis Consolidated Co.*, L. R., . B. D. 513; *Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004.

What, therefore, the pursuer here got, or was entitled to believe he had got, an obligation of this company, duly sealed and signed, and giving him the to sue the company *ex contractu* on an implied warranty, or, as it is put ngland, on the principle of estoppel. The question which remains, and on

[1] Lindley on Company Law, 5th edn., pp. 208 to 210; The British Mutual king Co., Limited, v. The Charnwood Forest Railway Co., 1887, L. R., 18 . Div. 714; Limpus v. The London General Omnibus Co., Limited, 1862, . J. Exch. 34.

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it was *ultra vires* of the company to have authorised.[1] The defenders were not then to be held responsible for their secretary's unlawful actings,

which the case really turns, is whether the fact that the certificate was irregularly or fraudulently issued by the officials of the company can affect the legal operativeness of the document, as an obligation of the company, duly signed and sealed and put in circulation by the negligence or fraud of the company's officials.

"I confess I am unable to see how the pursuers can be affected by these considerations. If the document found its way into what I may call circulation by the negligence of the company's officials, that of itself seems to afford a fairly sufficient ground of liability. And if, on the other hand, what happened amounted to fraud on the part of the officials, it was, it seems to me, fraud committed, not against the pursuer, but against the company. A negotiable instrument or document of title—say to goods—duly executed by a company, would not, I apprehend, be the less binding on the company—I mean in the hands of a *bona fide* holder for value—because it had been issued by the company's officials in violation of their duty, or for a fraudulent purpose of their own. And although of course a certificate of shares is not properly a negotiable instrument, nor in a proper sense a document of title, it is yet, as we have seen, substantially in the same position, so far as regards what in this question is the essential matter—viz., the company's inability to plead against a *bona fide* transferee for value that he has no better title than his transferrer.

"It is not necessary to consider what would have been the result if the certificate had been forged. The case of *Shaw* v. *Port Philip and Colonial Gold Mining Company, Limited*, 13 Q. B. D. 103, one of the cases I have already referred to, goes the length of holding that even in that case the company would be liable—at least if the document was issued by the proper officer of the company, although fraudulently and for his own purposes. But I confess I somewhat hesitate to accept that decision as ruling the case of forgery, which involves some very special considerations. Neither do I think it necessary to consider what would have been the result if the certificate here had been stolen from the company's repositories. It may be that in that case the company would only be liable on the ground of negligence. But there also—I mean in the case of theft—different considerations come in. In the present case the certificate was not only genuine but it was transmitted to Jardine along with a letter from the proper officer of the company, and although it is not proved that that letter was exhibited to the pursuer, it yet existed, and the pursuer would have been none the wiser if he had called for it.

"I am therefore of opinion that the pursuer here is entitled to the remedy which he asks. But I desire to add that I do not place my judgment on the ground urged in argument, that the pursuer has his redress against the company as having been defrauded by the company acting through its authorised agents. If that had been the ground of action, I should, I confess, have had great difficulty—I should indeed have been disposed to hold the defenders' answer a good one, viz., that the fraud, if committed, having been committed by the company's agents for their own purposes, and in their own interests, the company was not responsible except in so far as it took benefit. But here, if I am right, the pursuer was not defrauded at all, at least as regards his pecuniary interests. He got, if I am right, a valid document effectually binding the company, and the fraud was not therefore a fraud committed upon him, but a fraud committed against the company.

"On the question of damages there is a good deal of difficulty. But upon the proof I am disposed to come to the conclusion (1) that the pursuer did not seriously press for registration of his transfer so as to put the company in default until the month of February 1890; and (2) that while the evidence is somewhat imperfect, the value of the paid-up shares at that time was not more

[1] Klenck v. East India Co. for Exploration and Mining, Limited, Dec. 21, 1888, 16 R. 271.

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that all the more because they had reaped no benefit in the matter.[1] decision in the case of *Shaw* v. *The Port Philip and Colonial Gold Mining pany, Limited*,[2] relied upon by the pursuers, was accepted with hesi- n by the Lord Ordinary, and was, it was contended, unsound. In it company was held to be "estopped" from disputing a purchaser's to shares in the company, forged certificates of which had been d to him by the company's secretary. The case of *In re Bahia and Francisco Railway Company*[3] was not in point. In it a company held to be "estopped" from disputing the truth of a certificate which come into the hands of a *bona fide* transferree for value, the Court ing that the company had issued shares which it was bound to know t find their way into the hands of a third party. In the present no certificates were issued to Clavering, who got no proper transfer ever. (2) Assuming damages to be due, the Lord Ordinary's prin- of assessment was erroneous. The measure of such damages was to certained, not by the market value of the shares at the time of the action, but by the light of subsequent events, including the effect of ine's bankruptcy.[4] There was no evidence that Clavering meant to his shares in February, the date at which the Lord Ordinary had con- ed the value of the shares as affecting the damages. Indeed, if he sold them, he would have swamped the market and brought down value. In December following they were proved to have been prac- ly valueless.

rgued for the pursuers;—(1) Clavering was a *bona fide* transferree alue of the company's certificate regularly sealed and signed by the tors and secretary. The company were "estopped" or barred in a tion with him from disputing the truth of that certificate.[5] How-

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£6 per share. It has to be noticed that Jardine's difficulties had by that become public, and according to the pursuer himself his sequestration in following brought the shares down to about £3. Altogether, I think I he pursuer full justice by fixing his damage on this head at £3000, with est from 6th February 1890.

There is another parcel of shares,—140 in number,—which were part of ecurity for the loan, and as to which the question is entirely separate. e shares were in fact fully paid up, and the pursuer's only complaint as to is that the company delayed to register the transfer until the shares had ly depreciated in value. I think that, for the reasons already stated, the any here were not in default until the month of February, and that the ge suffered is the difference between the then value of the shares and the e at the date of the defences when the company offered to register. That ence I do not think I have the means of estimating, because the company nd that their shares have still a substantial value, but I think I shall do ce by giving the pursuer decree for £6 per share, the assumed value in uary, he being bound to transfer the shares to the company or its nominee condition of receiving that payment. The 500 shares I shall also require e transferred, if the defenders desire it. But they (not being paid up) are, ould suppose, of no value, and were of no value at any time during the roversy.

On the whole, the pursuer will have decree for £4000, with interest from February 1890."

Western Bank of Scotland v. Addie, May 20, 1867, 5 Macph. (H. L.) 80, per l Chanc. (Chelmsford), p. 85, per Lord Cranworth, p. 90, 39 Scot. Jur. 437.

Shaw v. The Port Philip and Colonial Gold Mining Co., Limited, 1884, L. R., Q. B. Div. 103.

In re Bahia and San Francisco Railway Co. 1868, L. R., 3 Q. B. 584.

Peek v. Derry, 1887, L. R., 37 Ch. Div. 541.

Buckley on the Companies Acts (6th edn.), p. 93, notes on sec. 31 of the Act

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ever fraudulently Stobbs acted in issuing the certificate to J truly within the scope of his employment, his actings b ultimately to benefit the company.[1] In *Mackay's* case, Smith, in delivering the judgment of the Court, pointed out of *Addie*,[2] relied on by the defenders, did not at all confl *wick* v. *English Joint Stock Bank*,[1] for it was decided which did not arise in *Barwick's* case. He further state *dicta* of Lords Chelmsford and Cranworth in *Addie*, to the action of deceit was not maintainable against a corporatio the frauds of its agents, were *dicta* relating to English fo and not necessary to the decision of the case. There was n Lord Justice Lindley's book[3] that the case of *Shaw* v. *The P Colonial Gold Mining Company, Limited*,[4] was unsound. *Bishop and Others* v. *The Balkis Consolidated Company, Lim* tinguishable from the present case. In it the plaintiff had of shares in a company which had been transferred to hi upon the faith of a "certification" by the company's secre Court held that he could not recover in respect the word " did not import a warranty of the transferrer's title, but mere tation by the company that the document had been lodg secretary apparently in order, and that the transferrer was e shares. In the present case there was the issue of "cert As regarded the damages, if the amount fixed by the Lord altered, it ought to be increased. The measure of damag ascertained by seeing what the pursuers could have obt shares if they had been put in a position to sell in Novemb beginning of 1890, as they ought to have been. Even in Se and after Jardine's bankruptcy, the price of the shares wa £6, 10s.

Lord Justice-Clerk.—The pursuer in this case asks for dam that a transfer which he received of certain shares in the defen which were certified to him by the secretary of the company on 2 1889 was not registered by the company, and which shares he h to get rid of in the market.

The circumstances are very peculiar. It appears that Mr Ja one of the managing directors of the company, had induced the s company—a Mr Stobbs—who had sent him the shares in questi as if Mr Jardine had paid for them, while in point of fact he h small part of the price of them, to allow him to retain those sh from Mr Jardine a cheque for the amount to be paid upon them,

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of 1862; *In re* British Farmers Pure Linseed Cake Co., 1878, L. 533; Weir v. Bell, 1878, L. R., 3 Exch. Div. 238, per Baron Bra Burkinshaw v. Nicolls, 1878, L. R., 3 App. Cases, 1004; and *I* San Francisco Railway Co., *vide supra*, note 3.

[1] Barwick v. English Joint Stock Bank, 1867, L. R., 2 Exch. v. Commercial Bank of New Brunswick, 1874, L. R., 5 Privy 394.

[2] Western Bank of Scotland v. Addie, *supra*, note 1, p. 659.

[3] Lindley on Company Law, p. 484.

[4] Shaw v. The Port Philip and Colonial Gold Mining Co., note 2, p. 659.

[5] Bishop and Others v. The Balkis Consolidated Co., Limited, Div. 512.

nding that he was not to use the cheque till Mr Jardine allowed him to do Mr Jardine thereupon proceeded to transfer the shares with a view to sing money, and he did succeed in raising money from Mr Clavering upon se shares.

Now, in that state of circumstances, Mr Clavering maintains that he is en- ed to damages in respect of the position in which he has been placed with ard to those shares, and the Lord Ordinary has found that he is.

The defence maintained upon the part of the company is that the secretary s not acting within his duty as their servant in doing what he did, and that what was done was a fraud, they are not liable for his fraud. I cannot ept that. Their servant the secretary was authorised by them to conduct ir business, and it was his duty to issue such certificates as were issued in s case, and he did issue the certificate, which is duly signed by two directors, eing a certificate for these shares, and on the transfer being intimated by Clavering to the company, he, as the officer of the company, wrote upon margin the words which have been quoted in the course of the debate. w, in doing these things, I hold that he was acting as the representative of company whose duty it was to do such acts, and that the company must esponsible for the acts so done. I concur with the Lord Ordinary upon that tter.

The only remaining question is as to the damages sustained by the pursuer he result of those acts, and certainly the defenders have something to say on question of the amount of damages. The Lord Ordinary takes as the time which he must consider the question of damages, the month of February 0. The transaction took place in 1889, and the Lord Ordinary, fixing the od at February 1890, comes to the conclusion that the sum of damages that ht to be given is £4000. If that was the exact time at which the computa- of damages was to be made, I am not sure that I would agree with the d Ordinary in the amount; but the opinion I have formed after hearing the is that Mr Clavering is entitled to claim damages at an earlier period than t—in point of fact, the time from which he is entitled to claim damages is time at which he made his demand, in November 1889.

Now, it is perfectly true, as is maintained by the defenders, that a large nber of shares like these, if suddenly thrown on the market, would tend to ng the market down, and probably they would not realise anything like the which the pursuer represents; but it is also equally clear that if the pursuer had his shares placed on the register in 1889, he would have been able, hout doing anything so sudden as to throw the whole of them into the rket at once, to make a good realisation of them; and accordingly, that being I am inclined to hold that the sum of damages which the Lord Ordinary has wed in this case is not excessive, but is a reasonable sum in the circum- nces.

I understand that the defenders are quite willing to transfer the 140 shares ich are fully paid up to the pursuer, and to that the pursuer cannot have any ection, because the shares being fully paid up no liability can be incurred der them. But that is a matter really of no practical consequence in the case, hough it will be necessary slightly to alter the Lord Ordinary's interlocutor. e general result, however, at which we have arrived is practically the same that at which the Lord Ordinary has arrived, viz., that the sum of damages ould be as in his Lordship's interlocutor.

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LORD YOUNG.—I am of the same opinion.

I have not much hesitation in rejecting the argument which was addressed to us by the reclaimers here, to the effect that the company are not responsible for the consequences of the misconduct of their directors and secretary, or any two of their directors and secretary, or of their secretary alone.

It was, so far as we can judge, quite an intelligible and proper transaction between the pursuer here and Mr Jardine, whereby Mr Jardine got an advance of £4500 from the pursuer upon the security of a certain number of paid-up shares in this company, of which Mr Jardine was a director. It may have been a rash loan on the part of the lender, but it is a commonplace business transaction of loan of money on the security of a transfer of fully paid-up shares in the company. He got a transfer of 140 really fully paid-up shares, and he also got a transfer of 500 shares from Mr Jardine which were not fully paid up, but in regard to which Mr Jardine had a certificate that they were fully paid up, under the hands of two directors and the secretary of the company.

I do not need to explain in detail the circumstances under which Mr Jardine got that certificate with respect to the 500 shares. In point of fact, he got it from those who were the proper officers of the company to grant and issue such a certificate. It was signed by two directors and by the secretary, and issued by the secretary, the proper officer of this mercantile company to perform that duty. If they had been fully paid-up shares, and the company when required had registered the pursuer as the transferree, then there would, of course, have been no ground of complaint on the part of the pursuer at all.

But after the lapse of a month from the date of the loan, the borrower having a month to pay it,—according to the contract of loan it was to be paid in a month,—when it was not paid at the end of the month, he sent the transference of the 500 shares and the 140 shares—640 shares in all—to the secretary of the company to be registered in his name, and if everything had been properly done by the officers of the company, he would have been entitled to be registered in respect of those 640 shares. There was an application at an earlier date, on 24th October, but I do not refer to it. On the 20th November, however, he sent the transfers of those certified fully paid-up shares, 500, and the really paid-up shares, 140, to the secretary of the company, and desired that they should be registered. That was not done, and the company say they could not do it because the 500 shares were not fully paid up. I do not quite follow their reason for not doing it with respect to the 140 shares, but they declined to do it with regard to these either. The matter was put off and put off by the secretary who had been a party to this very gross fraud which had been committed: was put off and put off by him until the month of May following, when the pursuer was informed that the directors declined to recognise the transfer in his favour at all, and declined to put it upon the register.

Now, I agree with your Lordship that they were bound to put the transfer upon the register with respect to both sets of shares in November 1889; I think that was their obligation, and that they cannot be permitted to allege that the 500 shares were not fully paid up, in the face of the certificate of their own directors and secretary that they were fully paid up. I think they were estopped or barred, or whatever term you choose to use, from pleading that they were not fully paid up. The pursuer proceeded, as he was entitled to do, in reliance upon a certificate under the hands of the proper officers of this mercantile company to the effect that they were fully paid up. I therefore regard, with your Lordship

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the failure of the company to register when they were requested to do so in the month of November as a wrong committed by them upon the pursuer, and for that wrong he is entitled to compensation in damages. I do not think he is bound to ask that the shares should be registered now. He asked it in November 1889, and we are now in the month of March 1891. I think he is entitled to his remedy in the shape of damages to repair the injury to him by the wrong done him by the defenders.

It is not quite a simple and certain matter to estimate the amount of damage. The Lord Ordinary is of opinion that the wrong was committed in the month of February, and that the damage might properly be estimated at £4000. I think with your Lordship that that would have been too large a sum upon the evidence to give if the wrong had not been done till February, but I think it was done in November, and I do not think that that amount of damage is excessive, for the evidence rather impressed me with the conviction that if registration had taken place on the 20th of November the pursuer might have realised those shares which are now worthless.

The defenders might have them, at their own expense, if they want them, but were informed by their counsel that they do not want them, but would rather be without them. The pursuer is, in my opinion, agreeing with your Lordship and the Lord Ordinary, entitled to be recompensed with a sum of £4000 of damages, of course with the expenses of this process.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER was absent.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties in the reclaiming note for the defenders against Lord Kyllachy's interlocutor of 20th December 1890, recall the said interlocutor: Ordain the defenders to make payment to the pursuers of the sum of £4000, with interest thereon at the rate of five per cent from the date of this decree until payment, the pursuers being bound, in exchange for said payment, to transfer to the defenders, or their nominee or nominees, the 500 shares on which £1 has been paid, and the 140 fully paid shares mentioned on record."

BURTON, SMART, & MACDONALD, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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ALFRED SHEDLOCK AND OTHERS, Pursuers (Reclaimers).—*D.-F. Balfour—Dickson.*

JAMES B. HANNAY, Defender (Respondent).—*Murray—Ure.*

Foreign—Jurisdiction—Contract—Lex loci actus.—On 16th November 1888 an agreement was entered into in New York between Duncan on behalf of Hannay, of Glasgow, the inventor of a new process for producing white lead, and Shedlock and Hudson, of New York, "for sale of said inventions for the Americas, and to designate to them power to handle said process" upon certain terms. The agreement was subsequently confirmed by Hannay at Glasgow subject to certain conditions which were accepted in writing by Shedlock and Hudson at New York.

The latter having brought an action of damages in Scotland against Hannay in respect that he had sold his rights in connection with the invention, and had

* Decided Jan. 30, 1891.

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thereby violated the agreement, *held* that as the agreement was made and executed in New York, its validity and meaning fell to be determined by the law of New York.

In 1888 Mr J. B. Hannay, residing at Cove Castle, Dumbartonshire, invented a new process of producing white lead.

On 16th November 1888 he entered into the following agreement:—"It is understood that J. Thomson Duncan has an understanding with J. B. Hannay, F.R.S.E., of Glasgow, the inventor of the apparatus and new method or process of producing white lead, whereby he is empowered to enter into arrangements, which he hereby does, with Alfred Shedlock and James A. Hudson, of New York, for sale of said inventions for the two Americas, and to designate to them power to handle said apparatus method, or process, in such manner as shall seem to them best, and that upon terms as already fixed by correspondence between the said Shedlock and Duncan, and approved of by the said Hannay, viz., That all necessary expenses shall be first deducted from any income that may be derived from sale or use of the patents, and the one-half of the remainder is to go to the said Hannay and the other half to be retained by the said Shedlock and Hudson; it being understood that the said Hannay is to be kept free of all responsibility as to outlays which may be made by the said Shedlock and Hudson, in the event of failure to carry through the business to a successful issue. Dated New York, 16th November 1888."

This document was attested by a notary-public, and bore the notarial seal only. It was signed by Duncan, Shedlock, and Hudson.

Hannay confirmed this agreement as follows:—"Glasgow, 1st Dec. 1888.—The above agreement is hereby confirmed by me, subject to the following conditions,—That, in the event of other patents being taken up in America, all improvements made by anyone connected with the undertaking shall be added for the general good of the process, free except for any expenses incurred. . . . ." Shedlock and Hudson accepted these modifications, and concluded the agreement as so modified by a writing attested at New York by a notary-public, and bearing only a notarial seal.

The agreement was thereafter registered in the United States Patent Office.

Shedlock and Hudson and their mandatary now brought an action of damages against Hannay for breach of the agreement, under which, they alleged, they had acquired the sole right to use the invention in question in the United States, and to dispose of it as they pleased.

They averred;—(Cond. 2) ". . . By the said agreement the pursuers acquired the sole right to use the said inventions in, *inter alia*, the United States of America, and to dispose of said right in said United States as they pleased. The statements in answer are denied, subject to the admission that the pursuers registered the agreement in the United States Patent Office and under reference to the proceedings there." (Cond. 3) "Subsequently in breach of said agreement, the defender, in or about the month of April 1889, sold to the White Lead Company, Limited, the whole patents and inventions belonging to him—or which he was entitled to acquire—for the said improved method of manufacturing white lead which he had then applied for in the United States of America and other countries, and all future improvements thereon, including the rights to said inventions which he had previously sold to the pursuers as aforesaid, and he has refused to carry out the foresaid agreement with the pursuers. The sale to the White Lead Company was made by the defender wilfully, in violation of said agreement with the pursuers. . . ." (Cond. 4) "In 18[illegible] the defender and the said White Lead Company applied in New York for

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and obtained in or about 1889 or 1890, letters-patent for the said invention although the defender was advised that this was in breach of his said agreement with the pursuers. The pursuers were thereby, as the defender knew and intended when he entered into the agreement with the White Lead Company, prevented from obtaining letters-patent in the said United States for the said invention, and from obtaining any benefit from their rights under the said agreement. The pursuers would have derived very large profits and advantages from their rights under the aforesaid agreement between them and the defender had the same been carried out; and in consequence of the defender's having, in violation of the said agreement, sold his right to said invention, apparatus, method, and process of producing white lead to the White Lead Company, Limited, the pursuers have sustained loss to the extent of £30,000."

The pursuers pleaded;—1. The defender having made and thereafter violated the agreement with the pursuers condescended on, they are entitled to decree for the amount of loss and damage sustained by them through the defender's violation of said agreement.

The defender pleaded;—2. The validity and meaning of said alleged agreement fall to be determined and interpreted according to the law of New York, by which (1) it is invalid and inoperative; and (2) it is, and has been determined by decree to be, unavailing to confer any rights on the pursuers.

In support of this plea, he stated;—"The said deed was framed and executed in New York, and the contract therein expressed was to be performed in New York. Explained that the validity and interpretation of the agreement therefore fall to be determined according to the law of the State of New York. No consideration is therein expressed; and by the law of the State of New York a consideration is necessary for the validity of an agreement not under seal; the said agreement is not under seal, and is therefore invalid. . . . The pursuers afterwards registered the document above mentioned in the American Patent Office, New York, and endeavoured to get the patents issued to them, on the plea that the said document conferred on them the ownership of the said patents, but they were entirely unsuccessful. According to American law the said document is inept to convey any right of ownership in the said patents or to entitle them to have letters-patent issued to them."

The Lord Ordinary (Trayner), on 7th November 1890, pronounced this interlocutor:—"Finds (1) that the agreement founded on was made and executed in New York; and (2) that the validity and meaning of said agreement fall to be determined by the law of New York: Therefore, to this extent and effect, sustains the second plea in law for the defender, and *quoad ultra* continues the cause: Grants leave to reclaim."*

* "OPINION.—The only question with which I have at present to deal is that raised by the first part of the defender's second plea in law.

"The agreement in question which has reference to the obtaining and use of a certain patent in America was executed in New York on 16th November 1888, by the pursuers and a Mr J. Thomson Duncan, the latter being represented *in gremio* of the deed as a person empowered by the defender to enter into the arrangement there expressed. The agreement so executed is 'confirmed' by the defender, subject to certain conditions in a writing dated 'Glasgow, 1st December 1888,' appended to the agreement, and these conditions the pursuers agreed to and accepted by a note, also appended to the agreement, executed by them in New York. In this state of the facts I am of opinion that the agreement or contract in question was made and executed in New York, and that any question regarding its validity as a contract, its construction, or the extent and character of the rights and obligations arising therefrom, falls to be determined

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The pursuers reclaimed, and argued;—(1) The action was one brought in the domicile of the defender for damages for a breach of contract. It was not the fact that the contract had been made and executed in New York. The only fact in favour of the respondent's view was that the agreement had been partly signed in New York. But this was of no importance, looking to the terms of the letter of 1st December, which was an essential and vital part of it. The patent was a Scottish one, and the agreement relating to it dealt with its sale not in the State of New York only, but in "the two Americas." (2) There were no technicalities in it, for although the agreement itself seemed to incorporate previous correspondence the confirmation which followed made it complete. The *lex fori* must apply unless there was some reason to the contrary in the contract,[1] but there was nothing in it which appealed to the law of any particular country, and the Court required no assistance from American law to construe its terms. Further, the Court must keep in view the fact that the contention of the defender was advanced with the view of bringing about the result that the agreement must be held null and void,—in opposition to the general rule that a contract must be interpreted *ut valeat magis quam pereat.* Besides, the *locus solutionis* here was not New York, it was the "two Americas." It was all over the Americas, and the contract was what might be termed a cosmopolitan one, so that no special law could be in view of the parties. The contract fell therefore to be interpreted in accordance with the rules which obtained at the place where the action was brought. The natural place for Hannay to perform the obligation laid upon him was in Scotland, and as he had refused to do so, the Courts of this country would compel him.

The respondent argued;—The Lord Ordinary had taken the right view, and the agreement fell to be construed by the law of the State of New York. New York was the *locus contractus,* for the agreement had really been executed there. The document of 1st December, although written from Glasgow, was nothing more than a letter by the defender confirming Duncan's authority to act for him. The law was correctly stated by Turner, L. J., in *Shand's* case,[2] when he said,—"The general rule is that

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by the law of New York.—(*P. and O. Steam Navigation Company* v. *Shand*, 3 Moore's P. C. 272; *Jacobs*, L. R., 12 Q. B. D. 589.)

"The difficulty which has sometimes arisen in the determination of questions similar to that with which I am now dealing, from the fact that the place of making the contract was different from the place where it was to be performed, does not seem to arise here. In the present case the *locus solutionis* is, to some extent at least, the same as the *locus contractus;* and I think the whole circumstances, viz., the character of the contract, its subject-matter, its execution in New York, and its anticipated fulfilment there and elsewhere in America, lead to the inference that the parties intended the law of New York to be that according to which the contract should be interpreted, and, if necessary, enforced. There is certainly nothing to indicate that the parties had in view the law of Scotland as the law which was to determine their rights or liabilities."

[1] Owners of "Immanuel" v. Denholm & Co., Dec. 7, 1887, 15 R. 152; Valery v. Scott, July 4, 1876, 3 R. 965; Ainslie, &c., v. Murrays, March 17, 1881, 8 R. 636; Don v. Lippman, May 26, 1837, H. L. 2 Shaw & Maclean, 682; Stewart v. Gelot, July 19, 1871, 9 Macph. 1057, 43 Scot. Jur. 583; *In re* Missouri Steamship Co., 1889, L. R., 42 Chanc. Div. 321; Gillespie's Bar, 324; Story's Conflict of Laws, sec. 280; Bell's Law Dictionary, *voce* Law [the Law Merchant].

[2] The P. and O. Steam Navigation Co. v. Shand, 1865, 3 Moore's P. C. Reps. 272, at p. 290; Jacobs, Marcus, & Co. v. The Crédit Lyonnais, Feb. 1884, L. R., 12 Q. B. Div. 589; Lloyd v. Guibert, Nov. 1865, L. R., 1 Q. B. 115; Dale v. Dumbarton Glass Work Co., Feb. 5, 1829, 7 S. 369.

law of the country where a contract is made governs as to the nature he obligation, and the interpretation of it." It might be otherwise if a erent intention were to be gathered from its terms, *e.g.* where it was vided that it was to be entirely carried out elsewhere, as in the case of *Missouri Steamship Company*,[1] or where the subject-matter of it was table estate situated elsewhere. There was another rule which also lied here,—"The law of the place of performance determines the vali- of the contract in respect to performance."[2] This was a contract a sale "for the two Americas," and nothing at all remained to be done Scotland. It might be that there were many *loci solutionis* in America, that could not affect the present argument. The maxim *actor sequitur m rei* was applicable to questions of jurisdiction only, and did not ct this case.

t advising,—

ORD PRESIDENT.—This is an action at the instance of two persons of the e of Shedlock and Hudson, who are citizens of New York, and it is founded an agreement, the terms of which are before us, which bears to be dated New York 16th November 1888. There is a supplementary writing of 1st ember of that year in which the defender in this country assents to what been done by his authorised attorney in New York, under certain conditions; that again is met by an acceptance on the part of the pursuers of the modi- on so introduced.

he agreement, therefore, as it appears to me, is undoubtedly an agreement ated in New York, and it is only necessary that we should look at it er to see what is its nature before disposing of the question raised. If greement is binding, according to its terms, there can be no doubt that has been a very grave breach of the obligation undertaken under it by defender, because,—the agreement being for the purpose of constituting a of joint adventure for carrying on a trade in a patent invention in "the two ricas" by the pursuers and defender,—the defender, after having come under bligations of that agreement, committed a breach of it in this way,—in the h of April 1889 he sold the invention to another company called the White Company, Limited. Therefore one can have very little sympathy with defender in so far as concerns the honesty of the transaction, but the ques- before us is entirely a question of law, whether the agreement is enforceable rding to its terms.

ow, there are many curious speculations among writers on international law how far the place of making an agreement regulates its construction. But is one consideration which presses upon my mind very strongly in this case, which seems to lead to a conclusion without much difficulty. It is alleged by defender that this agreement is invalid according to the law of the State of York, because it is not under seal, and therefore cannot be enforced according at law. Now, when we look at the agreement, we find that whatever other acter it may bear—I think it is an agreement for a joint adventure—whatever its precise character may be, it is, at all events, a bilateral contract; and a eral contract must be binding upon both parties or upon neither. Now, ose the case were reversed, and the defender were seeking to enforce this ement in New York, if he could not succeed in enforcing the agreement there

[1] L. R., 42 Chanc. Div. 321.
[2] Wharton's Conflict of Laws (2d edn.), sec. 401.

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according to the law of that country, it seems to me to follow of necessity from the principle I have just announced that the agreement cannot be enforced here either, because that would be to make one party liable in the agreement while the other was not, and that is a result that the law can never countenance. A bilateral contract, as I have already said, must be equally binding upon both parties, or binding upon neither. This view of the case confirms me very much in the impression which I entertain otherwise, that, in a case like the present, the *lex loci actus* must necessarily govern, because there is really no other law that can very well be applied as in a question regarding the validity or construction of the agreement. You cannot appeal here to the *lex loci solutionis*, because that is an indefinite place. The agreement is to be carried into effect all over the Americas, but there are a great many states in each, and the law of those states on questions of this kind may be essentially different. We are therefore driven to this, that we cannot say that the *lex loci solutionis* can possibly regulate the validity and construction of the agreement.

Now, is there any choice between the law of the place of execution and any other law? I confess I think not. I think we are necessarily shut up to the law of the place of execution; the *lex loci actus* is the law which must regulate the validity and construction of this agreement.

I am therefore of opinion with the Lord Ordinary that this agreement having been made and executed in New York, its validity and meaning must be determined by the law of that state. His Lordship, "to this extent and effect," sustains the second plea in law for the defender. I think probably that might have been omitted, but, at the same time, limited as it is, I think it stands quite consistently with the rest of the interlocutor, because the only extent and effect to which the second plea is sustained is, that the validity and meaning of the agreement has to be determined by the law of New York.

I am therefore for adhering.

LORD ADAM.—I am of the same opinion.

LORD M'LAREN.—I am of the same opinion also, and have nothing to add.

LORD KINNEAR.—I am of the same opinion.

I think this case is free from many of the difficulties which may arise where contracts are executed in one country with a view to performance in another. There are two material points to be taken into account; in the first place, that the contract was executed in New York; and, in the second place, that the subject-matter of the contract is a right to be exercised in the United States. The pursuers' averment is, that there was an agreement entered into by which they say the defender agreed with the pursuers for the sale of his invention for the two Americas, and gave them power to deal with his invention. Then they go on to make an averment which, as a matter of pleading, would be quite out of place if it were concerned with the law of Scotland, but which is perfectly relevant and proper if it is an averment with reference to foreign law, which to this Court is a matter of fact. Their averment is, that by the said agreement they "acquired the sole right to use the said inventions in, *inter alia*, the United States of America, and to dispose of the said right in the said United States"; and then they go on to say that "they registered the agreement in the United States Patent Office." Now, that is an averment as matter of fact, that the effect in law of

their agreement was to give them the sole right to use this invention in America. The right which they so acquired must, of course, depend on the law of the United States, because an exclusive privilege of using or selling a process or a manufactured article within a certain territory is a right that can be conferred by no other Government except the Government of that territory; and therefore the mode of its acquisition and the conditions upon which it is to be exercised must be determined by the law of the territory alone. It therefore appears to me that the pursuers start their case by laying down as the fundamental basis of their action an averment of the law of the United States.

But then they go on to make their averment of the breach of contract, which they say has been committed. In the third article of their condescendence they say that the defender sold to another company the whole patents and inventions belonging to him, which he had already sold to them. But then, in order to make that a relevant averment, it was, of course, necessary that they should go on to say that by this sale they had been deprived of the right which, by the previous contract, they had already acquired; and, accordingly, in the fourth article of the condescendence they say that in 1889 the defender and the new company applied in New York for, and obtained, letters-patent for the said invention, although the defender was advised that this was in breach of his agreement with the pursuers. Then comes the material averment of damage from breach of contract,—"The pursuers were thereby, as the defender knew and intended when he entered into the agreement with the White Lead Company, prevented from obtaining letters-patent in the said United States for the said inventions, and from obtaining any benefit from their rights under the said agreement." Now, that again appears to me to be an averment, and a perfectly relevant averment, of the law and practice of the United States; and therefore the pursuers' averment is that by the law of the United States they had acquired a good right by an effectual contract, and that they have been prevented from enjoying it because the defender has interposed an obstacle which by the law of the United States deprives them of the right which the defender gave them. It appears to me therefore that the pursuers put in issue the law of the United States, and base their case upon it. Now, the answer is, that by the law of the United States the contract which the pursuers allege to be effectual to give them the sole right to the invention is no valid contract at all, because the law of the United States requires that such an agreement should be under seal; that this agreement is not under seal, and therefore that it is not valid.

Now, there again is a very relevant averment by the other party of the law of the United States. The general rule certainly is that the formal requisites which are necessary for the validity of a contract must be determined by the law of the place where the contract is made. I do not know that it is at all necessary in this case to determine whether that is a rule of universal application, or whether there might not be a case in which, in this country at least, we should be disposed to hold that, while the forms and solemnities of the place of execution are sufficient for the validity of a contract everywhere, they are not indispensable for its validity everywhere, so that contracts might possibly be enforced in this country, although defective according to the *lex loci actus*, if they comply with the conditions which our law requires to make them binding. I do not think it is necessary to consider the question; because, in the present case, it appears to me enough to say that the defender in making that answer makes a perfectly relevant answer to a perfectly relevant averment. The pursuers' averment is

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that it was the defender's breach of contract, and that alone, which prevented the pursuers from making their alleged right effectual in the United States. The defender answers that it was not any breach of contract which deprived the pursuers of the right they allege, but the original inefficacy of the written instrument on which they rely to give them any right in the United States whatever. It therefore appears to me that this record puts the United States law in issue, and that if the pursuers do not succeed in proving that law to be as they allege, they fail in proving the fundamental averment upon which their whole case rests.

Taking that view, therefore, it does seem to me doubtful whether it was quite necessary, although I think it was very proper and convenient, to raise the question at this stage in the form in which it has been raised, because it seems to me that if the pursuers had been allowed to go on to prove their case and had failed to prove the fundamental fact which they allege, namely, that they had acquired a right effectual to them in the United States, they would have failed to prove anything like breach of contract.

On these grounds, and entirely concurring with what your Lordship has said, I am of opinion that the interlocutor should be adhered to.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—REID & GUILD, W.S.—Agents.

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Mar. 13, 1891. Renton Football Club v. M'Dowall.

RENTON FOOTBALL CLUB AND OTHERS, Pursuers (Respondents).—*Murray—A. S. D. Thomson.*

JOHN K. M'DOWALL AND OTHERS, Defenders (Reclaimers).—*Asher—R. V. Campbell—Dickson.*

Title to sue—Unincorporated society—Competency of action—Patrimonial interest.—The Renton Football Club, an unincorporated society, its office-bearers, and five persons described as members of the club, sued the Scottish Football Association, also an unincorporated society, its office-bearers, and the members of certain committees, for reduction of a minute of the defenders deciding that the pursuers' club be declared professional and expelled from the association. The pursuers averred that they had been illegally expelled from the association of which they were members; that as members they enjoyed several important pecuniary advantages which they would lose by expulsion; and that they had been duly authorised at a meeting of the club to sue the action. The secretary of the association, several members of its general committee, and all the members of the "professional committee" appeared, and pleaded, *inter alia*, (1) that the pursuers had no title to sue, inasmuch as they did not represent and had no authority to use the name of the Renton Football Club; and (2) that the Scottish Football Association being an unincorporated society could only be sued by calling its individual members. It was admitted that the association had several thousand members.

The Court *allowed* the pursuers a proof of their averment that they were duly authorised at a meeting of the club to sue the action, and *repelled* the second plea.

1ST DIVISION. Lord Kincairney. C.

ON 17th October 1890 the Renton Football Club and certain persons described as the president, the vice-president, the match-secretary, the honorary secretary and the treasurer of the club, together with seven other persons described as members of committee, and five other persons described as members of the club, brought an action against the Scottish Football Association and persons described as the vice-president, the honorary secretary, and the treasurer of the association, together with twenty-four persons described as members of the general

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committee, and nine persons described as members of the professional committee of the association, concluding for a reduction of a minute of the business and professional committee, whereby the committee decided that the Renton Football Club were declared guilty of "professionalism" and expelled from the association. There was also a conclusion for damages, but this conclusion was departed from by minute in the Outer-House.

The pursuers stated;—(Cond. 1) "The pursuers the Renton Football Club is an association for encouraging and carrying on the game of football in Renton and elsewhere. The defenders, the Scottish Football Association, were formed nearly twenty years ago, and consisted at first of a few clubs only, but now comprise upwards of 150 clubs." (Cond. 3) "The Scottish Football Association has a constitution and rules, which bind all the clubs and members thereof . . . The association has considerable funds and also heritable property in Glasgow. Each club and each affiliated association is bound to contribute an annual sum to the general funds, and, in addition, one-third of the gate-money taken for admission to the final tie between the two clubs competing for possession of the Scottish Cup goes into the funds of the association, as well as the money drawn for admission to trial matches for the selection of the Scottish Eleven, amounting to very considerable sums. Further, the association are lessees of offices in Waterloo Street, Glasgow, which are kept for the use of the members, for the management of the association's business, the holding of meetings and other association purposes, and which all members of the association have right to use. The association has also purchased heritable subjects in Carlton Place, Glasgow, for the use of its members." (Cond. 4) "By article 6 of the constitution and rules of the association it is provided that the affairs of the association shall be conducted by a committee of seventeen members, including the president, vice-president, and treasurer." The pursuers then set forth the minute under reduction and the grounds upon which they maintained it was illegal. (Cond. 9) "The consequences to the pursuers of this attempted expulsion are very serious. The pursuers cease to have the use and benefit of the funds and property of the association, to which they very materially contributed. Other clubs, which are members of the association and affiliated associations, are debarred by the constitution and rules from playing with them. They had a large number of fixtures for the coming football season, which would in ordinary course have yielded them a considerable revenue and which cannot now be played in consequence of the actings of the defenders. Their share of entry-money for certain matches has been very large, *e.g.*, on 4th February 1883 it was £144, 8s. 8d. after paying all expenses, and on 13th February 1886 it was £93, 1s. 6d. They are excluded from contending for valuable prizes offered by the association out of its funds. They have thrown upon their hands the burden of maintaining their grounds without the corresponding benefit of having association matches played upon them, and in these and other ways they are suffering and must suffer from the wrongful and illegal actings of the committee, and they are entitled to the damages concluded for in respect of the injury to their patrimonial rights."

The pursuers pleaded;—(3) The pursuers not having been legally and validly expelled from the association are still members thereof, and are entitled to have the same declared.

Appearance was entered for the secretary of the association, for certain of the members of the general committee, and for all the members of the professional committee called as defenders. No appearance was entered for the Scottish Football Association.

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The compearing defenders in their statement of facts stated, *inter alia*; —(Stat. 1) "The Renton Football Club is composed of a large number of persons. Only a few of the members of the Renton Football Club are pursuers of the present action. The pursuers do not represent, and have no right to use the name of the Renton Football Club for the purposes of this action. The said club is not incorporated or entitled to sue under the name of the Renton Football Club." The pursuers answered,—(Ans. 1) "The Renton Football Club is composed of nearly 200 persons. The pursuers were duly authorised at a meeting of the club to sue the present action. Admitted that the said club is not incorporated. *Quoad ultra* denied." (Stat. 2) "The Scottish Football Association is not incorporated or entitled to be sued under that name. It comprises 172 clubs and 11 affiliated associations. It has no individual members. None of these clubs or associations have been called to this action."

The compearing defenders pleaded;—1. The action is incompetent. 2. No title to sue. 3. The action should be dismissed in respect (1) The pursuers are not entitled to sue; (2) The defenders are not duly convened.

It was not disputed that the Scottish Football Association was composed of clubs whose collective members amounted to several thousand persons, and that the membership was a very fluctuating body.

On 6th January 1891 the Lord Ordinary (Kincairney) repelled the first plea in law, and the second head of the third plea in law stated for the compearing defenders; and before further answer as to the second plea and the first head of the third plea for the said defenders, allowed the pursuers a proof of their averment that "they were duly authorised at a meeting of the club to sue the present action," and to the defenders a conjunct probation.*

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* "OPINION.—In support of the defenders' first plea that the action is incompetent, they contended that the questions raised and interests involved were not such as a Court of justice could consider, and that no question of civil right or patrimonial interest was really raised. They quoted *Forbes* v. *Eden*, 8th Dec. 1865, 4 Macph. 143, 38 Scot. Jur. 98, affirmed 11th April 1867, 5 Macph. (H. L.) 36, 39 Scot. Jur. 411, in support of the position that the Court could never entertain questions regarding violation of the constitution of voluntary associations where no patrimonial interests were involved.

"On this point I am of opinion that, assuming the truth of the pursuers' averments, the action is such that the Court may and is therefore bound to entertain. I do not require at this stage to consider whether it is competent for the Court to give the pursuers the full remedy they ask. It will be for consideration, when the merits of the case are reached, whether a decree of declarator that the Renton Club is not professional can be pronounced. Neither does it seem necessary to express any opinion as to the nature and amount of the patrimonial interest which will warrant recourse to the Court, nor to affirm absolutely that there cannot be cases in which Courts of justice might intervene, even although no interest of a strictly patrimonial character could be alleged. For I think there is no doubt that there is in this case an ample allegation of that kind of patrimonial interest which in many cases has been regarded as sufficient to give jurisdiction to the English Courts in actions relating to expulsion from clubs. Reference was made by the pursuers to the *dicta* of Lord Denman in *Innes* v. *Wylie*, 1844, 1 Car. and Keenan, 257; to *Wood* v. *Wood*, 1st June 1874, L. R., 9 Ex. 190; to *Fisher* v. *Keane*, 1878, 11 Ch. Div. 353; to *Labouchere* v. *Wharncliffe*, 1879, 13 Ch. Div. 346; and especially to the judgment of Jessel, M.R., in *Rigby* v. *Connol*, 1880, 14 Ch. Div. 482. And on the

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The compearing defenders reclaimed.

The arguments sufficiently appear from the Lord Ordinary's opinion, the three points considered by the Lord Ordinary being argued to the Inner-House.*

After the hearing the case was adjourned in order to give the pursuers an opportunity of producing a minute of their club authorising the institution of the action. A minute bearing to be a minute of the Renton Football Club was thereafter produced, but the defenders denied the authenticity of the minute, on the ground that the meeting of which it bore to be the minute had not been convened in terms of the rules. The Court then made avizandum.

At advising,—

LORD M'LAREN.—This is an action by an unincorporated society, formed of

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whole, I think it plain enough that this action cannot be thrown out as incompetent at this stage, as not disclosing any question which can be judicially entertained.

"In support of the plea of no title to sue, it was maintained that the Renton Football Club, not being incorporated, could not sue by that name alone, and that, as it was not a trading company, it was not sufficient to add the names of certain selected members, but that, being an unincorporated association not established for purposes of trade, it was essential that all the members should join in the action. No authority was quoted for that proposition, which was submitted as being elementary and self-evident. The pursuers contended that, in joining with the club its office-bearers and several of its members, they had stated a sufficient instance. This contention may be sound, although I do not think that any exact precedent was quoted. But the pursuers have not left their title to depend on that argument, because they have averred that they were duly authorised at a meeting of the club to sue the action. It appears to me that that is a relevant averment—(*Bow* v. *Patrons of Cowan's Hospital*, 6th December 1825, 4 S. 276; *Jamieson* v. *Watson*, 15th July 1852, 14 D. 1021, 24 Scot. Jur. 631); and I propose to allow them to prove that averment. If they succeed in proving it, their title will be considered on that footing; if they do not, it will be open to them to maintain that the instance is sufficient without that authority.

"The first head of the third plea seems a repetition of the second plea.

"The second head of that plea is that the defenders are not duly convened. I understand this plea to mean that the Scottish Football Association is not duly convened. It is a very peculiar body, and it is averred—what seems impossible—that there are no individual members of it at all. It holds meetings, however, passes resolutions, and possesses property, heritable and moveable. The defenders' argument came, I think, to this, that there could be no competent action of the kind now brought, unless all the members of all the clubs and affiliated associations of which the Scottish Football Association consisted were called, which is obviously a practical impossibility; that otherwise the association could not be sued at all, and that if, through the fault of its servants or the contract of its officers, the association incurred an obligation, its property could not be reached by its creditors.

"The defenders rested their argument chiefly on the case of *M'Millan* v. *The General Assembly of the Free Church*, 9th July 1862, 24 D. 1282, 34 Scot. Jur. 621, and in particular on the *dicta* of the Lord President, at page 1291, and also on the judgment and note of Lord Jerviswoode in a subsequent action by Mr M'Millan v. The Free Church of Scotland, and its officials (20th July 1864, 2 Macph. 1444). The pursuers relied mainly on the case of *Somerville* v. *Rowbotham*, 27th June 1862, 24 D. 1187, 34 Scot. Jur. 619. I think it unnecessary to say more than that that decision appears to me to be substantially in point, and I consider that I follow it in repelling the defenders' plea now in question."

* *Additional Authorities.*—General Assembly of Baptist Churches v. Taylor, June 17, 1841, 3 D. 1030; Culcreuch Cotton Co. v. Mathie, Nov. 27, 1822, 2 S. 47; Duke of Portland, Nov. 23, 1852, 15 D. 62; Tantussi, June 23, 1886, 2 Times Reports, 700.

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persons engaged or interested in a lawful sport, and directed against the proceedings of a society to which they are affiliated, whereby the pursuers were expelled from the association on the ground of what is called professionalism. The question in the action is, whether the pursuers are amenable to censure or exclusion upon this ground. The only matter, however, which is now under consideration is the title of the pursuers to sue. The Lord Ordinary has dealt with that question, and the substance of his interlocutor is that he allowed the pursuers a proof of their averments that they were duly authorised at a meeting of the club to pursue the present action. The objection to the instance is that the Renton Football Club being an unincorporated society has no *persona standi in judicio*, and it is contended that the difficulty is not removed by the course which has been taken of joining certain individual names along with that of the association.

In considering this question we may start with the very elementary proposition that as every subject of the Crown is entitled to the protection of the Courts of law, so every assemblage of persons who may conceive that their collective rights have been invaded, must be entitled to redress by taking proper means for having their case judicially considered. But it is also clear that an unincorporated society has not a title to institute an action of this kind in its name without further addition. Various reasons may be given for this rule, but it is sufficient to give one, and that is, that in the event of a decree for expenses being given against the society, or in the event of a counter action being brought against the society under the designation which it has given to itself, there would be no person against whom a decree *ad factum prestandum* could be given, and it would be impossible that such a decree could be carried into execution in the ordinary way. On the other hand, it by no means follows as a consequence of this rule that every individual member of the unincorporated society must be made a party to the action. Where a society consists of a small number of persons it may be very convenient, and would save all questions, if the name of every individual member were inserted in the instance, but from the constitution of such societies, and from the very slight cohesion which sometimes exists between their members, it is evident there are cases where it would be exceedingly difficult to comply with such a requirement. It is certainly undesirable, and indeed I think inconsistent with sound principle, that we should lay down a rule with reference to the instance of unincorporated societies, with which in many cases it would be difficult, and in some impossible, to secure compliance. Indeed, I think that to require the insertion of the names of every member would be a rule which would be more likely to result in vexatious preliminary litigation as to the constitution of the society than productive of any benefit to either of the parties concerned. It is undoubtedly the right of the defenders to see that in addition to the instance of the society itself, they should have the instance of certain persons who are responsible for the proper prosecution of the action, and for giving obedience to the decrees that may be given under it or under any counter action that may be joined with it.

In the present case we have, in addition to the title of the Renton Football Club itself, the names of all the persons described as office-bearers and two others—seventeen persons in all. I think it will be generally agreed that the office-bearers of an unincorporated society are always proper persons to be named along with the society itself, both because they are likely to be substantial persons and acquainted with the affairs of the society, and also because they are the persons to whom the society has deputed the conduct of its affairs. I do

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not say that in every case it would be sufficient that the office-bearers of the club or society were named, but in the majority of cases it may be considered that the office-bearers fairly represent both the mind of the society with whom they are associated and the requirement of character and responsibility. In the present case, while we have had very full argument upon the legal questions, no personal objection has been stated to any of the parties named as pursuers, and I must take it that those persons sufficiently represent the wishes of the football club, and that the objection to the instance is maintained upon theoretical grounds.

There is, however, a further condition of the right of an unincorporated society to sue by a representation of its members, and that is, that those persons must be duly authorised by a meeting of the society. It is plainly not necessary that they should be authorised by every individual member of the society or that there should be a signed power of attorney, because there would be the same difficulty in getting such a deed as there would be to find out the names of the persons to be inserted in the summons. But there must be an authority given by at all events a majority of the known members of the club, either in writing or by a resolution of a meeting attested in the ordinary way. The Lord Ordinary has allowed proof on the subject, and on the first explanation of the case we were all disposed to affirm the principle which the Lord Ordinary had laid down. But with the view of saving litigation, counsel interposed and produced a signed minute giving the necessary authority. It is objected to that minute that while it authorised the institution of the action, it did not say in what names the action should be prosecuted, and if that had been the only objection to the mandate I should not have thought it a good one. It was the function of the meeting of a society to give authority to institute an action, but it was not part of their duty, because they were not a meeting of lawyers, to state the form in which the action should be brought. But the position of the case is now somewhat altered, because it is stated by counsel for the defenders that they mean to deny the authenticity of the mandate upon the ground that the meeting was not properly convened, and the result of that objection is that we must simply adhere to the Lord Ordinary's interlocutor, and leave it to be proved, if it can be proved, that the requisite authority was given.

LORD KINNEAR and LORD ADAM concurred.

LORD ADAM intimated that the LORD PRESIDENT, who had heard the cause but was absent, also concurred in the judgment.

THE COURT pronounced this interlocutor:—"Refuse the reclaiming note and adhere to said interlocutor . . . Remit to the Lord Ordinary to proceed," &c.

WILLIAM OFFICER, S.S.C.—A. J. & J. DICKSON, W.S.—Agents.

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Glasgow Tramway and Omnibus Co., Limited, v. Magistrates of Glasgow.

THE GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED, Petitioners.—*Murray—Dickson.*

THE LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF GLASGOW, Respondents.—*Comrie Thomson—Ure.*

Company—Resolution to alter memorandum of association—Confirmation by Court—Companies Memorandum of Association Act, 1890 (53 *and* 54 *Vict. cap.* 62), sec. 1.—The Companies Memorandum of Association Act, 1890, sec. 1, enacts that (subsec. 1) "Subject to the provisions of this Act, a company registered under the Companies Acts, 1862 to 1886, may, by special resolution, alter

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the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, ... but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding up the company." Subsec. 5,—"The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company, if it appears that the alteration is required in order to enable the company (*a*) to carry on its business more economically, or more efficiently; or (*b*) to attain its main purpose by new or improved means; or (*c*) to enlarge or change the local area of its operations; or (*d*) to carry on some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company; or (*e*) to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement."

The corporation of Glasgow possessed statutory powers to make and maintain tramways in the streets of Glasgow. Section 26 of their statute provided that animal power alone should be used on the tramways. The corporation leased the tramways for twenty-three years from 1st July 1871 to a limited company, which was promoted for the purpose of acquiring the lease, and whose objects, as specified in the memorandum of association, were to carry on the working of the tramways and the omnibus traffic in connection therewith under the lease, and after the expiration of the lease to carry on the business of omnibus proprietors in the city and vicinity.

The company in the course of working the corporation tramways acquired a large stock of horses and plant, the greater part of which would be rendered useless and a source of loss in the event of the lease not being renewed, and accordingly, when about three years of the lease had still to run, the company applied to the Court for alteration of their memorandum of association, under the above Act, so as to include, *inter alia*, these objects,—"(10) To exercise the powers and carry on the business of a tramway company, and to promote, or acquire, equip, work, and dispose of any tramways within the city of Glasgow and the vicinity. (11) To carry on the business of omnibus, road-car, coach, hackney, or stage carriage, and cab proprietors, carting and general contractors, undertakers, funeral furnishers, and carriers in all their various branches. (12) To carry mails, parcels, and other matter transmitted through the Post-Office . . . (13) To work and move all or any of the carriages or other vehicles of the company by means of electrical power, steam power, or by any other mechanical power which may be available, or by means of haulage with wire ropes, cables, chains, or other appliances."

The corporation opposed the application, on the ground that it was a breach of the contract with the corporation for the company to alter its constitution in any way during the lease, and because object (13) was inconsistent with the prohibition by Parliament of mechanical power.

Held that the promoting and disposing of tramways was an object foreign to the purposes of the memorandum of association and could not be sanctioned, and that *quoad ultra* the alterations fell to be confirmed.

Observed that the alteration of the constitution of the company would not enlarge their rights under the Tramways Acts.

1st Division. C.

By the Glasgow Street Tramways Act, 1870 (33 and 34 Vict. cap. lxii.) the corporation of Glasgow were empowered to construct tramways on the streets of Glasgow. Sec. 26 enacted that "all carriages used on any tramway shall be moved by animal power only"; and sec. 87 gave the corporation power to "lease from time to time to any person or body the right of user of any tramway made by the corporation, and of demanding and taking in respect thereof the tolls and charges authorised by this Act."

By agreement, dated 25th May 1871, between the corporation of Glasgow, as first parties, and William Morris and others, as second parties, of the narrative that the first parties had agreed, under the powers of the Glasgow Street Tramways Act, 1870, "to lease the tramways there-

authorised to a joint stock company to be formed by the second parties under the Limited Liability Act, on the terms and for the period hereinafter specified," it was, *inter alia*, agreed as follows:—"3. The first parties shall lease the tramways for twenty-three years, from the 1st day of July 1871, to a limited liability company, to be called the Glasgow Tramway and Omnibus Company, Limited, and (hereinafter called 'the company') to be formed by the second parties within the period of three months from the said 1st day of July 1871, the capital of such company to be not less than £200,000, applicable solely to the tramways to be leased under this agreement, and omnibuses and omnibus traffic in connection therewith, and the articles of association of said company shall be framed in conformity with this agreement, and so as to facilitate the working out thereof, and the said lease to be granted as aforesaid."

Accordingly, on 30th September 1871, a company named the Glasgow Tramway and Omnibus Company, Limited, was incorporated under the Companies Acts, 1862 and 1867, with a capital of £350,000, divided into 35,000 shares of £10 each, of which, at the date of the petition after mentioned, £9 per share had been paid up.

The objects for which the company was established were by the memorandum of association declared to be,—(1) To adopt and carry out the foresaid agreement between the corporation and William Morris and others. "(2) To take any new lease, on such terms as may be agreed on, of the said tramways and extensions on the expiration of the lease above referred to." (3) To adopt and carry out another agreement which it is not necessary here to explain. "(4) To work, conduct, and develop the business of the tramways above described, and of the omnibus traffic in connection therewith. (5) After the expiration of the lease or leases aforesaid, to carry on the business of omnibus proprietors in Glasgow and the vicinity. (6) To purchase and acquire any land, buildings, plant, cars, omnibuses, horses, machines, plant, stables, or other property, whether real or personal, and of whatsoever nature, the acquisition of which may be useful for or conducive to the attainment of any of the objects of the company, and to acquire patents, or concessions, or any interest therein for the purposes of the company. (7) To establish and construct works, buildings, and machinery, and therein to make, build, and construct cars, omnibuses, and plant for the purposes of the company. (8) To sell or otherwise dispose of any property acquired by the company. (9) To do all such other things as are incidental or conducive to the attainment of the above objects."

On 17th November 1871 the corporation of Glasgow and the company entered into a lease, whereby the corporation, on the narrative of the heads of agreement between themselves and the promoters, let to the company "the sole right to use, for the sole purposes of the Glasgow Street Tramways Act, 1870, carriages with flange wheels or other wheels specially adapted to run on a grooved rail on the whole tramway authorised to be formed by the said Act," for the space of twenty-three years from 1st July 1871.

The provisions of the lease which are material to the present report were as follows:—"(1) The corporation were to make the tramways out of moneys to be raised or borrowed by them. (2) The company were to pay to the corporation the interest paid or payable by the corporation on the money borrowed on capital account and on certain other expenses. (3) The company were also to pay to the corporation a sum of three per cent per annum on the sum borrowed by the corporation on capital account, to be accumulated as sinking fund in extinction of the cost of constructing the tramways. (5) The company were to maintain the tramways and a

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certain space of the adjacent roadways, and hand over the same at the end of the lease in good working condition. "(6) The company shall have the right of user of the tramways for the sole purpose of the Glasgow Street Tramways Act, 1870, during the currency of this lease, and also of demanding and taking the tolls and charges authorised by the said Act. . . . (7) The carriages to be used by the company on the tramways shall be constructed and maintained to the satisfaction of the corporation or any person to be appointed by them for that purpose; and the carriages shall be run at such times, and at such speed, as the corporation or an officer appointed by them may from time to time direct; and, generally, the corporation shall, subject to the provisions of this lease, have the whole powers to make regulations or pass bye-laws with reference to the working or use of the said tramways as they shall from time to time consider necessary or expedient, with all the other powers and authorities conferred on the corporation, or on the Lord Provost and Magistrates, by the said Act." (9) In addition to the foresaid sums the company were to pay to the corporation £150 per annum for every mile of street in which the tramways were opened for traffic, and proportionately for any portion so opened less than a mile. (10) Besides their other obligations the company were to pay a sum of four per cent per annum on the money expended by the corporation in the construction of the tramways, which sum was to be invested in the joint names of the Lord Provost and the chairman of the company, and expended from time to time in the renewal of the tramways and adjacent roadways—any balance at the end of the lease being declared to belong to the company. "(11) On or before the 1st day of July 1873 the company shall invest a sum of not less than £60,000 in the purchase of heritable property in the city of Glasgow or the vicinity, and the same shall be conveyed to the corporation; but the conveyance or conveyances thereof shall be qualified by a back-bond declaring that the said properties are held in security of the fulfilment by the company of the obligations of this lease. (13) The company shall be entitled to all the powers and privileges, except in so far as at variance with the present lease, conferred on lessees by the foresaid Act, and they shall be subject to all the liabilities thereby imposed. (17) Except in so far as implemented by the execution of these presents, or as otherwise carried into effect, the heads of agreement before mentioned shall remain operative and binding between the parties hereto."

Thereafter the tramways authorised by the Act of 1870 were duly constructed, and the company entered into possession and worked them.

On 25th November 1890, the company presented a petition, praying the Court to confirm the following special resolution of the company, in terms of the Companies Memorandum of Association Act, 1890:—*

* The Companies Memorandum of Association Act (53 and 54 Vict. c. 62) sec. 1, enacts,—"(1) Subject to the provisions of this Act, a company registered under the Companies Acts, 1862 to 1886, may, by special resolution, alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, . . . but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding up the company. (2) Before confirming any such alteration, the Court must be satisfied—(*a*) That sufficient notice has been given to every holder of debentures or debenture stock of the company, and any person or class of persons whose interest will, in the opinion of the Court, be affected by the alteration; and (*b*) That, with respect to every creditor who, in the opinion of the Court, is entitled to object and who signifies his objection in

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"That the memorandum of association of the company be altered so as to include among the objects for which the company is established the following, or any one or more of them, viz.:—(10) To exercise the powers and carry on the business of a tramway company, and to promote or acquire, equip, work, and dispose of any tramways within the city of Glasgow and the vicinity. (11) To carry on the business of omnibus, road-car, coach, hackney or stage carriage, and cab proprietors, carting and general contractors, undertakers, funeral furnishers, and carriers in all their various branches. (12) To carry mails, parcels, and other matter transmitted through the Post-Office, or under its directions or regulations, and to perform all such reasonable services in regard to the conveyance of mails, parcels, and other matter as the Postmaster-General may from time to time require, and to enter into agreements with the Postmaster-General. (13) To work and move all or any of the carriages or other vehicles of the company by means of electrical power, steam power, or by any other mechanical power which may be available, or by means of haulage with wire ropes, cables, chains, or other appliances. (14) [This head of the resolution was withdrawn in the course of the proceedings after mentioned.] (15) To take on lease any premises, lands, or farms, the acquisition of which may be useful for or conducive to the attainment of the objects of the company or any of them."

The petitioners stated that there had been abortive negotiations between them and the corporation of Glasgow with reference to the renewal of the lease, which expired in 1894, and that the corporation had now intimated their intention to apply to Parliament in the ensuing session for powers to work the tramways by electricity or mechanical power, alleging that they already possess the power to work them by horses. "In these circumstances, the petitioners think it prudent that steps should be taken to widen the field of the petitioners' business, so that their large stock of horses and plant may not become useless in the event of no arrangements for a prolongation of the lease being arranged, or in the event of the

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manner directed by the Court, either his consent to the alteration has been obtained, or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court: Provided that the Court may, in the case of any person or class of persons, for special reasons, dispense with the notice required by this section. (3) An order confirming any such alteration may be made on such terms and subject to such conditions as to the Court seems fit; and the Court may make such orders as to costs as it deems proper. (4) The Court shall, in exercising its discretion under this Act, have regard to the rights and interests of the members of the company, or of any class of those members, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made, to the satisfaction of the Court, for the purchase of the interests of dissentient members; and the Court may give such directions, and make such orders as it may think expedient, for the purpose of facilitating any such arrangement or carrying the same into effect: Provided always that it shall not be lawful to expend any part of the capital of the company in any such purpose. (5) The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company, if it appears that the alteration is required in order to enable the company—(*a*) To carry on its business more economically, or more efficiently; or (*b*) To attain its main purpose by new or improved means; or (*c*) To enlarge or change the local area of its operations; or (*d*) To carry on some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company; or (*e*) To restrict or abandon any of the objects specified in the memorandum of association or deed of settlement."

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respondents being successful in their said application to Parliament, so that the petitioners may be in a position to offer for a lease to work the tramways otherwise than by animal power."

The corporation lodged answers and maintained that under the Act of 1870, and the agreement and lease following thereon, the company were absolutely precluded, at all events during the subsistence of the lease, from carrying on any other business than the working of the tramways leased to them by the respondents. And they stated that it was on the faith that the energy and capital of the petitioners would be dedicated solely to this end that the respondents undertook the very large expenditure on the construction of tramways above mentioned. There was no warrant or authority whatever in the said statute, agreement, or lease, for the very extensive change in the character and scope of their business now projected by the petitioners. In particular the respondents objected to objects (10) and (13) of the petitioners' proposed addition to their memorandum of association. They contended that to introduce object (10) into the memorandum would be to run entirely counter to the Act of 1870. By that Act the company came into existence solely for the purpose of working tramways, which the respondents were empowered to construct. If the company were now permitted to promote or acquire and work other tramways, then the capital, energy, and resources, which the respondents were entitled to rely upon being dedicated exclusively to the tramways constructed by them might be dissipated on other and entirely different concerns.

The respondents contended that to introduce object (13) would be to run counter to the 26th section of the Act, which provided that "all carriages used on any tramway shall be moved by animal power only." Parliament had hitherto refused its sanction to the use of mechanical power on tramways formed on the streets of Glasgow; and, if the employment of any other than horse power was to be sanctioned, the right to use such power should be vested in the respondents as proprietors of the tramways and conservators of the streets of the city in the public interest, and not in companies or persons whose interest in the streets must necessarily be limited in character and duration, and in some respects antagonistic to the interests of the public.

The respondents further contended that the pecuniary obligations to them under which the petitioners lay might, and probably would, be seriously affected. If the petitioners should embark on the numerous schemes embraced within the objects now sought to be included in their memorandum of association their financial resources would be seriously imperilled, and their ability to meet their pecuniary obligations to the respondents would be impaired if not destroyed. In answer, the petitioners stated that in terms of the lease the corporation held heritable securities to the amount of £129,232, and that the total pecuniary obligations of the company to the corporation would not exceed £105,000, and this was neither admitted nor denied by the corporation.

Argued for the petitioners;—Under the Companies Memorandum of Association Act, the Court had a discretion in the matter of confirming a resolution to alter a memorandum of association, but practically as regarded persons outside the company such a resolution would be confirmed provided it complied with subsec. 2 and subsec. 5 of sec. 1 of the Act. Subsec. 2 enacted in the first place that the Court must be satisfied that notice had been given to persons whose interests would be affected by the proposed alteration, but no question arose here under that head. Then it was further provided that the Court must be satisfied that the claims of creditors who had not consented to the

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alteration had been discharged or had determined or had been satisfied. Now, in answer to the respondents' objection, it was sufficient to point to the petitioners' statements on the head which the respondents neither admitted nor denied, and which therefore must be taken *pro veritate*—at anyrate the petitioners were ready to go to proof on it; that article shewed plainly that the corporation were very amply secured against any possible loss during the remaining years of the lease. Next, as regarded subsec. 5 it was to be borne in mind that a company might be incorporated under the Companies Acts for any purposes of profit whatever, which were not in themselves contrary to morality or to public policy. The petitioners therefore might legitimately and without objection have possessed all the powers they now desired to have, had they enumerated them in their memorandum of association. Once incorporated, however, a company was, until the recent Act, strictly limited to the purposes enumerated in its memorandum of association. The only way in which it could (in practical effect) enlarge the scope of its business was by the cumbrous and expensive method of a liquidation, and the incorporation of a new company with enlarged powers. The object of the Act of 1890 was to supply a more expeditious and cheaper way of effecting the same result in certain classes of cases, which were enumerated in subsection 5. The question therefore was, Did the powers for which the confirmation of the Court was asked fall into any of these classes? And that was the only question under this head, for there was nothing in the constitution of the company which prevented them from taking advantage of the Act. They were a company registered under the Companies Acts, and that was sufficient to give them a title to petition. The purposes of a company as defined in its memorandum might perhaps be of such a limited and specific character—especially as regarded the duration of the company,—that no possible additions to its memorandum would fall within subsection 5, but that was not the case with the petitioners; their memorandum did not limit the period of their existence to that of the present lease, nor did it contemplate that their only business should be that of lessees of the corporation tramways, for they were expressly given powers to enter into a new lease, and to become omnibus proprietors. Now of the proposed new purposes to which the corporation specifically objected, (10) fell within either subhead (*c*) or subhead (*d*) of subsection 5, and (13) fell within either subhead (*a*) or subhead (*b*). It was said that to confirm (13) would be to entitle the company to break the contract which they had made with the corporation, as that contract prohibited the use of other than animal power on the tramways. But that was to confound the powers of the company with their rights *ex contractu*. It could not be suggested that the Court by granting the present application would give the company the right to violate the Act of Parliament, which prohibited the use of other than animal power; and it was almost equally obvious that the addition of the proposed power to the company's memorandum would not give them a vested right to use other than animal power on the Glasgow tramways should Parliament see fit to sanction such a means of locomotion. While their contract with the corporation lasted they would be bound by that contract notwithstanding anything that might be done in this application, just as any private individual lessee would have been, and when their contract with the corporation came to an end they, whatever their powers might be, would have no more right than any private individual to use mechanical or any other mode of locomotion on the tramways, unless they and the corporation entered into a new lease. What they desired was to be put into as advantageous a position as an individual lessee would have been in at the end of

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the lease in contracting for a new lease; for if Parliament were to sanction the use of mechanical power on the Glasgow tramways a private individual lessee could have contracted with the corporation for a new lease, whereas for the petitioners with their present powers to do so would be *ultra vires*, or at least it was doubtful whether it would be *intra vires*.

Argued for the corporation;—It might be that the corporation were secured against all possible loss, provided the company's powers remained what they were, but if the company was permitted to embark in all the speculations which would be within its power, were confirmation to be granted, it was impossible to say what liabilities it might not incur. The company was in an unique position, for as long as the lease lasted it was entirely under the control of the corporation, and could do nothing without the consent of the corporation. It was bound to apply its whole capital to the working of the tramways belonging to the corporation—the 3d article of the agreement with the promoters (which was incorporated into the lease by the 17th article of the lease) distinctly provided that: and it was bound to use only animal power in using the tramway—the Act of 1870 enjoined that, and was binding on the company. In short, it was *pars contractus* between the corporation and the company that the company's powers should, during the lease, remain what they were. This being so, the present application was an attempted breach of contract, and as such, neither complied with subsection 2 of the Act of 1890, nor with subsection 5,—not with subsection 2, for the consent of the corporation had not been obtained, and it could not be said that a breach of a contract was either a discharge or a determination of or a security for that contract. Then subsection 5 contemplated that additions to a memorandum should be in some way ancillary to the powers already in the memorandum. But the powers which it was here proposed to add were subversive of the existing constitution of the company. Under its existing powers it could do nothing but work the Glasgow tramways so long as it was lessee of these tramways. In any case, the Court had a discretion, and it would be well exercised in refusing the application during the currency of the present lease.

The petitioners in reply disputed the construction of the agreement which would bind them to apply their whole capital, which much exceeded the specified £200,000, to the working of the tramways, but they stated that they were willing so to apply it during the currency of the existing lease.

At advising,—

Lord Kinnear.—This is an application under the Companies Memorandum of Association Act, 1890, for the confirmation of certain resolutions to alter the memorandum of association of the Glasgow Tramway and Omnibus Company. The Act was passed in order to enable companies, with the sanction of the Court, to enlarge the scope of their memorandum of association so as to relieve themselves to a limited extent, defined by the Act, of the incapacity which disables trading corporations created for certain definite purposes only from undertaking any kinds of business or entering into any contracts not warranted by the terms of the original constitution of the company, either expressly or by necessary implication. I think that there can be no question that in the position in which the petitioners are placed it is most reasonable that they should be allowed to avail themselves of the power conferred by the statute, provided that the interests which the statute requires to be protected are sufficiently secured.

The petitioners' company was incorporated in 1871, mainly for the purpose of

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working certain tramways in Glasgow under a lease from the corporation for twenty-three years from July 1871, and after the expiration of that period under such new lease of the same subjects as might be agreed on, and for carrying on an omnibus traffic in connection with the tramways during the subsistence of the lease or leases, and after their expiration for carrying on the business of omnibus proprietors in Glasgow and the vicinity. In carrying on their business under the lease up to this date, the company have employed a capital of £369,502, they have acquired a great deal of property, both heritable and moveable, and they are now in possession of a very large stock of horses and plant, which are necessary for the conduct of their business. They say that if the lease which they now hold from the corporation should come to an end, without being renewed, they would be in this position, that their constitution as established by their present memorandum of association would allow of their applying this large and valuable stock of horses and plant to no useful purpose, except in so far as regards the comparatively inconsiderable portion which might be used in the business of omnibus proprietors. The position therefore which they have stated is this, that if their business is restricted by the limits of their present memorandum, they will be placed in a very disadvantageous position in contracting with the corporation for a renewal of the lease, for if they should fail to come to terms with the corporation, which seems to be probable, they will have this valuable stock thrown upon their hands, with no resource except to sell it at what is called a break-up value, to the serious loss of the shareholders. In these circumstances, it is quite legitimate and most reasonable that they should endeavour now so to enlarge the scope of their corporate life as to enable them to make some profitable use of their property when the lease comes to an end, in case it should not be renewed, and in the meantime to make valid agreements for that purpose, which should be binding both upon the company and upon the persons with whom they might contract, because it is quite clear that as the memorandum of association now stands, any agreements which they might now make for the purpose of using their property for any other objects than those expressly warranted by the memorandum of association would be altogether invalid and ineffectual. In so far therefore as this application depends upon the general reasonableness of its character, it appears to me that the petitioners have presented a case which entitles them to obtain the sanction of the Court to the resolutions which they have passed.

But the Court is not entitled to sanction such resolutions merely because they appear reasonable and proper in the interests of the company itself. We must be satisfied that the conditions under which the statute allows the memorandum of association to be altered are complied with. Now, these conditions are of two kinds. In the first place, the statute allows the alteration of a memorandum of association only for certain limited and definite purposes, and the Court therefore cannot confirm a resolution for altering a memorandum unless it appears that the alteration is required for these purposes; and in the second place, even if it should so appear, the Court cannot confirm a resolution unless they are satisfied that sufficient notice has been given to all persons interested, and that the interests of those who are entitled to object have been duly secured.

Now, with regard to the first of these conditions, what is required is that the company should shew that the alteration is necessary to do one or other of five things, namely to carry on its business more economically or more efficiently—that of course means its present business—or to attain its main purpose by new

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or improved means, or to enlarge or change the local area of its operations, or to carry on some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company; or to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement. The first question therefore appears to me to be whether the resolutions which the company asks should be confirmed are in accordance with these conditions of the statute. The new objects which the company proposed to add to their memorandum of association are stated under six heads, but one of these has now been withdrawn from consideration. There remain therefore five heads, under which are set forth the new objects or purposes which the company desire to have added to their memorandum of association.

Now, it appears to me that there is only one of these heads which raises a question of any difficulty upon this branch of the case, and that is the power contained in the first of the proposed new resolutions, which, if the resolutions are confirmed, would become the 10th purpose of the memorandum of association. The resolution proposes to give the company the right "to exercise the powers and carry on the business of a tramway company, and to promote or acquire, equip, work, or dispose of any tramways within the city of Glasgow and the vicinity." Now, in so far as this resolution proposes as an object of the company the exercising of the powers and the carrying on of the business of a tramway company, and the acquisition, equipment, and working of tramways within the city of Glasgow and the vicinity, it would appear to me that it falls within the powers given by the 5th subsection of the statute as being an enlargement or change of the local area of the operations of the company. It does not appear to me that in so far as the words which I have read go, the resolution would carry the business of the company beyond the scope of the provisions of the statute. But then, in addition to the purposes to which I have just referred, the resolution proposes that the company should have power to promote and dispose of any tramways within the city of Glasgow and the vicinity. Now, the power to dispose of property, heritable or moveable, may be a merely ancillary power, without which it would be impossible to carry on the main purposes of the corporation, and if nothing more were implied in the words "dispose of tramways" than the power which the company already has under their present memorandum of association, it does not appear to me that it would create any difficulty. But the words of the proposed resolution seem to me to go beyond that. The word "promote" is not a word of any very definite meaning, but if the company obtain power to promote and dispose of tramways, that certainly appears to me to cover the promotion of undertakings for the construction of tramways, and for the disposal of these tramways after they had been constructed, and might possibly be held to cover speculations departing even more widely from the original purposes of the company. I am disposed to think that the promotion and disposal of tramways is a matter entirely foreign to the original purposes of the memorandum of association, and I cannot say that it has been made apparent, by any of the explanations which have been given to us at the bar, that this alteration is required in order to enable the company to do any of the things contemplated by the statute. I am therefore unable to see that the Court is in a position to confirm the resolution in so far as it is a resolution authorising the company to promote and dispose of tramways. With that exception, it appears to me that all of the new purposes which

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the company desires to undertake are clearly within the terms of the statute. I do not think it necessary to examine them in detail. It is enough to say that they all fall under one or other of the heads given in the statute.

But assuming that to be so, there is a second condition which must be satisfied before the Court can confirm the resolutions. The Court requires to be satisfied with respect to every creditor who in the opinion of the Court is entitled to object either that he has given his consent to the proposed resolution, or that his debt or claim has been discharged or determined, or that it has been secured in some way to the satisfaction of the Court. Now, I think that there is no doubt whatever that the position of the corporation of Glasgow as the creditor in the obligations of the lease of the tramways to the company is such as to entitle the corporation to state objections to the proposed alterations, and, if these objections cannot be otherwise satisfied, that the corporation are entitled to insist that their claims should either be discharged or in some way secured to the satisfaction of the Court. The corporation have accordingly stated objections, and have maintained them very strenuously to the Court.

These objections appear to me to be of two kinds. In the first place, the corporation maintain that the proposed alterations ought not to be sanctioned as being inconsistent with the statute, and as otherwise objectionable irrespective of the special claims of the corporation as creditors in the obligations of the lease; and in the second place they maintain that the resolutions ought not to be sanctioned because they would prejudice the interests secured to them by that contract.

As to the first of these objections, I think it applies mainly to the 4th of the new resolutions, which would stand, if the resolutions are sanctioned, as the 13th of the purposes of the memorandum. By it the company seek to obtain authority "to work and move all or any of the carriages or other vehicles of the company by means of electrical power, steam power, or by any other mechanical power which may be available, or by means of haulage with wire ropes, cables, chains, or other appliances." The corporation contend that to introduce this object into the petitioners' memorandum of association would be to run counter to the Act of Parliament, that is to say, the Glasgow Street Tramways Act, 1870, by which the tramways now vested in the corporation were established. By the 26th section of that Act it is provided that "all carriages used on any tramway shall be moved by animal power only." The corporation state that Parliament has hitherto refused its sanction to the use of mechanical power on tramways formed on the streets of Glasgow, and they contend that if the employment of any other than horse power is to be sanctioned, the right to use such power should be vested in them as the proprietors of the tramways and conservators of the streets of the city in the public interest, and not in companies or persons whose interest in the streets must necessarily be limited in character and duration, and in some respects antagonistic to the interests of the public.

It appears to me that this is an objection which is not relevant to any question which we are here required to consider. It seems to me to proceed upon an entire misconception of what it is that the company proposes to do, and of what it is competent for them to do in the way of enlarging the scope of their business. It is quite manifest that no resolution of the company, and no confirmation of any resolution of theirs, can possibly vest in them the right to use mechanical power on the streets of Glasgow. If the effect of the Act of

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Parliament has been correctly stated it is perfectly clear that nothing that the company can do will enable them to use mechanical power contrary to the provisions of the Act of Parliament. The only effect of their resolution, if it should be confirmed, will be that it will remove a disability which is entirely personal to the company themselves. It will give them no right adverse to the corporation, and no power to do anything which is not at present perfectly lawful to any private company or individual, or to any association of persons who may choose to combine for the purpose of using mechanical power, and set forth that purpose in a memorandum of association registered under the Companies Acts. Therefore it seems to me that the apprehension of the corporation is entirely without foundation. The resolution, if confirmed, will enable the company to make contracts with the corporation, or with any other persons who may be entitled to authorise, or who may hereafter be entitled to authorise, the use of mechanical power on tramways in Glasgow or its vicinity, but it will do nothing more. I do not know whether it may not be that the company has this power already. It does not appear that they are expressly limited by their memorandum of association to the use of animal power only, but it may very well be that they are so limited by implication, because they have come into existence, according to the constitution contained in the present memorandum, for certain specified purposes only, which may perhaps be held to exclude the use of tramways by other than animal power. One can quite understand therefore why they should think it proper to take in express terms this power of using mechanical means in case they should be enabled, by the confirmation of their resolutions, to carry on a more extensive business than they do at present.

The other objection to the proposed resolutions which the corporation have stated is this,—they say that the tramway company are bound to them, in the first place, under very large pecuniary obligations, and in the second place, under an obligation to devote their whole capital, energy, and resources exclusively to the tramways constructed by the corporation, and at present leased by the company, and therefore, the corporation contend, it would be contrary to the conditions of their contract, if the company undertook, or were allowed to undertake, a different business in which they might employ some portion of the capital and resources which the corporation say ought to be devoted exclusively to their service. Now, the lease certainly does impose very heavy obligations upon the company, and secures to the corporation in the public interest very important rights. But it appears to me that all these obligations of the company to the corporation are already very amply secured. They are secured by the terms of the lease itself, and by the conduct of the business which has followed upon the lease in the execution of its terms.

In the first place the lease provides, in its 11th clause, that the company should be required to invest a sum of not less than £60,000 in the purchase of heritable property, to be conveyed to the corporation in security of the obligations of the lease in their favour, and in the second place, in order to secure the performance of the company's obligation to maintain the tramways, and to run cars upon them for the benefit of the community—to carry on their business fairly for the benefit of the community—there are a number of very stringent stipulations in the lease which appear to me to put the corporation in a very secure position indeed as against the company, and therefore on a consideration of the objections which have been stated on behalf of the corporation with

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reference to the provisions of the lease, I am disposed to think that—throwing out of account one special stipulation to which I shall advert immediately—the corporation is so amply secured that it would not be proper to refuse to sanction what are in themselves most reasonable alterations in the memorandum of association upon the ground of any interest which the corporation may have. The company state that the pecuniary obligations undertaken by them to the corporation have amounted in all to something less than £30,000 per annum on the average of the last five years; that this has been duly paid hitherto, and that for the three and a-half years of the lease which are still to run the total sum to be paid by them to the corporation, on this average, will not exceed £105,000. They then further state that, in terms of clause 11 of the lease, they have conveyed to the corporation heritable property to the value of £129,232 in security of the obligations undertaken by them in the lease. Now, in answer to these statements, the corporation admit that the pecuniary obligations of the company amount to the sum mentioned, and that they have hitherto been paid, but they go on to say, "*quoad ultra* not known, and not admitted." Now, I cannot take that as a denial of the statement which the company make that the corporation hold under absolute disposition property of the petitioners of much greater value than the lease required, and amply sufficient to secure these obligations. The respondents may not be prepared to admit the exact figures stated in the condescendence. But they must of course know whether the statement is true or false to the general effect I have mentioned, and if they intended to deny it they should have done so in terms. They have not asked for any inquiry upon that point, and therefore I take it that upon record the corporation admit that statement. It appears to me therefore that the pecuniary obligations which the company have undertaken to the corporation are amply secured.

But then there remains the special stipulation to which I have referred, which seems to me to raise a question of some difficulty.

The contract of lease imports an obligation which in effect comes to this, that the company are bound to apply their whole capital of at least £200,000 exclusively to the purposes of the Glasgow tramways, and it is said that if they are allowed to enlarge the purposes of their business in the manner proposed they would be induced—or at all events enabled—in breach of their obligation, to devote some part of their capital to purposes foreign altogether to their original constitution. Now, there no doubt may be a question of construction upon the contract as to whether that is or is not too rigorous a reading of the obligation, or whether, on the other hand, the obligation is not satisfied by the company having already devoted to the purposes of the corporation tramways a much larger amount of capital than the minimum mentioned in the memorandum. But if there be any such question, I should not regard this as a proper process in which to determine it. On the contrary, I think that the objection is one which must be considered upon the assumption that the construction of the contract maintained by the corporation is the true construction, and that no part of the original capital can be applied to any purpose which is not authorised by the original memorandum. Therefore, the question comes to be whether this obligation with the others is sufficiently secured. There may be something to be said for the view taken by the company that the obligation is sufficiently secured already, but I think that we are relieved of the difficulty of determining that question, which is not without some delicacy, by the proposal which was made by the company at the bar during the course of the debate. They

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stated that they were willing to undertake that during the subsistence of the lease they should not call up capital to be applied to any purposes except the purposes of the lease. If the company are willing to give that undertaking, and to make it a condition of their resolutions being confirmed, I am of opinion that all the resolutions ought to be confirmed, except the portion of the first resolution to which I previously referred.

LORD M'LAREN and LORD ADAM concurred.

The LORD PRESIDENT was absent at the advising, but LORD ADAM intimated that his Lordship concurred.

THE COURT pronounced the following interlocutor:—"Confirm the proposed alteration of the petitioners' memorandum of association except in so far as regards the power to promote and dispose of tramways contained in the 10th article, and in so far as regards the 14th article thereof, but under the condition that the uncalled-up capital should be applied solely to the purposes of the existing lease."

MILLAR, ROBSON, & INNES, S.S.C.—T. J. GORDON & FALCONER, W.S.—Agents.

No. 136.

Mar. 17, 1891. Forbes v. Whyte.

SIMON FORBES, Pursuer.—*Dickson.*
GEORGE WHYTE, Defender.—*Party.*

Expenses—Party conducting his own case.—Held that a party to an action residing at a distance from the seat of the Court who conducts his own case personally and is found entitled to expenses is not entitled to charge against the opposite party anything in respect of personal expenses while absent from his home attending the litigation.

Opinions that he is not entitled to charge for his trouble and loss of time.

1ST DIVISION. C.

IN the action reported *supra*, p. 182, Whyte, the respondent, was found entitled to expenses, and his account was remitted to the Auditor for taxation.

From the account, it appeared that the case was discussed before the Lord Ordinary in the Bill-Chamber on 9th and 10th October 1890, that there was a discussion before the First Division in the Single Bills on 28th October, and that the case was disposed of on the merits on 28th November. Whyte, who throughout appeared personally, charged nothing in lieu of professional fees, either to counsel or agents, for these discussions. His account was made up as follows:—(1) Railway and cab fares incurred by him in coming from and returning to Aberdeen to attend the two earlier discussions, and in coming from and returning to London on the occasion of the last discussion; (2) "personal expenses in Edinburgh," at the rate of £1, 11s. 6d. a-day, for nine days in all; and (3) "days from business in Aberdeen" (or "in London"), at the rate of £3, 3s. a-day, for nine days in all. There was a further sum of £3, 6s. 10d. of expenses of audit, which was incurred to Whyte's agent. The total amount of the account was £55, 6s. 4d.

The Auditor taxed off the sum of £44, 12s. 6d., allowing only a sum of £3, 3s. under the head of "engaged from business in Aberdeen," in respect of the discussion in the Bill-Chamber, and of £1, 1s. and £3, 3s. under the corresponding heads charged for the later discussions. He also allowed the audit expenses, and further allowed an addition under that head of £1, 7s. 8d., making a total allowed of £12, 1s. 6d.*

* In a note the Auditor stated that he had been informed that the respondent was a commercial traveller in London, that he (the respondent) "states his

Whyte lodged objections to the report. No. 136.

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LORD ADAM.—We have here a note of objections by George Whyte to the Auditor's report on his account of expenses in a petition for the sequestration of his estates. Whyte conducted his own case, and being successful, was found entitled to expenses. He lodged an account of these expenses, amounting in all to £55, 6s. 4d., of which sum the Auditor has taxed off £44, 12s. 6d., and has added on a small sum of £1, 7s. 8d., bringing out a balance of £12, 1s. 6d. due to Whyte.

In his report, the Auditor explains the principle upon which he has proceeded in these terms,—"My view is that he"—that is Whyte—"is not entitled to professional fees, but only to a reasonable allowance for his trouble, and that having elected to conduct his case personally, in place of employing counsel and agent in the usual way, he is not entitled to charge more than if he were resident at the seat of the Court."

Mr Whyte's objection practically comes to this. He says that he is entitled to all of what he calls outlays and other charges—his railway fares and other expenses in the coming to Edinburgh from Aberdeen and from London, his personal expenses while in Edinburgh during the discussions on the petition at the rate of £1, 11s. 6d. per day, and a sum of three guineas per day for the time when he was detained from business in consequence of his attendance in the Court.

Now, for myself, I should require further consideration before I could hold that when a person conducts his own case he is entitled to any remuneration at all for his trouble in the matter. If he is entitled to anything in name of outlay, I think it must be of the most moderate description; but for a party who is living at a distance to come here each time the case is in the roll and conduct his own case personally, and then charge substantial sums for outlay, personal expenses and loss of time, is absurd. The Auditor has allowed about £12 as being a reasonable allowance to Mr Whyte. As I have said, I doubt whether anything at all should be allowed, but we cannot consider that from the way in which the matter comes before the Court, the other party not having lodged a note of objections. All we can do is to repel Mr Whyte's objections, which I am of opinion we ought to do.

LORD M'LAREN.—I agree that a person who conducts his own case is not entitled to remuneration for trouble and loss of time incurred in consequence of his having elected to attend the Court personally. I am therefore not prepared to affirm the principle on which the Auditor appears to proceed.

Nor, as at present advised, am I prepared to allow a person conducting his own case anything for his personal expenses, railway fares, hotel bills, and so on.

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expenses on this footing, that he is entitled to charge his travelling expenses to and from his place of residence for the time, with personal expenses at 31s. 6d. per day, and an allowance of £3, 3s. per day for time detained from business. My view is that he is not entitled to professional fees, but only to a reasonable allowance for his trouble, and that having elected to conduct his case personally, in place of employing counsel and agent in the usual way, he is not entitled to charge more than if he were resident at the seat of the Court."

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But as no objection is taken by the other party to the Auditor's report, we may give decree for the sum which the Auditor has allowed.

LORD KYLLACHY.—I agree that a litigant conducting his own case is not entitled to any compensation for time and trouble, and I participate in your Lordship's doubt whether such litigant is entitled to more than his judicial outlays—that is to say, his outlays in connection with the fees of Court, and outlays of that description.

But in any case, I am clear that such litigant is not entitled to more than a reasonable allowance for his outlays, judicial and extrajudicial. And it seems to me that, in the whole circumstances of this case, the sum here allowed by the Auditor fairly represents such reasonable allowance.

The LORD PRESIDENT and LORD KINNEAR were absent.

THE COURT repelled the objections, and decerned for the sum found due by the Auditor.

ALEX. MORISON, S.S.C.—PARTY—Agents.

No. 137. Mar. 17, 1891. Hall v. Hall.

ALEXANDER HARVEY HALL AND OTHERS, First Parties.—*Johnston—Rankine.*

ANNIE MARGARET HALL, Second Party.—*Low* *—*Dickson.*

Succession—Conditio si institutus sine liberis decesserit.—Held (by a majority of the whole Court, *diss.* Lord Justice-Clerk and Lord Young) that the implied *conditio si institutus sine liberis decesserit* does not apply to provisions by a testator in favour of his brothers and sisters.

WHOLE COURT M.

MISS WILLIAMINA ANNE SCOTT, of Campfield, died at Aberdeen on 23d October 1889, leaving a disposition and settlement, dated 14th June 1844 by which she conveyed her estate of Campfield and others, therein particularly specified, and generally her whole estate, heritable and moveable, to her mother Mrs Anne Hall, and her stepfather Mr Harvey Hall, in conjunct fee and liferent, and to the longest liver in liferent, but for her or his liferent use allenarly, and "to the children of their marriage, equally between them in fee." She further directed that, failing any more particular arrangement by herself, Mrs Hall and Mr Hall should have power to apportion the lands and estate of Campfield "among the children of their marriage in such way and manner, and according to such proportions as they or the survivor shall judge proper."

When she executed the disposition and settlement, Miss Scott was twenty-one years of age, and had no brothers or sisters, or their descendants, of the full blood living, but had alive six brothers and sisters uterine, the children of the marriage between her mother, Mrs Hall, and her stepfather, Mr Harvey Hall. No other children were subsequently born of the said marriage.

Mr and Mrs Hall both predeceased Miss Scott. Of her brothers and sisters uterine, four predeceased her, three without issue, and one John Robert Hall leaving an only child, Annie Margaret Hall, who was born on 16th August 1864.

This was a special case to which the parties were Alexander Harvey Hall and Mrs Anne Hall or Lancey (with consent of her husband), the surviving brother and sister uterine of the testatrix, Miss Scott, of the first part, and Annie Margaret Hall, the only child of John Robert Hall,

* Mr Low was of counsel for the second party, and signed the minute of debate, prior to his elevation to the bench.

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of the second part, for the opinion and judgment of the Court upon the question,—"Whether the second party, as coming in place of her deceased father or otherwise, is entitled to one-third of the whole estate, heritable and moveable, of the late Williamina Anne Scott, of Campfield, under her disposition and settlement?"

The second party maintained that she, as coming in place of her deceased father, was entitled to take one-third of the whole estate under the destination in the deed, or under the implied *conditio si sine liberis decesserit*. The first parties maintained that the second party was not entitled to any share of the estate.

After a hearing before the Second Division, the case was appointed to be laid before the whole Court with minutes of debate.

In their minute the first parties argued;—The claim of the second party was founded alternatively on the destination in the deed or on the implied *conditio si sine liberis*. The former alternative must rest on the argument that the words "children of the marriage" included grandchildren, issue of a predeceasing child. That contention ran counter to the whole course of decision both here and in England.[1] Such an extension of the term "children" was inadmissible, at least where persons survived, as here, to whom the term in its natural sense was applicable. If the second party had had brothers and sisters it would have involved a claim on the part of all of them, as well as herself, to share along with their uncle and aunt *per capita*. Lastly, it was inconsistent with the power of appointment in the deed in which the testatrix gave her own interpretation of the word "children," for the objects of the power were declared to be the "children" of her mother and stepfather, and such a power could not competently be exercised in favour of grandchildren.[2]

The substantial ground of the second party's claim was the *conditio si sine*. The question was whether the application of the *conditio* was to be restricted to cases in which the person or persons expressly instituted as objects of a testator's bounty were so related to him that he was either their direct ascendant (*parens*) or stood technically *in loco parentis* to them, or whether it was to be extended to the class of cases in which the testator, though not in matter of relationship *in loco parentis*, had in a more popular sense placed himself by the provisions of his will *in loco parentis* to the objects of his bounty.

The doctrine of the *conditio*, at least in its modern development, seemed to be peculiar to the law of Scotland. It was founded on three obscure passages in the Corpus Juris Civilis.[3] It appeared from these texts that the *conditio* was regarded as applicable only where the testator was an ascendant of the person instituted. Within that relation John Voet was willing to allow the condition ample scope, since he was of opinion that it would apply even in the case of a natural child. But in regard to collaterals, he said, "Non etiam tacite haec subaudienda conjectura si . . . collaterales sunt quorum intuitu non tanta, quanta quidem respectu descendentium, pietatis, indeque natæ conjecturæ, ratio est."[4] Further, he held that the *conditio* did not apply if the favoured person or persons were known by the testator to have children. It thus appeared

[1] Rhind's Trustees v. Leith, Dec. 5, 1866, 5 Macph. 104, 39 Scot. Jur. 120; Lowen v. Lewis, 9 App. Cas., 890, 915.

[2] Mackie v. Mackie's Trustees, July 4, 1885, 12 R. 1230.

[3] D. 35, 1, 102; C. 6, 25, 6; C. 6, 42, 30; see Blair's Executors v. Taylor, Jan. 18, 1876, 3 R. 362, at pp. 365 and 367.

[4] *Ad Pand.* 36, 1, 17 to 23; see Earl of Lauderdale v. Royle's Executors, May 19, 1830, 8 S. 771; Martin's Trustees v. Milliken, Dec. 24, 1864, 3 Macph. 326, 37 Scot. Jur. 155.

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that the Scots Courts had carried the doctrine much further than the authorities on which it unquestionably was originally founded. The *conditio* seemed to be unknown in England, apart from the Wills Act of 1837,* which gave a statutory remedy of a somewhat analogous character, but confined it to the settlement of an ascendant.

The phrase *in loco parentis* was familiar in another department of Scots law. The general rule being that marriage might lawfully be entered into between persons who were seconds in blood, and between persons related in a more remote degree, according to the notation of the Canon law, it would have followed that uncle and niece, aunt and nephew, grand-uncle and grandniece, &c., might lawfully intermarry, had it not been for the further rule that persons were within the forbidden degrees if one of them stood *in loco parentis* to the other; that was where he or she was brother or sister to a direct ascendant of the other party.[1] It was probably this analogy between the disability of ascendants and descendants, and of persons holding this relation, that suggested the extension of the *conditio* beyond the line of direct descent.[2] If the doctrine was to be extended beyond cases in which the testator stood, in this strict sense, *in loco parentis* to his beneficiaries, that could only be by eliminating relationship altogether from the consideration, and deducing the applicability of the *conditio* solely from the nature and provisions of the particular settlement.

Certain general rules might be gathered from the authorities. (*a*) The duty of the Court was to discover, if it could, from the terms of a settlement, what was the intention of the testator. To give effect to the *conditio* was *ex hypothesi* to insert a clause or term in the settlement which did not appear on the face of it. Two theories had been put forth to explain the *ratio* of thus exceptionally dealing with the *ænixa voluntas* of a testator. One was that he really meant the inclusion of issue of a predeceasing object of his bounty by the use of the words to be found in his will; the other, that he inadvertently forgot the possibility of the predecease, and would, had he thought of it, have certainly provided for it in express terms. It was here immaterial which of those views, or whether either of them, was sound. It was enough that there must be some limit imposed on this presumption of intention; otherwise, the cardinal rule of lapse of a legacy through the death of a legatee or beneficiary before the death of the testator, or before the vesting of the bequest, would be reduced to a nullity. (*b*) One mode in which the scope of the *conditio* was restricted was brought about by the general, if not universal, rule that there must be no proper *delectus personæ* in the bequest.[3] That principle explained the subordinate rules, that the settlement must be a general one, and of the nature of a family settlement, and that the bequest must be devised to a class. The doctrine of *delectus personæ* applied with much force where there was a special conveyance, but that circumstance was not conclusive against the application of the *conditio*.[4] Nor was it necessary to call the whole class in order to let in the presumption; nor that all the persons favoured should belong to the same class; nor that

* 1 Vict. cap. 26, sec. 33.

[1] 1 Fraser, Husband and Wife, 119.

[2] See Hamilton v. Hamilton, Feb. 8, 1838, 16 S. 478, per Lord Glenlee, at p. 487, 10 Scot. Jur. 263.

[3] Hamilton v. Hamilton, Feb. 8, 1838, *supra*; Fleming, 1798, M. 8111; Gillespie v. Mercer, March 8, 1876, 3 R. 561; Douglas' Executors, Feb. 5, 1869, 7 Macph. 504, 41 Scot. Jur. 268; Bryce's Trustee, March 2, 1878, 5 R. 722.

[4] Chancellor v. Mossman, July 19, 1872, 10 Macph. 995, 44 Scot. Jur. 557.

the members of the class should be benefited equally.[1] (c) The other mode in which the application of the *conditio* was restricted was found, it was submitted, in the rule whereby it was confined to cases where the testator either was an ascendant (*parens*) or stood strictly *in loco parentis* to the persons called to share in the inheritance.

The doctrine of the *conditio* was first recognised in 1738 in the case of *Montrose Magistrates* v. *Robertson*,[2] where the destination was in the direct line. The first case in which the doctrine was applied beyond the line of direct descent was *M'Kenzie* v. *Holte's Legatees* in 1781.[3] It appeared from the Session Papers in that case that the beneficiaries instituted were the children of two sisters and of a niece of the testator's husband, and that the testator was disposing of property which had come to her from him, and which she apparently regarded herself as bound to dispose of in favour of his nearest relatives. So that substantially the testatrix stood *in loco parentis* to the children, and was making for her husband a family settlement. The case of *Wallace* v. *Wallace* in 1807[4] contained the first formal statement of the restriction now in question. The testator left the residue of his estate to the children of a nephew that might be in life at the decease of the longest liver of the testator and his spouse, with a survivorship clause. The nephew and his eldest son died before the date of payment, but the latter left a child, who was therefore great-grandnephew of the testator. The decision was that the testator's great-grandnephew was, in place of his deceased father, entitled to a share of the residue along with the surviving children of his nephew. The successful argument proceeded on the presumed will of the testator, as involving the *conditio si sine liberis;* and the argument to the contrary was that the presumption of the *conditio* only held in the case of direct descendants, and where the testator was properly *in loco parentis*—neither of which relations was, it was contended, to be found in the circumstances of the case. The cases of *M'Kenzie* and *Wallace* were strongly founded upon in *Christie* v. *Paterson*.[5] That decision, so far as was known, was the only example of a divergence from the rule of practice which had confined the application of the *conditio* to cases in which the testator was either *parens* or strictly *in loco parentis* to the persons instituted. The persons there called were cousins-german. One of them predeceased the testator leaving issue, and that issue was held entitled to the share which would have fallen to their mother had she survived. The Lord Ordinary rested his decision on the cases of *M'Kenzie* and *Wallace*. He was followed by Lord Hermand,[6] by the Lord President, and by Lord Gillies, but Lords Balgray and Succoth differed; and Lord Balgray explained the case of *Wallace* as depending on the will being a complete family settlement by a testator, who stood, as it were, *in loco parentis*, and declined to hold that the *conjectura pietatis* ruled the case in hand. The case of *Hamilton* v. *Hamilton* in 1838 was important on account of the *dicta* which fell from some of the Judges.[7] In *Thomson's Trustees* v. *Robb*[8] the *conditio* was held to

[1] Halliday, Nov. 9, 1869, 8 Macph. 112, 42 Scot. Jur. 65; Magistrates of Montrose v. Robertson, 1738, M. 6398; Wood, 1789, M. 13,043; Bogie's Trustees v. Christie, Jan. 26, 1882, 9 R. 453.

[2] M. 6398.

[3] M. 6602.

[4] M. Clause, App. No. 6.

[5] July 5, 1822, F. C. 667, 1 S. (N. E.) 498.

[6] But see Lord Hermand in Neilson, June 4, 1822, F. C. 619.

[7] 16 S. 478, see particularly Lord Glenlee, p. 487.

[8] July 10, 1851, 13 D. 1326, 23 Scot. Jur. 620.

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apply to a gift to the family of a sister, called generally, and a nephew and niece *nominatim*. In *Martin's Trustees* v. *Milliken*[1] Lord Barcaple decided, and Lords Cowan and Neaves were of opinion, that the *conditio* could not be applied in favour of the children of a legatee described as "the natural son of my brother." *Rhind's Trustees* v. *Leith*[2] was a case in which it was sought to apply the *conditio* to a gift to the testator's cousins-german. The claim was rejected, on the ground that the cousin whose child claimed had not survived the date of the settlement, and so the parent not having been instituted, there could be no conditional institution of the child. But Lord Justice-Clerk Inglis[3] in that case doubted the case of *Christie* v. *Paterson* as an authority for extending the *conditio* to cousins. In several recent decisions, in which the *conditio* was applied in favour of the children or descendants of nephews or nieces of the whole or half blood, it was distinctly assumed to be necessary that the testator should stand *in loco parentis* to the parties instituted in his will.[4] In *Bogie's Trustees* v. *Christie*[5] the Lord President thus explained what was meant by a testator placing himself *in loco parentis*:—"It does not mean that the uncle has during his life occupied such a position as treated his nephews and nieces with that kindness which a parent would shew to his children; what is meant is, that in his settlement he has placed himself in a position like that of a parent toward the legatee—that is to say, that he has made a settlement in their favour similar to what a parent might have been presumed to make." This, however, was merely a qualification of the doctrine, which had admittedly been settled by a long series of decisions, that the *conditio* was, as a general rule, applicable to cases of settlements made by uncles or aunts on nephews or nieces—in other words, by persons who stood, according to the more technical sense of the words, *in loco parentis* to the object of their bounty.

In *Blair's Executors* v. *Taylor*[6] the question now at issue was more thoroughly canvassed than in any other case. The main distinctions between that case and the present were that there the testator was full brother to the persons whom he favoured in his will, and that, though he called all of his brothers and sisters, he did so *nominatim*, not in general terms. But neither of these specialties seemed to have been decisive in leading the majority of the Court to the conclusion that the *conditio* did not apply. The Lord Justice-Clerk Moncreiff and Lord Neaves rested their judgment mainly, if not exclusively, upon the view that the testator did not stand *in loco parentis*, and Lord Ormidale did not differ. Lord Gifford, who dissented, admitted that the cases which alone were attended with difficulty were those in which a bequest was made, not to strangers *nominatim*, nor to children or descendants, but to collateral relatives either by name or as a class, and that there it was very difficult to lay

[1] Dec. 24, 1864, 3 Macph. 326, 37 Scot. Jur. 155.

[2] Dec. 5, 1866, 5 Macph. 104, 39 Scot. Jur. 120.

[3] 5 Macph. p. 111; see also Douglas' Executors, Feb. 5, 1867, 7 Macph. 504, 41 Scot. Jur. 268, per Lord President Inglis, pp. 507-8, and per Lord Benholme, p. 509.

[4] Aitken v. Wright, Dec. 22, 1871, 10 Macph. 275, 44 Scot. Jur. 164; Irvine v. Irvine, July 9, 1873, 11 Macph. 892, 45 Scot. Jur. 546; Nicol v. Nicol's Executor, Jan. 18, 1876, 3 R. 374; Gillespie v. Mercer, March 8, 1876, 3 R. 561; Gauld's Trustees v. Duncan, March 20, 1877, 4 R. 691; Bryce's Trustees, March 2, 1878, 5 R. 722; see also M'Call v. Dennistoun, Dec. 22, 1871, 10 Macph. 281, 44 Scot. Jur. 160, per Lord Deas at p. 284.

[5] Jan. 26, 1882, 9 R. 453; see also Berwick's Executor, Jan. 23, 1885, 12 R. 565, at p. 571.

[6] Jan. 18, 1876, 3 R. 362.

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down a satisfactory principle. His Lordship further admitted that the *conditio* applied in general to bequests to nephews and nieces, and proceeded to figure circumstances in which a brother might be more in the position of parent to his brothers and sisters than an uncle to his nephews and nieces, and suggested that, even in the case of strangers in blood, such as an adopted father and son, the *conditio* might apply, and he concluded,—"It is dangerous to make a legal presumption that one person is *in loco parentis* to another. I rather think that this will always depend upon circumstances, apart from the case of direct descendants." This dissent of Lord Gifford shewed the strength and the weakness of the argument upon the other side. Those who maintained it were driven to abandon a legal presumption upon which a rule of some certainty had been based, without being able to substitute for it anything but the indefiniteness of circumstances. It was plain that the argument, if carried to its logical result, must eliminate relationship altogether from the consideration, for it could not stop at any particular degree of relationship. If so, they must bring the matter to this, either that the *conditio si sine* should be applied in all cases where a testator made a general settlement, or a general provision, in favour of a class, or they must allow extrinsic circumstances to weigh. It was submitted that in either view there would be a wide departure from the principles which have hitherto regulated the interpretation of settlements and a transition from judicial interpretations to mere conjecture. The presumption of intention involved in the doctrine of the *conditio si sine* had been extended beyond its original conception, but on definite and intelligible lines. On the other hand, the views expressed by Lord Gifford shewed forcibly the danger of indefinitely extending the doctrine beyond the intelligible limit which had hitherto (with one doubtful exception) been imposed upon it, viz., that in the case of collaterals the testator must not only have evinced the intentions of a parent in his will by granting what is substantially a family settlement, but also must be, in the technical sense, *in loco parentis*.

The second party argued in her minute;—It was well settled that "the *conditio* applies where the settlement is universal, where the beneficiaries are a class, where the provision is of the nature of a family settlement, and where the testator, if not a parent, is at all events *in loco parentis* to the beneficiaries."[1] In the present case the settlement was universal, was in favour of a class, and was of the nature of a family settlement; the only question therefore was whether, in the sense of the *conditio*, the testator was *in loco parentis* to the beneficiaries? In considering that question, it was not unimportant, in the first place, to see what was the principle upon which the *conditio* in its modern development rested. That principle had been laid down upon high authority to be the implied will of the testator. In the case of a provision by a parent to his children, the *pietas paterna* was itself sufficient to raise the implication. In the case of those who were not actually parents, the implied will was mainly to be gathered from the terms of the settlement—the fact that the settlement was universal, in favour of a class, and of the nature of a family provision, being, as already pointed out, the strongest indication of intention that children should take the share of a predeceasing parent.[2] Con-

[1] Blair's Executors v. Taylor, Jan. 18, 1876, 3 R. 362, per L. J.-C. Moncreiff, at p. 364.

[2] Dixon v. Dixon, Feb. 9, 1841, 2 Rob. App. 1, per Lord Brougham, p. 22; Grant's Trustees v. Grant, July 2, 1862, 24 D. 1211, per Lord Kinloch, Ordinary, p. 1221, per Lord President M'Neill, p. 1226, per Lord Deas, p. 1230; M'Call v. Dennistoun, Dec. 22, 1871, 10 Macph. 281, 44 Scot. Jur. 160, per Lord Ardmillan, p. 285.

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sistently with this principle, the *conditio* had been applied not only in favour of the children of descendants, but also in a long series of cases where provisions have been made by a testator in favour of collaterals.[1] In *Nicol* v. *Nicol's Executors*,[2] the *conditio* was held to apply to a bequest to the children of the testator's brothers uterine, though the testator had a brother of the full blood, to whom part of the estate was left. In *M'Kenzie* v. *Legatees of Holte*,[3] the rule was applied in a destination to strangers in blood, viz., to the children of the sisters of the testator's husband and of his niece. In *Christie* v. *Paterson*,[4] the principle was given effect to where the testator bequeathed the residue of his estate to "the children of the brothers and sisters" of his mother. But, while this decision had been apparently accepted as sound by several eminent Judges,[5] it had been disapproved of by Lord Justice-Clerk Inglis in *Rhind's Trustees* v. *Leith*,[6] and by Lord Justice-Clerk Moncreiff in *Blair's Executors* v. *Taylor*.[7] *Christie* v. *Paterson* was however a very different case from the present, because it dealt not with a universal settlement in favour of the testator's cousins, but with a bequest of residue only; further, the bequest was expressly limited to cousins "who shall be alive at the time of my death." It was true that the Lord President indicated the opinion that in no case could the *conditio* be applied when the relationship between the parties was that of cousins; but the ground upon which his Lordship disapproved of *Christie's* case was, that there the testator did not stand *in loco parentis* to the legatees, and that the will was not, properly speaking, a family settlement, both of which elements concurred in the case of *Wallace*, which that of *Christie* professed to follow. In the present case, it seemed too clear for argument that the terms of the settlement were sufficient to raise the implication of intention on the testator's part, that the issue of predeceasing children should take their parents' share, unless the relationship of the testator to the beneficiaries was such as to exclude the implication.

What then was meant by the term *in loco parentis?* It was submitted that the question whether the testator stood *in loco parentis* to the beneficiaries did not depend wholly or even chiefly upon actual relationship. If, in the whole circumstances, the granter might fairly be regarded as having put himself in that position towards the beneficiaries—that was to say, if he had made a settlement in their favour similar to what a parent might have been presumed to make, he would be held to have placed himself *in loco parentis*, so as to let in the *conditio*. Applying this test, it was submitted that the testator had clearly placed herself *in loco parentis*. If she had been an aunt, it must be admitted that the *conditio* would apply. Did the mere fact that she was an elder sister by a previous marriage necessitate a different construction being put

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[1] Wallace v. Wallace's Trustees, M. *voce* "Clause," Appx. No. 6; Thomson's Trustees v. Robb, July 10, 1851, 13 D. 1326, 23 Scot. Jur. 620; Dennistoun v. Kinloch, *supra;* Bryce's Trustees, March 2, 1878, 5 R. 722; Bogie's Trustees v. Christie, Jan. 26, 1882, 9 R. 453.

[2] Jan. 18, 1876, 3 R. 374.

[3] Feb. 2, 1781, M. 6602.

[4] July 5, 1822, 1 S. 543 (N. E. 498), 20 F. C. 687.

[5] Lord Justice-Clerk Boyle in Booths v. Black, 9 S. 406; Lords Cunningham and Fullarton in Thomson's Trustees v. Robb, *supra;* and Lord Ormidale in Gauld's Trustees v. Duncan, March 2, 1877, 4 R. 691.

[6] Dec. 5, 1866, 5 Macph. 104, 39 Scot. Jur. 120.

[7] Jan. 18, 1876, 3 R. 362.

[8] Bogie's Trustees v. Christie, Jan. 26, 1882, 9 R. 453, per Lord President Inglis, at p. 455, and Lord Shand, p. 457; Blair's Executors v. Taylor, Jan. 18, 1876, 3 R. 362, per Lord Gifford, at p. 373.

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upon her family settlement? A man's nephews and nieces, if the children of a much older brother, might be all older than himself, or in positions which made it unreasonable to say that he was *in loco parentis* to them; on the other hand, an elder brother might be so much older than the other children as to make it reasonable to say that he was *in loco parentis* to them.[1]

Blair's Executors differed in all essential particulars from the present case. There the testator made his will when a young man about to leave the country, and settle as a merchant in Smyrna. By his will he left his whole estate to his father, and failing him by death, to his brothers and sisters *nominatim*. The question arose upon the death of the testator, thirty-five years afterwards, predeceased by his father and by two brothers who left issue. A majority of the Court held that the testator was not *in loco parentis* to his brothers and sisters, the true ground of judgment being that they were called only as conditional institutes, and were not called as a class, but *nominatim*. No doubt the Lord Justice-Clerk and Lord Neaves indicated the opinion that a person could not be *in loco parentis* to brothers and sisters; but that opinion was not necessary to the judgment, and was, it was humbly submitted, contrary to principle and authority. Here all the circumstances pointed to the testator having assumed the position of a parent to the beneficiaries instituted. She was, at the date of the settlement, twenty-one years of age, while the eldest beneficiary was only twelve. She describes herself as Miss Scott "of Campfield," and that estate, which formed by far the larger part of what was carried by the settlement, was primarily and specially conveyed, and it was declared that, failing "any more particular arrangement" by the testator, her mother and stepfather, being the parents of the beneficiaries, "or the survivors, shall have power to transfer, divide, and apportion Campfield, among the children of the marriage, as they or the survivor shall judge proper." Such a settlement, in which the testator left her whole estate to a class of very near relatives equally among them was, it was submitted, clearly a settlement "similar to what a parent might have been presumed to make," while the whole circumstances evinced that kind of personal affection for the beneficiaries which might fairly be regarded as analogous to the *pietas paterna*, so as to justify the conclusion that the testator had put herself *in loco parentis* to those who, though her brothers and sisters, were truly a younger generation.

The consulted Judges returned the following opinion:—

LORD PRESIDENT, LORD ADAM, LORD M'LAREN, LORD KINNEAR, LORD WELLWOOD, LORD KYLLACHY, LORD KINCAIRNEY, LORD STORMONTH-DARLING, LORD LEE.—The question referred to the consulted Judges arises under the testamentary disposition of Miss Williamina Anne Scott of Campfield, who conveyed her estate heritable and moveable to her mother, Mrs Anne Hall, and her stepfather, Mr Harvey Hall, in conjunct fee and liferent, for her or his liferent use allenarly, and to the children of their marriage in fee.

According to the terms of the disposition, the testamentary heirs of Miss Scott are Mr Alexander Harvey Hall and Mrs Lancey, the brother and sister uterine of the testator. But a share is claimed by Miss Annie Margaret Hall, the child of a deceased brother uterine of the testator, on the ground that the *conditio si sine liberis decesserit* ought, as she contends, to be read into the will, in the same manner as if this had been a will by a parent in favour of his

[1] Blair's Executor's v. Taylor, *supra*, per Lord Gifford, at p. 372.

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children, or by a testator in favour of nephews and nieces to whom he had placed himself *in loco parentis*.

As to the origin of the rule of law under which issue are held entitled to come in place of the parent without express words of institution, it is probably unnecessary to say more than that it was introduced on the authority of the Roman law, or by an analogical application of its principles.

But as the authority of the Roman law is referred to in the argument in favour of the extension of the rule in question to the present case, it may be pointed out that the law of Scotland which goes by the name of the "*conditio si sine liberis*" is by no means identical with the *conditio* of the Roman jurisprudence. While in one direction our Judges have sought to confine its application by means of the expression to be found in almost all the reported cases, that the benefit of the *conditio* is confined to persons to whom the testator placed himself *in loco parentis*, in another direction the rule of our law has a wider extension than that of the Roman system. Under our system, the *liberi*, or issue of the persons instituted, have the benefit of the implied condition in preference to next of kin of the testator. But the case treated in the Digest is the case of a gift to an institute with a conditional institution in favour of a stranger or remoter heir, in which case only it was considered that the testator would have preferred the issue of his immediate legatee to the stranger, if he had contemplated the case of the death of the legatee before the opening of the succession.

According to the principles of construction of wills which are now received and acted on, it is probable that we should not feel justified in introducing such a rule at all if the question were now to arise for the first time; for it must be admitted that the effect of the *conditio* is to import into the will something which is not there, although this is accomplished by means of an artificial rule of construction. The same reasons which raise a doubt as to the validity of the process by which the rule was originally introduced into our law ought, as we think, to incline the Court to refrain from extending the doctrine beyond the limits within which it has hitherto been confined by decisions and the practice following on decisions. To these general observations it may be added that in England the doctrine of the implied institution of children rests on statutory authority, and is confined in its operation to the descendants of the testator; and it has not been shewn to us that any writer of authority has advocated an extension of the principle beyond the admitted limits of its application in the law of Scotland.

It is plain enough that the Judges by whom the *conditio si sine liberis* was first admitted as a rule of construction had no intention of establishing it as a universal rule. The rule was first applied to the case of bequests by parents to children, and was afterwards extended to the relation of uncle and nephew, subject to this qualification, that it should appear from the will that the uncle had placed himself *in loco parentis* towards the objects of his gift; in other words, that he intended to make a family settlement.

Accordingly when, in the case of *Rhind's Trustees* v. *Leith*, it was proposed to apply the *conditio* to a bequest in favour of the testator's first cousin, it became necessary to fix a limit to the application of the rule, and the whole subject was considered from this point of view. It was seen that if the *conditio* was made general in its application, this would be equivalent to repealing the rule of law that a legacy lapses by the predecease of the legatee. It was found

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that with the doubtful exception of the case of *Christie*, there was no authority for applying the *conditio* to legacies in favour of collaterals; and it was pointed out by the Lord Justice-Clerk Inglis that the case of *Christie* was of little weight as an authority, because the case was determined by a majority of three to two, and Lord President Hope, who was in the majority, gave his decision not in accordance with his personal opinion on the point, but in deference to the supposed authority of the case of *Wallace*, which certainly does not touch the question of the extension of the *conditio* to collaterals.

It is true that in the case of *Rhind's Trustees* the claim made in virtue of the *conditio* must have failed on another ground, viz., that the parent of the claimant was not instituted. But this circumstance was in the view of the Judges who decided the case, and their decision is given with reference to the two questions. As an expression of judicial opinion, the case of *Rhind* is entirely adverse to the extension of the *conditio* to collaterals. But the history of the question at issue does not end here. In the case of *Blair's Executors* v. *Taylor* the question of the limits of the application of the *conditio* was again considered by the Second Division of the Court, the claim in this case being at the instance of the child of one of the testator's predeceasing brothers. The leading opinion was given by Lord Moncreiff, and was in accordance with that delivered by the present Lord President in the case of *Rhind's Trustees*. Lord Moncreiff, after reviewing the authorities and weighing all the reasons that had been urged in favour of the extension of the rule to the descendants of brothers and sisters, came to the conclusion that the children of the testator's brothers were not entitled to come into their parents' place as implied institutes. Lord Neaves and Lord Ormidale concurred, while Lord Gifford came to a different conclusion. The decision seems to be directly in point, and it has all the weight which is due to a carefully considered judgment of the majority of the Court.

Supposing the question to be open to reconsideration, we could not come to a different conclusion from that which is expressed in these decisions. It is not necessary to recapitulate the arguments which are set forth in the opinions there delivered. But it may be pointed out that the presumption on which the *conditio si sine liberis* is founded—viz., the supposed preference of the testator in favour of the issue of his legatees—is not necessarily consistent with fact. A childless testator may have considered in his own mind whether he ought to leave his fortune exclusively to his surviving brothers and sisters, or whether he ought to include nephews and nieces within the scope of his gift. This is a matter on which the views of testators may very naturally differ. But in the case supposed, if the testator did not mean to leave anything to the nephews and nieces, he would naturally suppose that he sufficiently expressed his wishes by passing them over. Few persons in making a will would wish to resort to the odious form of express disinherison, and it seems undesirable to establish a rule which would render it necessary for testators to use excluding words in order to accomplish their intentions. In the case of bequests to descendants, it is so usual to include the whole family that there is not much likelihood of the testator's true intention being defeated through the operation of the *conditio*. But it is not by any means so clear in the case of bequests to collaterals that the intention is to go beyond the immediate next of kin.

The case of uncle and nephew is perhaps intermediate ground. At all events, the rule is there established, with a limitation to the case of proper family settlements, containing no indication of a contrary intention.

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We see no expediency in extending the rule either to gifts in favour of brothers and sisters, or to gifts in favour of cousins, and it is at least doubtful whether such extension, even if expedient, is altogether legitimate or within the province of a Court of construction. If the principle is to be further extended, it will be very difficult to find any other limit than the one indicated in the decisions, and the choice seems to be between confining it to the wills of parents or persons *in loco parentis*, and making the rule universal and thus rescinding the rule that a legacy lapses by the predecease of the legatee.

Our opinion accordingly is that the question in the special case ought to be answered in the negative.

At advising,—

LORD JUSTICE-CLERK.—The consulted Judges have in this case arrived at a unanimous decision, expressed in one opinion, in which I understand two of your Lordships concur. I regret that after full consideration it has been impossible for me to concur in the judgment which must follow upon that opinion. Had the question been entirely novel, I should have been willing to waive my own view in favour of that arrived at by so large a number of my brethren, so many of whom are senior to myself, and to have been guided by them in the decision of a novel question. But as I hold that the decision to be given in this case is a direct upsetting by the whole Court of what has been already in principle decided—and in my view rightly decided—I feel bound to express my own view to the effect that the former decision was sound, and ought not now to be departed from as a precedent.

In seeking for a definition of what is required in order to justify the Court in holding that the children of a beneficiary under a will shall take their parent's share, when the parent has predeceased the testator, although not mentioned as substitutes, I accept that which was laid down by my predecessor in this chair in the case of *Blair's Executors*. He specifies four elements as necessary—first that the settlement be universal; second, that the beneficiaries be a class; third, that the provision be of the nature of a family settlement; and fourth, that the testator, if not a parent, be at all events *in loco parentis* to the beneficiaries. It is certain that as regards the first three elements there can be no doubt. The testatrix in this case made a universal settlement. She was the sister uterine of the beneficiaries, her mother having married a second time, and they are pointed at not individually but as a class to which there might have been additions after the will was made. She was the member of the family who had means to dispose of, and for the love she bore to her mother she left all her estate in fee to her brothers and sisters, thus plainly making for her parents that family settlement which it would have been natural for them to make had they possessed the subject of the settlement.

What is the meaning of a family settlement? It means just this, that the testator was bestowing his gifts on all of a class, not because of the personal regard he had to each separately and individually, but because of his regard for the family generally, and his wish to favour all whether he knew them or not, or indeed whether they were in existence at the time of his executing his will or not. Whenever you have a will which it is natural for a testator to make from his relationship to the class favoured, you have a family settlement. These elements concur in this case.

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The only remaining question therefore is, whether the testator was *in loco parentis* to those favoured by the will. What is the meaning of these words? I concur with the Lord President in the case of *Bogie's Trustees* that they do not mean that the testator has during his lifetime acted towards them in his intercourse with them as a parent would do. It is not necessary that he should have ever seen them at all at the time of his will being executed. The position must be ascertained from the will itself, in the light of the circumstances attending it. Has he, as the Lord President expresses it, "placed himself in a position like that of a parent towards the legatees—that is to say—made a settlement in their favour similar to what a parent might have been presumed to make." It appears to me that there can be no doubt whatever in this case that what the testatrix did was to make a family settlement exactly as described by the Lord President, viz., "similar to what a parent might have been presumed to make." Having therefore the three elements of family settlement, a universal settlement, and of settlement in favour of a class, and further of settlement such as a parent presumably would make, the question is narrowed down to a very simple one indeed. Is a sister uterine excluded by law from putting herself *in loco parentis* to the class of her brothers and sisters in dividing her estate among them? For it cannot be seriously suggested that every other element does not point in the direction of her having done so if it was not beyond her power by law.

The argument against the view that the *in loco parentis* element is possible in the case of so near a relative as a sister uterine seems to me to be one based on no principle. When once it is admitted that even during the lifetime of the actual parents a relative such as an uncle or aunt can in making a will act *in loco parentis* to a family, I can see no principle whatever which should debar a sister from doing the same. It cannot really depend upon a question of family ascendancy, for if it is the action in making the will which places the testator in the *locus* of *parens*, that is a place assumed, not in virtue of any right, but in order to fulfil a family purpose which the law holds to be natural. There cannot, I think, be any principle which should bar a member of the family from doing the part of a parent to the family in the way of provision merely because the member was not an actual ascendant in the family tree. The presumption is that the making of a family provision is from family affection, and no one would suggest that there is ground for holding that the purpose was less likely to exist in the case of a brother or sister than in the case of an uncle or aunt. In ordinary life the cases are many in which a brother or sister has to take up every duty of a parent that is possible to one not the actual parent. Once it is recognised that some relatives may by will put themselves *in loco parentis* to those not their own children, on what conceivable principle can it be held that the will of so near a relative as a brother or sister, though in every respect the same as that of the uncle or aunt, is not to be held to carry the same advantages to the children of predeceasing beneficiaries? The possible results are most anomalous. An uncle's gift to his nephews may pass by law to grandnephews, but a brother's gift to his brothers may not pass to their sons, his nephews, a generation nearer to him. Indeed, in the case of *Wallace* the rule was applied in favour of a great-grandnephew. I am unable to see any ground for such a distinction, by which one near relative is held to have included the children of those favoured and the other has not, although they have both expressed themselves in the same way and for the same general purpose. For it is intention that is in ques-

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tion. The intention to favour children of predeceasing institutes is implied by the law. What ground is there for not implying it in this case? None whatever that I can discover. It cannot surely be said that a brother or sister is less likely in making a family settlement to desire to favour the families of brothers and sisters than uncles or aunts to favour grandnephews and grandnieces. Indeed, the opposite is the more likely. Here, in this particular case, the place of parent as regards provision for the family is naturally and kindly taken by the sister. She was the member of the family who possessed the means, and was able to fulfil the duty of affection which generally rests upon the actual parent of providing for the family—that is, for the children of the family, and their children in the event of predecease, that being what the law holds that a natural parent will desire to do. The whole principle of the implication rests on the idea that natural duty would tend to a certain course of action, and that general words must be held to imply that which natural duty would dictate. The further implication in the case of other relatives than the natural parent is, that as they take upon themselves the fulfilment of the duty they take the place of the natural parent in that matter, and therefore must be held that they also desire that the same result should follow their general directions which would follow from similar directions of the parent himself. I am unable to find any principle upon which it is to be held that a brother or sister in taking up the natural duty and fulfilling it is not to be held to do so to the same effect by the same acts as would be held in the case of uncles and aunts.

The consulted Judges appear to be unable to find any principle, and to turn to expediency as a ground for refusing to give effect to the implication in the present case. They say—"We see no expediency in extending the rule, . . . and it is at least doubtful whether such extension, even if expedient, is altogether legitimate or within the province of a Court of construction." But the same opinion has already admitted that the rule of construction is "artificial." I therefore see no middle course between logically applying the artificial rule of construction, which is now undoubtedly a rule accepted, or to set it aside altogether. If the rule is to obtain at all, there is no expediency in limiting it arbitrarily, and the proposed limitation in this case I consider to be arbitrary in the highest degree. No case could be conceived in which a refusal to carry out the rule would be so arbitrary as the present case. The rule might in some cases have an effect different from that which the testator really intended. It certainly might be so in the case of an uncle or aunt. But there is no case, other than that of an actual parent, in which the presumptions are so strong in favour of the rule as that of a brother or sister. Therefore, if expediency is to come into consideration, it seems to me to be an incomprehensible view of expediency which holds it expedient to construe an uncle's will according to the rule and refuse to apply the rule to a brother's.

It may be asked, Where are you to stop? I am not troubled by that question. I hold that a decision in favour of the second party in this case would not extend the operation of the rule at all. I hold it to be *a fortiori* of the case of uncle and aunt, and I also hold that as the rule has been extended further already by the case of *Christie*, which was decided after much debate, the present decision is not an extension of the rule in any sense. The Judges in the majority in that case plainly held—and I agree with them—that the principle of the case of *Wallace* applied, and thus held distinctly that the limitation of the rule to cases in which there is ascendancy is unsound. They held that the logical result

its application to the case in which the institute was a grandnephew was that it must apply also to cousins-german. Holding that decision to be right, I hold further, that a rule which has been extended to cousins-german must apply to a brother or sister uterine, always assuming that the latter comes in the position of *parens* in the settlement. There can be no logic in holding that a cousin-german can place himself *in loco parentis* to his cousin, and to deny the same power to a brother or sister uterine. I am aware that numerous criticisms have been made upon the decisions in *Wallace* and in *Christie*, to the effect that the case of *Wallace* was not a precedent justifying the decision in *Christie*. But it seems to me that the opinions of the majority in *Christie* were plainly based on the view that the question whether a testator put himself *in loco parentis* depended upon the expression of his will, and not at all upon the relation of ascendant or descendant. The Lord President in the case of *Wishart* v. *Sturrock* says that *Wallace* was not a precedent for *Christie*, because in *Wallace* the testator was *in loco parentis* to the persons favoured. But I read the case of *Christie* as meaning that the majority there held that the cousin put himself *in loco parentis*, and that it did not occur to them that a cousin was precluded from doing so merely because he was not an ascendant. In that view, which I hold to be sound, the case of *Wallace* was a precedent for the decision in *Christie*, and I see no reason to depart from what was decided in these cases. I do not think that the question, Where are you to stop? is to be an excuse for retrogression when no ground of equity, or even expediency, can be stated for going back. No evil has resulted from the decision in *Christie*, now seventy years old, and I see no reason for setting it aside, still less for giving a judgment contrary to it in a case which is *a fortiori* of it.

In saying what I have now said regarding the case of *Christie*, I do not overlook the decision in the case of *Rhind's Trustees*. If the question in this case related to a will by a cousin, I might feel myself bound by the decision in *Rhind's* case until it was reconsidered, and I admit that the opinions of the consulted Judges make it plain that no different result could be expected. But this case does not relate to cousins, and having been sent to the whole Court, I presume each of us is bound to express his own opinion without being bound by previous decisions, and in that view I have expressed my opinion after considering the cases but without feeling bound to follow them.

One other ground is stated in the opinion of the consulted Judges for the judgment they propose, to which it is necessary to refer, viz., that the application of the rule imposes upon a testator who does not desire that the children of predeceasing beneficiaries should succeed the necessity of resorting to what their Lordships call the "odious form of express disinherison." I do not understand the reasoning which makes any such consideration a ground for restricting the operation of an admitted principle. I do not understand how the expression of a testator's will can be odious if that which it expresses is not odious in itself. There can be nothing odious in a testator expressing his will in such form as shall prevent persons being favoured whom he is under no actual obligation to favour and does not desire to favour. It looks rather as if the consulted Judges thought that it would be an odious thing to exclude children from the benefit of a legacy to their parent, and that the expression of it in the will would be the expression of something odious, and that therefore it will be better to hold the odious thing done without its being expressed. If that is not what was intended by the reasoning, I am unable to understand what it is. But the view is, in

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my opinion, baseless. In no case would any such form—if odious—be necessary. The opinion of the consulted Judges expresses distinctly the doctrine that to whatever limit the *conditio* is to apply, it is only to apply in those cases in which the testator has placed himself by his will *in loco parentis* to the objects of his favour. He has therefore only to express himself so as to exclude the idea of his having placed himself in the position of *parens* to exclude the operation of the rule of construction, and thus avoid the odium which their Lordships seem to fear will be incurred by testators if the rule be applied in accordance with the decision in *Christie*.

Being unable to follow the views expressed by the consulted Judges, either upon principle or expediency, I must express my dissent from the judgment which must follow upon the opinion they have expressed.

LORD YOUNG.—This case was heard and referred to the whole Court for decision last summer, when I think Lord Lee was a member of this Court. So far as my memory serves me, I was opposed to that step, because it appeared to me that the question in the case might be decided upon the terms of the will, and without going into the troublesome and difficult questions that might arise on considering the *conditio si sine liberis* and the authorities on that doctrine.

The will is simple in its conception, although it is at the same time rather special. The lady whose settlement is here in dispute was a child of the first marriage of her mother, and she lived long enough to see her marry again and have another family. So long ago as 1844 she executed a disposition and settlement in favour of her mother and stepfather in liferent and the children of the marriage in fee. It so happened that at the date of the settlement all the children of the second marriage who were to be the ultimate beneficiaries were born, but it might have been otherwise—there might have been no children born of the marriage, and it would have been perfectly within her right to give the whole of her estate to her mother and stepfather in liferent and to the children of the marriage in fee, and although she had died before any of the children were born the will would have been effectual to carry the fee to any who were born afterwards.

A good deal is said in the minutes of debate about imputing intentions to the testator which he has not expressed. Nothing is more familiar; indeed few wills could be construed without implying a great deal that is not expressed in them. When a will says nothing about the term of vesting, the Court will imply a term of vesting—usually that vesting takes place *a morte testatoris* because as no one can have a claim to take anything under the provisions of the will unless he was intended to take a vested interest, anything which is given must be held as given on the consideration that the thing is meant to vest in the person at a particular period; but that result can only be reached by construction, if the will says nothing as to the term of vesting. Another familiar case of implied will occurs where a gift is so expressed as to be given to persons not by name but by description; it is there implied as a general rule that the will intends those to take who answer the description at the death of the testator. But instances of implying what is not expressed in a will or settlement are numerous, and I need not dwell further on them.

Now, I think that here no question as to the application of the *conditio si sine liberis* properly arises. The learned Judges whom we consulted seem to think that the only alternative is to admit the *conditio* or allow the legacy to lapse

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Their Lordships refer to the case of *Rhind's Trustees* v. *Leith* as implying this. They say—"It was seen that if the *conditio* was made general in its application this would be equivalent to repealing the rule of law that a legacy lapses by the predecease of the legatee." *Rhind's Trustees*, I may observe, cannot be regarded as a binding authority upon the *conditio*, because as their Lordships point out, the claim there made in virtue of the *conditio* must have failed on another ground—viz., that the parent of the claimant was not instituted. So that in *Rhind's Trustees* we have merely *obiter dicta* but no judgment. Again the learned Judges at the close of their opinion say—"If the principle is to be further extended, it will be very difficult to find any other limit than the one indicated in the decisions, and the choice seems to be between confining it to the wills of parents or persons *in loco parentis*, and making the rule universal, and thus rescinding the rule that a legacy lapses by the predecease of the legatee." Well, if a legacy is so given that the subject of it if not effectually given will fall into residue or intestacy, that may or may not be a case which would fall under the *conditio*. If a man makes a provision in his settlement to A B, and A B predeceases him, then the gift lapses unless the *conditio* applies and A B has left issue. If the *conditio* applies, and A B has left issue, the falling into residue or the intestacy will be prevented, the *conditio* of the residuary gift or the intestacy being that the institute shall die *sine liberis*.

But here I venture to say we have no question about the gift lapsing. The provision that the fee of the whole estate shall go to and be divided equally among the children of the marriage stands and must have effect. The question before us is whether the meaning of the word "children," as we shall be judicially satisfied in regard to its proper meaning, comprehends "grandchildren," and that in my opinion is the only question. If the meaning comprehends "grandchildren," or if we shall be satisfied that it does not comprehend them, there is equally an end to the matter.

Now, when this daughter gives her whole estate to her mother and to her stepfather in liferent, and to the children of the marriage in fee, and further empowers her mother or the survivor of the marriage to distribute it among the children of the marriage as seems proper to them, I am of opinion that in such a case the meaning of the word "children" does include grandchildren. I think that she made this gift of her estate as a family provision to her parents' children, enabling her mother or her mother's husband to divide it among the children of the marriage as if it had been their own, and if they had divided this estate among their children, dealing with it as their own, I think that the word children would have been held to include grandchildren. That is the result which I have reached looking to the ordinary custom of this country, the good sense of the will, and the disposition of the testatrix as it appears in the deed. It is always legitimate to look at such considerations in construing wills, and the reasoning which estimates the intention of the testatrix in this settlement as being according to the ordinary good feelings of the people of this country in such matters leads me to give the same meaning to the word children in this settlement as if it had been used by the father of the children himself in his own settlement.

But the general question of the *conditio* has been raised, and the learned Judges have given their opinion upon it; it is therefore right that I should indicate my opinion upon the matter.

I shall suppose that this is a provision by one sister to another. One sister

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may very well have a sister twenty years younger than herself to whom she has acted the part of a mother for the greater part of her life. Well, she makes a will giving this sister the whole estate she possesses. She has other relatives, —other brothers and sisters it may be—but she prefers to give her whole estate to one of them, her favourite sister. It is manifestly given from what may be called *pietas materna*, the mother-like feeling which the testatrix has to her sister twenty years younger than herself. The question is, if this younger sister should predecease her leaving issue, does what was intended for her go to her issue, or is it divided among the other brothers and sisters of the testatrix? In considering that question we are not entering upon a new field. The question has been considered and a conclusion reached in the case of a settlement by a father or mother in favour of their children; it has been considered, and a conclusion reached, in the case of an uncle or aunt giving a gift to a nephew or niece, and the question has been considered and the conclusion has been reached, not on the consideration of any rule *positivi juris* or of the provisions of any statute, but, as I have said, on the considerations which commend themselves as being right and proper according to the customs and feelings of the people of this country in such matters. Can you, with any regard to sound reason and sense, reach in such a case as I have put any other conclusion than that which has already been reached in the other cases to which I have referred? To my mind it is impossible to reach any other conclusion. I do not think that to apply the rule to this case would be to extend the principle; it would merely be to apply the same argument under the same circumstances. There is nothing suggested in the opinion of the learned Judges that will distinguish this case in principle from the cases in which the *conditio* has been held to apply. The question to be determined here is, whether the argument employed in these cases will lead to one result at one time and to another result at another? I think not. In those cases to which the *conditio* applies it has been put on the ground that the testator presumably had the same affection for the child of his child or for the child of his niece that he had for his own child or for his niece herself. It cannot be put on any other ground. I confess it appears to me to be a startling result that we shall impute to a father the same affection for his daughter's child as he had for his daughter, and the same affection to an uncle for his niece's daughter that he had for the niece, but that we shall not impute to a sister the same affection for a sister's child that she had for the sister herself. I think it is irrational.

On the whole matter I am of opinion that the *conditio* applies, as well as that on the terms of this settlement we should hold that the word children is inclusive of grandchildren.

Lord Rutherfurd Clark and Lord Trayner agreed with the consulted Judges.

The Court answered the question in the negative.

Morton, Smart, & Macdonald, W.S—Macandrew, Wright, & Murray, W.S.—Agents.

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Alexander Muirden (Cowie's Trustee), Pursuer (Respondent).—*Strachan—Wilson.*
Jane Cowie, Defender (Reclaimer).—*Greenlees.*

Personal or transmissible—Real burden—General conveyance—Titles to Land Consolidation Act, 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 19, *schedule L.*—By general

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disposition a testator conveyed his whole estates, heritable and moveable, to his son, declaring in the dispositive clause that the disposition was granted and was to be accepted under the following burdens, &c., "which are hereby declared to be real burdens on the estate and effects hereby conveyed," . . . *inter alia*, that the disponee should be bound to pay to a daughter of the testator an annuity of £35. The disponee made up his title to the different parcels of property that had belonged to his father, by notarial instruments in terms of schedule L of the Titles to Land Consolidation Act, 1868, each of which set forth the declaration above written at full length, and was duly recorded.

Held (following *Williamson* v. *Begg*, 14 R. 720, *aff.* judgment of Lord Wellwood, *diss.* Lord Rutherfurd Clark), that the annuity in favour of the daughter had not been validly constituted a real burden.

2D DIVISION. Ld. Wellwood. M.

THOMAS COWIE, Montrose, who died on 9th April 1877, by a *mortis causa* trust-disposition and settlement, conveyed to his son, Alexander Cowie, his whole estate, heritable and moveable, real and personal. The dispositive clause proceeded,—"But declaring that this disposition and conveyance is granted, and is to be accepted of, under the following burdens, conditions, obligations, and declarations, which are hereby declared to be real burdens on the estate and effects hereby conveyed, viz.:— . . . Further, in the event of Jane Cowie, my daughter, surviving me and the said Mrs Margaret Falconer or Cowie, her mother, the said Alexander Cowie and his foresaids shall be bound and obliged to pay to my said daughter a free annuity of £35 sterling per annum, and that during the whole period of her life, after the deaths of both her said mother and me."

In 1882 Alexander completed a title to five heritable subjects which had belonged to his father, by notarial instruments conform to schedule L of the Titles to Land Consolidation Act, 1868 (31 and 32 Vict. c. 101).* Each of these instruments set forth Thomas' title and infeftment, and the general disposition granted by him in favour of Alexander, and each of them set forth specifically and at length the real burdens constituted by the disposition and settlement, and in particular the annuity in favour of Jane. The clause of annuity in her favour, declared to be a real burden on the disponee's right, was entered at length on the records, with each of the notarial instruments.

In 1886 Alexander's estates were sequestrated, and his trustee raised an action against Jane for declarator that the annuity of £35 had not been validly or effectually constituted a real burden on the heritable subjects described in the summons, being the same subjects as those to which the bankrupt had made up his title, as already described.

He pleaded;—(1) The annuity provided to the defender by the disposition and settlement of the late Thomas Cowie has not been validly constituted a real burden on the heritable subjects described in the summons. (2) The annuity in question not being a real burden affecting the heritable subjects described in the summons, the pursuer is, in the circumstances, entitled to decree of declarator to that effect.

The defender pleaded;—(3) The said annuity having been validly constituted a real burden, by the foresaid disposition and settlement, over

* Section 19 of that Act, which sanctions the employment of such a notarial instrument, provides further,—"And on such notarial instrument . . . . being so recorded, such grantee shall be in all respects in the same position as if a conveyance of the lands contained in such notarial instrument had been executed in his favour by the granter of the general disposition, . . . and as if such conveyance had been followed, when such lands are not held by burgage tenure, by an instrument of sasine of the said lands in favour of such grantee."

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the subjects described in the summons, the defender is entitled to absolvitor, with expenses. (4) The said annuity being narrated at length in the notarial instruments as aforesaid, and having entered the records, affects and runs with the subjects in question.

On 15th November 1890 Lord Wellwood (Ordinary) repelled the defences, sustained the pursuer's first and second pleas, and found and declared in terms of the declaratory conclusion.*

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* "OPINION.—This is a hard case for the defender, but I am of opinion that the annuity provided to her, by the disposition and settlement of Thomas Cowie, has not been validly constituted a real burden on the heritable subjects described in the summons. Thomas Cowie's disposition and settlement was a general disposition. He thereby conveyed his whole estate, heritable and moveable, to his son, Alexander Cowie, without specifying any particular lands. The mixed estate was conveyed 'under the following burdens, conditions, obligations, and declarations, which are hereby declared to be real burdens on the estate and effects hereby conveyed.' One of those was an annuity of £35 to the defender.

"I am of opinion that the annuity was not validly constituted a real burden by the disposition and settlement of Thomas Cowie, because the deed does not specify the lands upon which it is to be a real burden. In order to constitute a real burden, I think it is necessary, not only that the amount of the burden and the creditor in it should be named, but that the lands over which it is to be created a burden should be specified. The law is thus stated by the Lord President in the recent case of *Williamson* v. *Begg*, 18th May 1887, 14 R. 720-23,—'A general conveyance of all the granter's lands without specifying any lands—which is what is generally understood by a general disposition—cannot possibly create a real burden, because, in order to create a real burden, there must not only be a very precise specification of the amount and nature of the burden which is to be created, but also as precise a specification of the lands over which it is to extend.' And on p. 724, Lord Mure expresses himself to the same effect,—'It is better, I think, that this case should be decided upon the broader ground, and I am also of opinion that the payment of the legacy in question was not effectually created a real burden by the testator. There is, no doubt, a declaration to that effect in the deed, and there may have been a personal obligation imposed on the disponee to pay the debt, but the deed is a general conveyance of heritage, without any special conveyance of any particular estate, with directions that the legacy should be secured as a real burden over it. That being so, it is clear that, under the rules of law which were in operation at the date of the passing of the Titles to Land Consolidation Act, 1868, no real burden was constituted, and I see nothing in the provisions of that statute which can be said to have relaxed or altered these rules.' It may be that there were other grounds sufficient to support that decision, but the passages quoted are authoritative, and even if I did not concur in them, I could not regard them as simply *obiter dicta*.

"Further, it is said that the annuity has been validly created a real burden by being narrated at length in the notarial instruments expede by Alexander Cowie; these are notarial instruments by which he made up a title to the various heritable subjects in which his father died infeft. Now, I think that if the annuity was not well created a real burden by the disposition and settlement, the defect could not be cured by the terms of the notarial instruments. The direction in schedule L of the Conveyancing Act, 1868, merely authorises the notary to insert those real burdens which are duly created by the deed, but it does not authorise him to insert burdens which have not been so created. The Lord President in *Williamson* v. *Begg*, p. 723, states particularly the province of the notarial instrument, of which the form is given in schedule L of the Act of 1868, and I need only refer to that statement. The notarial instruments in this case are therefore not conform to their warrant. In the whole circumstances, I think the pursuer is entitled to the declarator which he asks."

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The defender reclaimed, and argued;—The Lord President's opinion in *Williamson's* case[1] was only *obiter*, for there the declaration as to the real burden was not contained in the dispositive clause, nor was the real burden set out at length in the notarial instrument, so that it could never reach the record. Again, the form in which that action arose, viz., an action of damages against an agent who had failed to constitute the real burden, made it possible to decide it on another ground, viz., that the agent had no duty to do so, which was the ground taken by Lord Shand. Apart from authority, the effect of the insertion of the burden in the notarial instrument was this,—each notarial instrument wrote in and specified the particular lands in the general conveyance, which thus became a special conveyance of each particular parcel of lands in turn, and upon each particular parcel there was imposed the burden, which was thus carried into the record, and made known to all as affecting the lands. There was an obligation on the disponee to complete his title in such a way as to carry out the intention of the disponer.

Argued for the pursuer;—The question was closed by the decision in *Williamson's* case. There might be a personal obligation on the disponee, but that was not the question. The real burden never was properly constituted by the granter. The original disposition wanted one of the characteristics necessary to the creation of a real burden, viz., a specification of the lands. The notary could not supply that; he had no authority to do so. The notarial instrument was not habile for such a purpose. [LORD RUTHERFURD CLARK.—That is just what I doubt. By the statute this notarial instrument does more than feudalise, it specialises the general conveyance.]

At advising,—

LORD JUSTICE-CLERK.—The question in this case is whether or not a legacy left to Jane Cowie, the defender, has been validly constituted a real burden on the heritable subjects described in the summons. That legacy has been paid for some time by the testator's son, to whom the bulk of the property was left, and that was quite a proper course, for he was under a personal obligation to pay it. But he has become bankrupt, and the question as to the validity of the burden is raised by his trustee.

Although the testator no doubt directed that this annual payment should be a real burden on his estate, it is said that he did not do so in such a way as to be binding on his successor. The conveyance is in general terms, and the testator does not specify the lands on which the annuity is to be a real burden, and it is only in a notarial instrument executed after his death that the lands are specified. If we were considering this question for the first time, the leaning of my opinion would be to hold that what was done by the will, and the notarial instrument following upon it, would effectually constitute a burden over the heritable estate. But that matter is foreclosed. The case of *Williamson*, to which the Lord Ordinary refers, is as nearly on all-fours with this case as it is possible for one case to be with another. I do not feel myself at liberty to give any opinion that would be inconsistent with it.

Therefore, on the authority of that case, I think we must affirm the Lord Ordinary's judgment.

LORD RUTHERFURD CLARK.—The case of *Williamson* v. *Begg* is directly in

[1] Williamson v. Begg, May 18, 1887, 14 R. 720.

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point, and if your Lordships think it right to follow it, as I believe you do, the interlocutor of the Lord Ordinary must be affirmed.

But I am not satisfied with that decision. In my opinion it should be reconsidered, and as the question is one of very general importance I think it right to explain the views which I entertain upon it.

We have here a general conveyance by Thomas Cowie of his whole estate, heritable and moveable, in favour of his son Alexander. That the disposition contains moveable estate is to my mind immaterial. It is not the less a conveyance of the heritable estate, and the legal effect of it, and of the title made up under it, is the same as if it had conveyed the heritable estate alone.

Taking the disposition in that light, I find that the heritable estate was conveyed to the disponee under certain burdens, which were declared to be real burdens on the estate so conveyed. Some of these burdens were of such a nature that they could not be made real. I am not concerned with them. But one of these was an annuity of £35 in favour of the defender, and it cannot be disputed that such an annual payment may be lawfully constituted a real burden. It was maintained, however, that a real burden could not be constituted by a general conveyance and by an infeftment taken by a notarial instrument in the manner provided by the Act of 1868. It is this question which I desire to examine.

Under the old law, it was impossible to make up a title under a general conveyance, because it did not specify the lands which were conveyed and could not therefore contain any effectual precept of sasine. But it was the warrant for an action of adjudication in implement, and the charter of adjudication would convey the specific lands adjudged on the conditions and under the burdens contained in the general disposition. If this course had been followed in the present case, I cannot doubt that when infeftment was expede on the precept contained in the charter, the annuity in favour of the defender would have been validly created a real burden on the lands.

Of course the disponee, if he were the heir of the disponer, which I assume to be the fact in this case, might neglect the general disposition and make up his title as heir. If he had done so, there might have been difficulty in getting the annuity made a real burden. But it is not necessary to consider what remedies would in that event have been open to the defender, though it is right to notice that the same difficulty would have occurred if the disposition had been special. For it is equally open to the heir to neglect a special disposition. It is sufficient, however, that the heir, so far from neglecting the general disposition, made up his title under it, and that in the infeftment which he took by recording the notarial instrument expede in virtue of the 19th section of the Act of 1868 the annuity was declared to be a real burden on the lands in which he was so infeft.

I have always understood that the new form of title introduced by this section was to enable the conveyancer to dispense with the cumbrous adjudication in implement followed by a charter of adjudication, and that it took the place of the old form with precisely the same legal effect. But if the judgment in *Williamson* v. *Begg*, and that which we are now going to pronounce are sound, it is the necessary consequence that the conveyancer cannot use the new form except in those cases in which the estate is conveyed without conditions or burdens, or in which he means to neglect them. I cannot bring myself to think that this can be the true construction of the Act.

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The purpose of the statute was, in my opinion, to enable a title to be completed under the general conveyance, and it seems to me that by adopting the statutory form the general conveyance is itself feudalised. Its defect at common law was that it did not specify the lands. The statutory remedy is that the disponee who makes up his title under it is required to produce to the notary the disposition in favour of the disponer and the infeftment following thereon, from which the notary inserts in the notarial instrument the description of the lands. The instrument then recites the general conveyance, and proceeds "whereupon this instrument is taken in the hands of" the notary "in terms of the Titles to Land Consolidation Act, 1868." It may then be recorded in the appropriate Register of Sasines, and on this being done the 19th section declares that the grantee under the general disposition shall be in the same position as if a conveyance of the lands contained in the notarial instrument had been executed in his favour by the granter of the general disposition, and as if such conveyance had been followed by an instrument of sasine in favour of such grantee, expede and recorded in the appropriate Register of Sasines. In other words, the general conveyance by the adoption of the statutory form is equivalent to a special conveyance of the lands described in the notarial instrument, and infeftment is taken under it as the disposition conveying these lands. It thus forms the disposition on which the lands are held, and on which infeftment is taken. The grantee is infeft under the general conveyance thus made specific.

But what about the burdens? The schedule L furnishes the answer. It directs that if the deed is granted under any real burden or condition the following words shall be inserted in the notarial instrument. But always "under the real burdens," &c. I am of opinion that these words refer to the burdens and conditions contained in the general conveyance, and intended by that deed to affect the lands thereby conveyed. The language of the schedule is express. If the deed,—that is to say, the general conveyance,—is granted under any real burden or condition, the burdens and conditions are to be inserted in the instrument. For what purpose? In order that they may enter the sasine and so be made real on the lands, or in other words, that the general conveyance may be feudalised under the burdens which the granter desired to impose on the lands. This is necessary in order to complete the system of making up titles introduced by the Act of 1868. For if the burdens contained in the general conveyance are not made real by being set forth in the recorded instrument, it follows that by adopting the statutory form the grantee will be infeft in an unburdened estate, and that the purpose of the granter will be defeated.

The statute declares that by expeding a notarial instrument, the granter shall be in the same position as if a conveyance had been executed in his favour of the lands contained in the instrument. But when it also prescribes that the burdens contained in the general conveyance shall be inserted in the instrument, I cannot read it as meaning anything else than that the supposed special conveyance shall be a conveyance under these burdens. The legal conditions on which burdens may be made real are therefore completely satisfied. For there is a special conveyance under burdens, and when the instrument is recorded in the Register of Sasines the effect is declared to be the same as if infeftment had been taken under such a conveyance.

In the case of *Williamson* v. *Begg*, the Lord President, after reciting the clause in which certain legacies were declared to "form real burdens over the heritable estate hereby conveyed," says, "If the effect of that clause was to

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create the legacies real burdens on the estate, no doubt the making up the title under the general disposition should have been so arranged as to feudalise the estate subject to these real burdens. But looking to the deed I am of the opinion, which indeed hardly seemed to be disputed, that this declaration is of no avail as creating a real burden." His Lordship further says that a general conveyance cannot create a real burden, "because in order to create a real burden there must be not only a very precise specification of the amount and nature of the burden which is to be created, but also as precise a specification of the lands over which it is to extend."

I agree with his Lordship in thinking that the legacies could not be created real burdens by the general conveyance, and that if a real burden is to be constituted, it must be constituted over specific lands. But it must be added that no burden can be made real by any disposition. It must enter the infeftment. But I do not agree in the opinion that a burden is ineffectual and cannot be made real, because it is contained in a general disposition. Such a deed is as ineffectual to convey lands as it is to create a burden, and in precisely the same sense. For under the old law a general conveyance could not form any part of the feudal progress, inasmuch as the lands were not described, and as it could not be feudalised, it followed that no real burden could be created under it. It was merely a warrant for making up a title to the lands conveyed by means of an adjudication in implement and a charter of adjudication following thereon, but subject to the burdens contained in the general conveyance. For the grantee could use it only to take up the estate which was conveyed to him,—that is to say, to take up the estate under the burdens which the granter had imposed. His title was completed by taking infeftment on the charter, but by the very fact of taking infeftment the burdens were made real. The statute introduced a new form of completing a title under a general conveyance, and we are considering the effect of a title completed according to that system. I have shewn that under that system the general conveyance is part of the feudal progress. It is recited as such in the notarial instrument, and the statute declares that that instrument shall have the same effect as if a conveyance of the lands contained in the instrument had been executed in favour of the grantee by the granter of the general disposition. But are we to assume that this conveyance is to be unqualified? I see no reason for such an assumption. The statute provides a form of completing a title in conformity with the general conveyance, or in other words under the burdens and conditions therein contained. The statutory form of making up titles would be very incomplete if it did not. Hence, in my opinion, the conveyance which the statute conceives to be executed in favour of the grantee is a conveyance under the burdens contained in the general disposition. But an infeftment on such a conveyance makes these burdens real. The notarial instrument is equivalent to a conveyance of specific lands under the burdens contained in the general conveyance, and the recording of the instrument completes the infeftment on the supposed conveyance.

The Lord President considers the question whether the legacy could be made a real burden by means of the notarial instrument. I agree that it could not, unless there were a warrant for the insertion of it flowing from a person infeft in the lands. It is, of course, necessary in order to the constitution of a real burden that the lands shall be disponed under it. Without such a disposition there would be no warrant for inserting the burden in the notarial instrument. But here the necessary warrant exists. For the lands were disponed by an

owner infeft, under the real burden of the annuity, and I think that there was not only a warrant for the insertion of it in the instrument, but that the notary would not have been following the directions of the statute if he had omitted it.

His Lordship then examines the schedule. After reciting it, he says,—"That shews that a notarial instrument may be recorded under schedule L upon a general disposition, containing a full description of the lands conveyed to the general disponee, and there is no doubt that by such a deed a real burden may be effectually created. Accordingly, the words of the schedule which I have quoted above are completely satisfied by referring them to such notarial instruments as may be executed in creating real burdens where these have been properly constituted. The argument upon that section accordingly fails."

The 19th section applies to all general dispositions whether they shall extend to the whole lands belonging to the granter, or be limited to particular lands belonging to him "with or without full description of such lands." I do not pause to consider for what purpose the Legislature has comprehended these different forms of disposition under one common term. I take the meaning of the Lord President to be that when the general disposition contains a full description of certain lands the notarial instrument may set out the burden under which they are conveyed, and that in these circumstances the burden will be made real by recording the instrument. I understand him to hold that the direction of the schedule with respect to the insertion of burdens applies to this case alone. It seems to me that on that construction of the schedule a general direction is dealt with as exceptional. I see no warrant for it. The section is universal. It applies to all general dispositions, and the schedule is given as the form under which all such dispositions, without exception, may be feudalised, subject to the burdens therein contained. I do not think that the words of the schedule are satisfied by referring them to a particular class of notarial instruments. In my opinion they cannot be satisfied without referring them to every notarial instrument which can be expede under the 19th section.

Lord Shand seems to proceed on the ground that the grantee was under no obligation to create the legacy a real burden, and that in consequence it had not been made effectual. I should hesitate to adopt this view of the position of the disponee. But it is not necessary to consider it. In this case, as well as in the case of *Williamson*, the grantee accepted the estate on the conditions on which it was conveyed to him. He made up his title in such a form as he thought would be effectual to make the burden real. The question is whether the form was sufficient for that purpose, and that question cannot, in my opinion, depend on the rights or obligations of the grantee, but on the legal effect of the title which he has actually made up.

Apart from the decision in the case of *Williamson* v. *Begg* I should have no difficulty in deciding in favour of the defender. But considering the weight of authority against me, I can feel but little confidence in the opinion which I have expressed. I cannot, however, bring myself to think that I am wrong, and I have thought it right to express my opinion at some length in case the question should ever come to be reconsidered.

LORD TRAYNER.—I agree with the Lord Ordinary. I think the question here raised is not an open question, and has been decided by the case of *Williamson*, to which the Lord Ordinary refers. For my own part I see no

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reason to doubt the soundness of that decision. On the contrary, I concur in the decision, and agree with the views expressed by the Lord President and Lord Shand.

LORD YOUNG was absent.

THE COURT adhered.

A. LAURIE KENNAWAY, W.S.—WELSH & FORBES, S.S.C.—Agents.

No. 139. Mar. 17, 1891. M'Gilp v. Kilchoman School Board.

DONALD M'GILP, Pursuer (Respondent).—*M'Kechnie—G. W. Burnet.*
SCHOOL BOARD of KILCHOMAN, Defenders (Appellants).—*D. Robertson—Graham Stewart.*

Process—Sheriff—Appeal—Incompetency of appeal against interlocutory order of Sheriff who is empowered by statute to determine finally any matter—Local Government Act, 1889 (52 *and* 53 *Vict. c.* 50), *secs.* 86, 105.—The Local Government Act, 1889 (sec. 86), enacts that if under the provisions thereof a teacher appointed previously to the passing of the Education Act, 1872, shall be prejudiced in his right to school fees, he shall be entitled to compensation from the school board, "and such compensation, failing agreement, may be determined finally by the Sheriff."

In an action brought in the Sheriff Court by a teacher against a school board praying for declarator that the pursuer was entitled to a certain sum annually as compensation for fees under the above Act, the Sheriff-substitute appointed the pursuer to lodge a minute giving details as to fees previously received by him. The pursuer having appealed, the Sheriff allowed the pursuer a proof.

The defenders appealed to the Court of Session.

Held that the appeal was incompetent.

2D DIVISION. Sheriff of Argyll. I.

AT the passing of the Education Act, 1872, Donald M'Gilp was parochial teacher in the parish school of Kilchoman, Islay. Thereafter he was paid by a salary equivalent to the former heritors' salary, by fees, and by his receiving the Government grant allowed to the school.

In August 1889 the School Board of Kilchoman resolved under the Local Government Act, 1889, to remit as from 1st October 1889 the school fees previously charged, and they resolved to pay to M'Gilp £23, 15s. 8d. per annum as compensation in lieu thereof.*

In July 1890 M'Gilp raised an action against the School Board in the

* The Education Act, 1872, enacts, *inter alia*, sec. 55,—"Subject to the provisions hereinafter contained regarding the removal of the teachers of public schools appointed previously to the passing of this Act, such teachers shall not, with respect to tenure of office emoluments, or retiring allowance, as by law, contract, or usage, secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained, and such emoluments and retiring allowances shall be paid and provided by the school board having the management of such schools respectively."

The Local Government Act, 1889 (52 and 53 Vict. c. 50), which by sec. 22 provides that a certain sum of money shall be applied towards the payment of school fees in state-aided schools, enacts by sec. 86,—"If under the provisions of this Act, or of anything made or done in pursuance thereof, any teacher appointed previously to the passing of the Education (Scotland) Act, 1872, shall be prejudiced in any right to school fees possessed by him at the passing of this Act, he shall, after the passing of this Act, be entitled to receive from the school board compensation, in respect of any loss so sustained by him, and such compensation, failing agreement, may be determined finally by the Sheriff, and shall be payable out of the school fund."

By sec. 105 "Sheriff" is thus defined,—"The expression Sheriff means the Sheriff of the county, and includes Sheriff-substitute."

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Sheriff Court of Argyllshire, praying the Court to find and declare that by virtue of his appointment made previously to the passing of the Act of 1872, he was entitled to the payment of the whole fees exigible for the scholars taught in the school, that he was now entitled under the Local Government Act, 1889, to compensation in respect of the loss sustained by him in consequence of the remission of the fees, and to fix £45 as the compensation to which he was entitled.

The School Board defended the action, maintaining that they had offered full compensation.

The parties were at issue as to the amount of the fees which the pursuer had drawn prior to the resolution to abolish fees.

The Sheriff-substitute (Shairp), on 1st November 1890, appointed the pursuer to lodge a minute giving in detail certain information as to arrears of fees.

He appealed to the Sheriff, and asked for a proof as to the amount of his compensation.

The Sheriff (Irvine) allowed the pursuer a proof, and to the defenders a conjunct probation.

The defenders appealed, and argued;—The appeal to the Sheriff was incompetent. The determination of the matter lay with the Sheriff-substitute, or otherwise with the Sheriff if he entertained the case in the first instance, but not by way of appeal. If the Sheriff had no jurisdiction to hear the appeal the defenders were entitled to ask the Supreme Court to keep the Sheriff Court to its proper province, and therefore to recall the judgment. The question before the Sheriff-substitute was one of procedure, and the appeal to the Sheriff was therefore incompetent.[1]

Argued for the respondent;—The appeal from the Sheriff Court was incompetent. The Sheriff had authority to decide on appeal from the Sheriff-substitute the whole merits of the question, as was shewn by the case of *Bone*, where, though the appeal was itself incompetent the Sheriff removed the whole subject-matter to himself and disposed of it, and the Court of Session held that they could not interfere. If that were so the Sheriff could surely dispose finally of a point of procedure. Where the determination of a question was committed by the statute to "the Sheriff" the ordinary procedure in the Sheriff Court was to be followed.[2]

At advising,—

LORD JUSTICE-CLERK.—The arguments which were presented to us raised some difficulty in my mind, but in the view I take of the case, after consultation, these difficulties have disappeared. The Act of 1889, section 86, enacted—"If under the provisions of this Act or of anything made or done in pursuance thereof, any teacher appointed previously to the passing of the Education (Scotland) Act, 1872, shall be prejudiced in any right to school fees possessed by him at the passing of this Act, he shall, after the passing of this Act, be entitled to receive from the school board compensation in respect of any loss so sustained by him, and such compensation, failing agreement, may be determined finally by the Sheriff, and shall be payable out of the school fund." That section

[1] Bone v. School Board of Sorn, March 16, 1886, 13 R. 768; Fleming v. Dickson, Dec. 19, 1862, 1 Macph. 189, 35 Scot. Jur. 96; Leitch v. Scottish Legal Burial Society, Oct. 21, 1870, 9 Macph. 40, 43 Scot. Jur. 21; Harrington v. Richardson, Jan. 20, 1854, 16 D. 368, 26 Scot. Jur. 174.

[2] Magistrates of Portobello v. Magistrates of Edinburgh, Nov. 8, 1882, 10 R. 130.

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appears to me to mean nothing more or less than this, that the Sheriff, after such procedure as he thinks proper, shall determine the amount of compensation to be paid. I think it would be very proper that where any considerable sum is at stake he should make up a record and proceed to deal with the matter as if it was an ordinary Sheriff Court action, if the parties desire it. In my opinion, however, that is not a necessary proceeding; the Sheriff could, if he thought proper, call the parties before him and hear them, and then, without any formal proceedings at all, settle the question finally.

Therefore I think this appeal is incompetent, because while it was necessary for the Sheriff to acquire information to guide him in awarding compensation, this appeal arises out of something that he has done in the course of getting that information.

The facts are that the Sheriff-substitute ordered the pursuer to put in a minute stating the particulars of his claim. On appeal the Sheriff recalled this interlocutor and ordered a proof. I do not think, however, that in that state of facts the matter is brought outside the position in which it was placed by the Act. It was not, as I said before, a regular case proceeding in the Sheriff Court, but was merely a convenient means of settling what was the compensation due to the pursuer.

After this question has been finally decided and the amount of compensation fixed by the Sheriff, a question may arise whether an appeal would not be competent to this Court, not of course on the amount of compensation, but on the question whether the Sheriff in acting as arbiter to fix the amount of compensation had acted unfairly. On the question whether that would be competent, or whether what the Sheriff did could be interfered with otherwise than by reduction, I give no decision at present; all that I do say just now is that in my judgment the proceedings cannot competently be reviewed by the present appeal.

Lord Young.—I am of the same opinion. The pursuer here is a schoolmaster who claims and indeed is entitled to compensation under the Local Government Act of 1889. The Act provides that the school board and the schoolmaster shall agree as to the amount, but if they do not agree then the Sheriff shall determine what it is to be. Now, there is nothing in the case before us to indicate that when the Sheriff does decide the matter both parties will not be quite satisfied with the award. Before he has determined that matter I think it would be out of the question for us to inquire into the regularity of anything that the Sheriff may have done in the process of informing himself as to the amount of compensation due. Even in the case of ordinary actions in the Sheriff Court there are some appeals which are competent and some which are not, but if an incompetent appeal has been taken from the Sheriff-substitute to the Sheriff we do not deal with the matter at once, but wait till the end of the case, and if we think that anything has been done under the alleged incompetent appeal that has had an effect upon the decision, then we can alter it. Here the Sheriff-substitute has adopted a particular form of process to obtain the information necessary and the Sheriff has allowed a proof. I do not think that any form of process is prescribed in the Act of Parliament. I think that the Sheriff might get the parties before him in his own room, and after hearing them he could determine the question of the amount of compensation finally. We have no jurisdiction until the matter has been determined by the Sheriff, and indeed only then if the parties complain of any irregularity.

LORD RUTHERFURD CLARK.—I agree. I think the appeal should be dismissed. I think it is an idle and useless appeal.

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LORD TRAYNER.—I agree with Lord Rutherfurd Clark. I think this is an idle and incompetent appeal. The Sheriff is the final judge in the matter, and to ask us to interfere with the way which the Sheriff takes to get the information he requires for his decision is out of the question.

THE COURT refused the appeal.

D. MACLACHLAN, S.S.C.—M'NEILL & SIME, W.S.—Agents.

HENRY ROY, Petitioner.—*C. N. Johnston.*
DANIEL TURNER, Respondent.—*Party.*

No. 140.

Mar. 18, 1891.

Roy v. Turner.

Expenses—Arrestments on the dependence—Recall.—A defender, against whom arrestments on the dependence had been used, after decree paid the whole sum decerned for. The pursuer having refused extrajudicially to loose the arrestments, the defender presented a petition for that purpose. *Held* (*diss.* Lord Kinnear) that the defender was not entitled to recover from the pursuer the expense of the petition.

1ST DIVISION. C.

ON 30th August 1890 Daniel Turner, solicitor-at-law, Edinburgh, brought an action against Dr Henry Roy, Gladstone Terrace, Edinburgh, for payment of two accounts for law expenses, amounting together to £88, 0s. 9d., with interest and expenses of process.

On 1st September Turner used arrestments on the dependence in the hands of the Caledonian Railway Company.

Roy lodged no defences, and the accounts were remitted to the Auditor for taxation.

The Auditor taxed the accounts at £64, 5s. 7d., and decree for that sum was given against Roy, with expenses of process, amounting to £10, 11s. as taxed.

On 9th December Roy paid Turner the sums found due to him, and Turner gave Roy a discharge therefor. Roy also asked Turner to deliver to him the execution of arrestment, with a discharge written thereon, or else to write such a letter as would put the railway company in safety to pay the arrested funds. Turner refused, except on condition of receiving payment of the expenses of using the arrestments.

On 9th March 1891 Roy presented a petition against Turner for recall of the arrestments, praying also that Turner should be found liable in the expenses of the petition, and such other procedure as might be necessary to get the arrestments removed.

Turner lodged answers, but opposed the petition only in so far as expenses were sought against him.

Argued for the petitioner;—A pursuer arresting on the dependence was not entitled to recover the expenses of using the arrestments,[1] and when the sum decerned for, with the expenses of process as found due, had been paid, the defender was entitled to have the arrestments loosed. The respondent had declined to allow the arrestments to be removed extrajudicially, and therefore, this petition being thus necessary, the respondent should be found liable in the expense of it.

Argued for the respondent;—The cases cited by the petitioner merely proved that the expenses of using arrestments on the dependence were

[1] Symington v. Symington, June 11, 1874, 1 R. 1006; Black v. Jehangeer, Framjee & Co., March 19, 1887, 14 R. 678.

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not expenses in the original action, but the respondent, had he chosen, might have declined to grant a discharge for the sum decerned for, except on condition of receiving payment of the expenses of using the arrestments, failing which, he could have brought a furthcoming, and recovered these expenses there.[1] He had not done so, but he was in no way bound to assist the petitioner in getting the arrestments removed, and ought not therefore to be found liable in the expenses of this petition.

LORD ADAM.—This is a petition for the recall of arrestments used on the dependence of an action by the respondent against the petitioner, and there is no question that these arrestments fall to be recalled. The question simply is, whether the petitioner is entitled to have his expenses in coming here, or whether he is to pay the respondent his expenses? As I understand the facts, they are these—As soon as the respondent obtained decree in the action the petitioner paid him the whole sum in the decree—that is, the principal sum sued for and the expenses of the action; and having done so, the petitioner obtained the discharge which the respondent was bound to give him. The respondent now says that he is not bound to loose the arrestments except on payment of the expenses of using them, but I think that an arrestment on the dependence does not cover the expenses of using the arrestments. It may or may not be that these expenses would have been recoverable in a subsequent forthcoming, but as soon as the principal sum sued for and the expenses are paid the decree is satisfied, and there is nothing further covered by it. It may be that the respondent ought to have given the letter which the petitioner asked him for, but I do not think that he was bound to do so. The petitioner, however, is entitled to have the arrestments loosed, and had he confined his application to that there would probably have been no question about the matter, but unfortunately for himself he asked for expenses against the respondent. I think that he is not entitled to expenses against the respondent. He is entitled to recall of the arrestments, but not to the expenses of obtaining that recall. Therefore the respondent was quite entitled to put in answers as he has done, in which he only opposes the application in so far as expenses are sought against him. I think the petitioner was wrong in asking for these expenses.

LORD M'LAREN.—I agree with your Lordship that when arrestments are rightly laid on, in the exercise of a legal right to recover a just debt, the expenses of using the arrestments do not enter into the costs of the original action. Each party must bear his own costs, whatever they may be, in getting the arrestments out of the way.

On the one hand the arresting creditor cannot, unless by bringing a separate action, recover from the defender the costs of laying on the arrestments which he has used for his own protection. When the defender tenders the sum decerned for, and the costs of the action, this must be accepted as a satisfaction of the decree.

On the other hand, the arresting creditor is not, in my opinion, bound to discharge the arrestments voluntarily. He is not bound to grant a letter which will entitle the arrestee to pay or hand over the sum arrested.

As the pursuer is not bound to assist the defender in getting the arrestments

[1] Wight v. Wight, May 23, 1822, F. C.; May v. Malcolm, June 7, 1825, 4 S. 79; Mackay's Practice, ii. 105.

taken out of the way, it follows, in my opinion, that he is not liable in the costs of the proceedings which the defender may take for that purpose. No. 140. Mar. 18, 1891. Roy v. Turner.

LORD KINNEAR.—I am sorry to say that I am unable to agree with your Lordships. I think Mr Turner was bound to grant the letter which the petitioner asked him for, or to withdraw the arrestment in some other form. He had brought an action against the petitioner, and for his greater security used the arrestments which are the subject of the present dispute. It has turned out that the arrestments were unnecessary, for the petitioner was able to pay the sum for which Mr Turner sued, and he in fact paid it as soon as decree was given against him. I think, therefore, that he was entitled to require the creditor, whom he had paid in full, to remove the unreasonable embargo which he had placed upon the petitioner's property. I say unreasonable, not because the embargo was unreasonable in its origin—for it is the right of a creditor to use arrestments upon the dependence of an action in which he sues for payment of his debt—but because it became unreasonable to continue it after the petitioner had paid the whole sum for which decree was given against him in the action. It was therefore, in my opinion, the duty of the respondent to write such a letter to the arrestee as would put him in safety to pay over the arrested funds. The respondent in his answers takes up a position which I understand both your Lordships to regard as untenable, for he maintains that he is entitled to the expenses of using the arrestments. Your Lordships are of opinion that such a contention cannot be maintained, and therefore the respondent has declined to assent to the recall of these arrestments upon a ground which in the judgment of your Lordships is untenable. Then what course, in these circumstances, was open to the petitioner? He could only present this petition to have the arrestments recalled. The respondent lodged answers to this petition, and as he has taken up a position which we all think wrong, I cannot see any reason why he should get his expenses.

The LORD PRESIDENT was absent.

THE COURT recalled the arrestment and found the respondent entitled to expenses, modified to two guineas.

T. & W. A. MACLAREN, W.S.—PARTY—Agents.

GILBERT ARCHER, Pursuer (Respondent).—*Young*—*Orr*.
JOHN RITCHIE & COMPANY, Defenders (Reclaimers).—*Jameson*—*F. T. Cooper*. No. 141. Mar. 19, 1891. Archer v. Ritchie & Co.

Reparation—Slander—Newspaper—Innuendo.—A newspaper published a report of a meeting of a Good Templar Lodge, headed "Mr A.'s Crooked Ways." It was set out in the report that "Brother H.," who had been a candidate for the Grand Chiefship, stated that "Brother A." came to him and urged him to become a candidate, as he had no intention of standing again for the post; that subsequently, without giving him, "Brother H.," any notice of his change of mind, "Brother A." presented himself as a candidate, and was re-elected; and that he, Brother H., felt justified in making these explanations, as his conduct in opposing Brother A. was apt to be misunderstood. The same issue of the paper contained a short leading article, which substantially repeated the statement attributed to "Brother H." in the report, and added,—"It is to be hoped that this sharp practice, which is of a piece with the other proceedings of the official clique at the head of the Order, will not be lost upon the members." The news-bill of the day also contained the words,—"Mr A. and his Crooked Ways."

In an action by A. against the proprietors of the newspaper for slander, alleged

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to be contained in the above publications, which were innuendoed to mean that the defenders intended to represent, and did represent, that the pursuer had been guilty of deceitful and dishonourable conduct, and that he habitually indulged in conduct that was unfair, deceitful, and dishonourable, the Court *held* (rev. judgment of Lord Wellwood) that the publications would not bear the innuendo proposed, and *assoilzied* the defenders.

1st Division. Ld. Wellwood. C.

On 6th November 1890 Gilbert Archer, 2 Wellington Place, Leith, raised an action of damages for slander against John Ritchie & Company, proprietors of the *Evening Dispatch* newspaper, Edinburgh.

The pursuer averred (cond. 1) that he was Grand Worthy Chief Templar in the Independent Order of Good Templars in Scotland. (Cond. 2) "On 2d September 1890 the defenders caused to be printed and published in the *Evening Dispatch* newspaper, of that date, the following paragraph:—'Mr Archer's Crooked Ways.—The usual weekly meeting of Sir Walter Scott Lodge, I.O.G.T., was held last night in Marshall Street Hall—the C. T. (Mr James R. Clark) was in the chair. Brother James Hamilton, Grand Councillor of the Order, was one of the visitors, and he was requested to occupy a seat on the platform, beside the Chief Templar. After the initiation of candidates, Brother Hamilton was asked to address the meeting. In the course of his remarks he referred to the business which had been before the Grand Lodge at Aberdeen. He stood before them that night as the defeated candidate for the Grand Chiefship, but he felt bound to explain how he happened to be a candidate for the office at all. Had he known that Brother Archer was anxious for the post again, he certainly would not have allowed his name to be proposed. The idea of being a candidate for the office had never entered his head until, some time before the meeting of the Grand Lodge, Brother Archer came to him and urged him to become a candidate, as he said he had no intention of standing again for the post of Grand Chief. That was the origin and history of his candidature, and while he was not in the least astonished at Brother Archer's name being proposed again for the G. C. T., they could fancy his feelings when he saw that Brother Archer was actually a candidate, and seemed to have no intention of withdrawing—for that was the first and the only intimation he ever received that Brother Archer had changed his mind, and was ambitious to again fill the chair. He felt he was justified in making these explanations, as his conduct in opposing Brother Archer was apt to be misunderstood and misrepresented by the brethren throughout the country. Brother Hamilton concluded by earnestly urging the members to work more energetically than ever. It was in the subordinate lodges, and not in the District and Grand Lodges, that the work must be done, if it is done at all. Brother Hamilton received a cordial vote of thanks for his address.' The meeting referred to in said paragraph was, as the defenders well knew, a private meeting of the Good Templar Lodge referred to, and as the defenders also well knew it is, and was, contrary to the rules of the said Order and the said Lodge to publish reports of the proceedings of the meetings. There were no reporters at the meeting, and the defenders obtained the information as to what passed at said meeting improperly and surreptitiously."

The pursuer further averred,—(Cond. 3) "In the same issue of the said *Evening Dispatch* newspaper the defenders also printed and published an editorial note or leaderette to the following effect:—'The mystery connected with the Chief Templarship becomes deeper than ever by the explanations given by Mr Hamilton in an Edinburgh Lodge last night. No one stands higher—few, indeed, so high—in the estimation of the Order, and any statement made by him regarding his candidature for the

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G. C. T.-ship may therefore be readily accepted. That candidature was none of his seeking. Mr Archer, about three months ago, intimated that he did not intend to offer himself for re-election, and he suggested that Mr Hamilton should stand. Mr Archer's resolution was referred to publicly in several lodges and elsewhere, and no whisper was heard of any change in his intention until his name was proposed again at the Grand Lodge Session, and the surprise of Mr Hamilton may be understood when he found that Mr Archer did not withdraw his name. The contest was thus forced upon Mr Hamilton under circumstances which he never contemplated, rendering his position very unpleasant. It is to be hoped that this sharp practice, which is of a piece with other proceedings of the official clique at the head of the Order, will not be lost upon the members.' And in another column of the same paper the defenders printed and published a third paragraph, for the purpose of calling attention to the said report, in the following terms:—'Mr Hamilton last night gave a curious explanation of the circumstances under which Mr Gilbert Archer stood again for the G. C. T.-ship.' The defenders also, on the same day, printed and published, and exposed publicly in the streets and other public places in Edinburgh, Leith, and other towns, a bill of contents, being a large placard, in which were prominently printed in large type the words 'Mr Archer and his Crooked Ways.'"

The pursuer then averred,—(Cond. 4) "The statements contained in the foresaid paragraphs, note, and placard, are of and concerning the pursuer, and are false and calumnious, and were printed and published by the defenders maliciously, and without probable cause. The pursuer never went to Mr Hamilton or urged him to become, or suggested that he should become, a candidate for the office of Grand Chief Templar, or said to Mr Hamilton that the pursuer did not intend to stand again for the office. By the statements above quoted, the defenders intended to represent, and did represent, that the pursuer had been guilty of deceitful and dishonourable conduct, and that he habitually indulged in conduct that was unfair and deceitful and dishonourable, and that he was unworthy of the confidence and respect of the members of the said Order. The said statements further represented that the pursuer had wilfully misled the said James Hamilton, by statements which he, the pursuer, knew to be false, and that the pursuer had been guilty of unfair and treacherous conduct towards Mr Hamilton, and that the pursuer was a man who was frequently guilty of wilfully misleading others by statements known by him to be false, and of unfair and treacherous conduct in his dealings with others, and that he was a man who was unworthy of trust or confidence."

The defenders admitted the publication in their newspaper of the matter complained of, but averred,—(Ans. 4) "Denied. The paragraph set forth in condescendence 2 was an accurate report of the remarks made at the said meeting by the said Brother James Hamilton. The statements made therein were substantially true, and are not calumnious. . . . . The said Brother James Hamilton, at a subsequent meeting of the said Lodge, corrected his reported statement by saying that the pursuer had not personally called on him, . . . but that a deputation, some members of which . . . had been informed by the pursuer that he did not intend to stand again, and had informed pursuer they proposed to ask Brother James Hamilton to stand for the vacant post, had waited on him (Brother James Hamilton) with that object. . . . The publication of said paragraph was justifiable, and the statements made therein were privileged, as being the fair and reasonable discussion and criticism of matters of public concern. The editorial note or leaderette quoted in condescendence 3, in so far as it is not a mere *résumé*

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of actual facts in connection with the election to the Grand Chief Templarship, is a fair and reasonable criticism of the public action of the pursuer in his relations with a public body—the Independent Order of Good Templars in Scotland. All the statements made in said leaderette are true, and are not libellous. The third paragraph mentioned in condescendence 3 appeared in the summary of news, and was simply a statement of fact, and was true, and is not libellous. The placard referred to in condescendence 3 merely contained an announcement to the public of the fact that in the issue of the newspaper of that day they would find information on the subjects advertised, and such announcement was true. All the matters set forth and complained of in condescendence 3 were not false, but were true, and were in any circumstances not calumnious. Explained that the reports of meetings of the Good Templar Lodges are most useful and important to the members of the Good Templar Order, besides being of general interest to the public at large. The Order has over 37,000 members in Scotland, and the officials of the lodges often furnish paragraphs to the newspapers, with the object of enabling the public to know the transactions of the body."

The pursuer pleaded;—The defenders having slandered the pursuer as condescended on, to his loss, injury, and damage, the pursuer is entitled to damages as concluded for, with expenses.

The defenders pleaded;—(1) The pursuer's statements are irrelevant, and the action should be dismissed. (2) The paragraphs, leaderette, and placard complained of, not being libellous, decree of absolvitor should be pronounced. (3) The paragraph complained of in condescendence 2 being an accurate report of a meeting of a public body and of matters of public and general interest, and *separatim*, being of especial interest and importance to the members of the Good Templar Order, its publication by the defenders was justifiable, and decree of absolvitor should be pronounced. (4) The statements in the paragraph complained of in condescendence 2 being substantially true, and being privileged, the defenders should be assoilzied from the conclusions of the summons. (5) The facts stated in the editorial note or leaderette complained of in condescendence 3 being true, the defenders should be assoilzied. (6) The said editorial note or leaderette, being a fair criticism on the pursuer in his public character, and on matters of public and general concern, is privileged. (7) The statements in the third paragraph, and in the placard mentioned in condescendence 3, being true, the defenders should be assoilzied.

On 13th January 1891, the Lord Ordinary (Wellwood) approved of the issue quoted below * and disallowed the counter issue.†

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* 1.—Proposed issue for pursuer as amended and as approved by Lord Wellwood, Ordinary.—"It being admitted that the defenders are the printers, proprietors, and publishers of the *Evening Dispatch* newspaper, published in Edinburgh: It being also admitted that in the number of the said newspaper which bears date and was printed and published in Edinburgh upon the second day of

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† "OPINION.— . . . All that I decide at present is, that the publications admit of the construction put upon them by the pursuer. In allowing an issue I am, to a certain extent, influenced by the consideration that the reported statement of Brother Hamilton, on which the defenders' comments bear to proceed, is not admitted by the pursuer to be true. Indeed, the defenders admit in their fourth answer, as I read it, either that Brother Hamilton was wrongly reported, or at least that the statement he then made was not in accordance with the facts. Something also depends on the question whether the meeting of the lodge was public or private.

"The pursuer's proposed issue which I have allowed is framed on the footing

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The defenders appealed, and argued;—There was no relevant case here, for, in the first place, there was no sufficient denial of the truth of the facts stated in the publications complained of,[1] and secondly, these statements were not in themselves libellous. With reference to the first point the pursuer did not deny that he had intimated that he would not stand; neither did he deny that Hamilton had stood because the pursuer inti-

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September 1890 there was printed the paragraph set forth in the schedule A* hereto annexed; as also the editorial note or leaderette set forth in the schedule B† hereto annexed: Whether the defenders, on 2d September 1890, printed and published and publicly exposed a bill of contents of said newspaper, or large placard bearing the words 'Mr Archer and his Crooked Ways'? and whether the said paragraph, note, and placard, or any of them, are of and concerning the pursuer, and falsely and calumniously represent that the pursuer's conduct had been dishonourable, to the pursuer's loss, injury, and damage? Damages laid at £500."

2.—Proposed counter issue for defenders as amended and as disallowed by Lord Wellwood, Ordinary.—"Whether, prior to the election of a Grand Chief Templar in August 1890, the pursuer represented to members of the Independent Order of Good Templars that he did not intend again to be a candidate for the office of Grand Chief Templar; and whether, by said representations being repeated to him, James Hamilton, a member of said Order, was induced to believe that the pursuer would not be a candidate for said office, and was, with the knowledge and acquiescence of the pursuer, induced to become a candidate for said office himself; and whether the pursuer, notwithstanding said representations, and without any notice to the said James Hamilton, did become a candidate for the said office, and was elected to said office, and thereby defeated the candidature of the said James Hamilton?"

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of putting in issue the whole of the publications made by the defenders and reading them together as a whole. I am not prepared to say that that is an unfair way of putting the case before the jury. Indeed, it is more favourable to the defenders than if the pursuer were to separate the paragraphs, for instance, by taking a separate issue in regard to the printing and publishing of the placard.

"I have disallowed the counter issue proposed for the defenders, because it does not amount to a justification of the alleged slander. At the same time, I think that without a counter issue the defenders at the trial will be entitled to prove the circumstances in which the alleged libel was published. I do not think that such evidence will be excluded. In *Paul* v. *Jackson*, 11 R. 460, the Lord President, while stating that a defender is not entitled to prove the truth of the statements without a counter issue, or any part of them, in order to mitigate damages, or for any other purpose whatever, adds,—'It is equally well settled, however, that a defender charged with slander is entitled to lay before the jury the circumstances in which the slander was uttered, in order to prove the state of his information with regard to the subject-matter, and to shew that the offence and consequent injury to the pursuer is not so great as is represented and so to diminish the amount of damages.'

"It will also be open to the defenders at the trial, without a counter issue, to prove, if they can, that the report was one which they were entitled to publish, and that it was an accurate report, and to maintain to the jury that their comments were fair and reasonable criticism on a matter of public interest and the actions of a public man, and therefore not calumnious.—*Wright & Greig* v. *Ondram & Co.*, 16 R. 1004.

"The concluding paragraph of the pursuer's issue seems to be justified by the terms of the issue adjusted by the Inner-House in the case of *Macrae* v. *Sutherland*, 16 R. 476."

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* *I.e.*, that quoted in cond. 2.

† *I.e.*, that quoted in cond. 3.

[1] Campbell v. Ferguson, Jan. 28, 1882, 9 R. 467.

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mated that he would not stand. Then, on the second point, neither the statements nor the criticism was libellous, because nothing either immoral or dishonourable was imputed to the pursuer, and to found an issue the words must come up to that, except in cases of persistent holding up of a person to ridicule and contempt or in cases of trade slander. None of the expressions used implied, or could be construed to imply, a charge of untruthfulness. When the words founded on were not in themselves slanderous, the innuendo must be such as they would reasonably bear.[1] "Crooked ways" did not mean "deceitful ways," but merely that the pursuer after going a certain length in one direction, had changed his mind and gone in the opposite direction, *i.e.*, that his way was zig-zag. Nor did "sharp practice" mean anything more than that the person charged with it looked after his own interests keenly. Nothing dishonourable was implied. It was not seriously disputed that the account of what took place at the meeting was substantially accurate, or that that account was not in itself libellous. The mere report of what Hamilton had said contained nothing in the least degree offensive; on the contrary, what Hamilton was reported to have done was to apologise for opposing one so well esteemed as Archer. The real ground of complaint was the criticism in the leaderette, and the heading, and placard. But the criticism did not exceed the bounds of fair and reasonable criticism, and the heading and the placard were to be treated as a heading and a placard and nothing more—mere intimations, that was to say, of what would be found in the body of the paper. The meeting was a public meeting in this sense, that a newspaper which published a fair and accurate account of what took place would be protected. If the order of Good Templars was not a public body in the strict sense their proceedings were at any rate a matter of public concern. The defenders were entitled to a counter issue, as otherwise they would not be allowed to prove their averments of *veritas*.[2] If their criticism of the pursuer's conduct was slanderous, they were entitled to an opportunity of proving that he had in fact acted as they said he did.

Argued for the pursuer;—The report complained of was the report of what was alleged to have taken place at a private meeting—a meeting to which newspaper reporters were not admitted. The defenders having somehow got hold of a more or less accurate account of what took place at that meeting, had seen fit to publish it. They did so at their own risk and could not be heard to plead the accuracy of the report, if in point of fact it was defamatory, as it was. Even if the report *per se* would not bear the innuendo, the heading, the placard, and the leaderette shewed the *animus* with which the defenders regarded the pursuer's conduct. Their object was to hold him up as a dishonourable and deceitful man. There could be no doubt that anyone reading the whole would come to the conclusion that the pursuer was charged with having acted dishonourably. A heading might be read into the body of a statement so as to support an innuendo.[3] All the alleged slanderous writings might be put into one issue. A separate issue for each was unnecessary.[4]

At advising,—

LORD ADAM.—This is an action of damages for slander brought by a M:

[1] Fraser v. Morris, Feb. 24, 1888, 15 R. 454.

[2] Paul v. Jackson, Jan. 23, 1884, 11 R. 460.

[3] Andrews v. Drummond & Graham, March 5, 1887, 16 R. 568.

[4] Cunningham v. Phillips, June 16, 1868, 6 Macph. 923, 40 Scot. Jur. 533; Dunn v. Bain, Jan. 24, 1877, 4 R. 317; Cunningham v. Duncan, Feb. 2, 1889, 16 R. 383.

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Archer against John Ritchie & Company, the proprietors of the *Evening Dispatch*. The documents said to contain the slander consist of a report which appeared in the *Evening Dispatch* of a meeting of a lodge of the Good Templar Society, a leaderette, and a placard.

The first of these documents, namely, the report of the meeting, is headed "Mr Archer's Crooked Ways," and states that a meeting of a Good Templar Lodge had been held, and that after certain business Brother Hamilton made these remarks—(His Lordship then read the report of Brother Hamilton's address as given above). Now, this is a report of what Brother Hamilton is stated to have said, and it appears to me that it does not contain slanderous matter. What it reports Brother Hamilton to have said seems to me to be just this, that Brother Archer urged him to become a candidate for the Grand Chiefship, as he, Brother Archer, was not himself going to stand; that he, Brother Hamilton, consented, and that Brother Archer changed his mind—that is, after he had urged Brother Hamilton to stand,—and gave him no intimation of this change of mind. That seems to me to be the only reasonable construction that can be put upon the document, and I certainly fail to see that it is a slanderous statement to say that a person who had urged another to stand as a candidate for a particular office, for which he did not mean at the time himself to stand, afterwards changed his mind, and offered himself as a candidate without giving the other person notice of his change of mind. It may be an accusation of discourteous conduct, as Lord M'Laren called it in the course of the discussion, but it appears to me to be nothing more than that, and I can see nothing slanderous in it. No doubt the report is headed "Mr Archer's Crooked Ways," but while that may be rather a strong epithet to apply to the proceedings referred to, I do not think it alters the result. So far therefore as the report is concerned, it does not appear to me to contain defamatory or slanderous matter.

The next document—the leaderette—is perhaps even less objectionable—(His Lordship then read the leaderette already quoted). The difference between the leaderette and the report is just this—In the report it is stated that Mr Archer personally communicated to Mr Hamilton that he would not stand. In the leaderette all that is said is, that Mr Archer let it be known that he did not intend to offer himself for re-election, and suggested that Mr Hamilton should stand, and then that he changed his mind, and, as stated before, stood without giving Mr Hamilton any intimation of his change of mind. It appears to me that this is the reasonable construction of the document, and that being so, I can see nothing slanderous or defamatory in it.

No doubt, however, while there may be nothing slanderous upon the face of the documents, the pursuer is entitled to put an innuendo upon them, but, at the same time, he is not entitled to put upon them any innuendo he may choose to propose. In my view, the only innuendo which can be allowed is such as, on a fair and reasonable construction, the alleged slanderous documents will bear. The question, accordingly, which remains is, whether the proposed innuendo is one which can fairly be put upon the documents complained of? That innuendo is in these terms—"By the statements above quoted the defenders intended to represent, and did represent, that the pursuer had been guilty of deceitful and dishonourable conduct, and that he habitually indulged in conduct that was unfair and deceitful and dishonourable, and that he was unworthy of the confidence and respect of the members of the said Order." I fail to see that on a reasonable construction the documents contain any charge of deceitful or dishonourable con-

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duct. If it had been said that Mr Archer intended himself to stand for the Chiefship at the time he urged Mr Hamilton to stand, and concealed his intention, that might have been a charge of deceitful conduct, but I should have thought it doubtful whether it was slanderous. No such statement, however, is made, and while the pursuer may be charged with discourtesy he is charged with nothing more. The innuendo proposed by the pursuer then goes on—"The said statements further represented that the pursuer had wilfully misled the said James Hamilton by statements which he, the pursuer, knew to be false, and that the pursuer had been guilty of unfair and treacherous conduct towards Mr Hamilton, and that the pursuer was a man who was frequently guilty of wilfully misleading others by statements known by him to be false, and of unfair and treacherous conduct in his dealings with others, and that he was a man who was unworthy of trust or confidence." I cannot see any possible reading of the documents which would lead to that construction. No false statement is alleged to have been made by Mr Archer. Nothing unfair or treacherous is alleged against him. In my opinion, therefore, the documents will not bear, on any reasonable or proper construction, the innuendo sought to be put upon them.

That disposes of everything but the placard, which the defenders are said to have issued upon the same day as they published the report and leaderette, bearing the words, "Mr Archer and his Crooked Ways." Now, that placard simply indicates to the public the contents of the newspaper, and that anyone desirous to see it would find something in it which the publishers characterised as crooked ways. Now, that is a very strong expression, and probably comes being as near defamatory as can be, but, upon the whole matter, I do not think that any person reading that placard would put the construction upon it proposed by the pursuer, or would see anything in it detrimental to Mr Archer's reputation and character. Upon the whole matter, my opinion is that there is no issuable matter in the record, and differing from the Lord Ordinary, I think the action should be dismissed.

Lord M'Laren.—In this action, which is instituted against the proprietors of the *Evening Dispatch* newspaper, the pursuer claims damages for an alleged libel contained in (1) a report of a speech delivered by a gentleman designed as Brother Hamilton at a meeting of a branch of the Good Templar Society; (2) an editorial comment on this report, and (3) a placard in which the title of the editorial article is said to have been inserted, apparently by way of advertisement of the contents of the newspaper.

The Lord Ordinary has approved of an issue for the trial of the cause, and we are now to consider whether his Lordship's interlocutor is well founded—that is, whether an issue of libel can be extracted from the facts of the case as set forth in the summons and closed record.

As Mr Archer was not present at the meeting at which Mr Hamilton made the speech, he cannot in any view be held to have given a consent to the publication of the report of the proceedings, and therefore if the speech is a libel on Mr Archer, or if the speech contains expressions which may be properly sent to a jury on the issue of libel or no libel, the defenders are undoubtedly responsible for any damage which may have resulted from the publication. But it appears to me that the speech as reported does not contain any expressions reflecting on the pursuer's character or calling for vindication by legal proceedings.

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The substance of the speech (I mean the scheduled part of it) is this—Mr Hamilton refers to his own unsuccessful candidature for the presidency of the society, and he explains that Mr Archer, who is the President or "Grand Chief" of the society, had called on him at the end of a year of office, stating that he did not desire re-election, and inviting the speaker, Mr Hamilton, to come forward for the post. Then Mr Hamilton goes on to say that Mr Archer had eventually offered himself for re-election, but had not given the speaker any notice of his having changed his mind on the subject, and had thereby placed the speaker in an embarrassing position—in the position, which he did not desire, of appearing to oppose the re-election of his Chief.

The speech might possibly be construed into an imputation of want of courtesy on the part of Brother Archer towards Brother Hamilton. This is the only innuendo which, as I think, can be extracted from the speech. The law, however, does not take cognisance of charges of this kind, but leaves it to the party aggrieved to put himself right with his friends by making the necessary explanations, to which he will generally be able to give the same publicity which was given to the original attack.

It is right to add that, as I read this speech, it was not intended to convey any imputation whatever against Mr Archer. Mr Hamilton merely sought to explain the cause of his apparent antagonism to Mr Archer, and in doing so he could not avoid mentioning Mr Archer's omission to give him notice of his change of mind. But his references to Mr Archer are perfectly respectful, and the circumstance that he received a vote of thanks for his address indicates that they were so understood by the audience, as it is not likely that the members of the society would vote their thanks for a speech which contained a covert attack on the character of their Chief.

The question arising on the editorial article or "leaderette" involves somewhat different considerations. The article refers to Mr Hamilton's speech, of which it gives a summary, and in commenting on the proceedings of Mr Archer the writer uses the expression Mr Archer's "sharp practice." I do not find that the article misrepresents what took place at the meeting. This is not alleged in the record, nor are there any facts alleged which would give a meaning to the article different from the apparent meaning. The case then is, that on a true report of a speech, which is not in itself libellous, the writer of the article expresses an unfavourable opinion regarding Brother Archer's conduct. Now, the expression of an opinion as to a state of facts truly set forth is not actionable, even when that opinion is couched in vituperative or contumelious language. The Good Templars are a society constituted for public objects and appealing to the public for support, and observations on their proceedings cannot be said to lie outside the legitimate sphere of journalism. I see nothing in the expressions used which can be construed as an imputation on the moral character of the pursuer—nothing, indeed, beyond what persons taking a part in public work must be content to bear with good temper, and, if necessary, to meet by suitable reply.

There remains for consideration the publication of the placard alleged to contain the inscription "Mr Archer and his Crooked Ways." The difference between this case and the case in the report is that the placard, of course, goes to the public without the explanatory statement which renders innocuous the use of the same expression in the report. It is plain enough that a libel may be conveyed by a placard as well as by any other publication in print or writing. On the other

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hand, the proprietors of the newspaper are entitled to say that the primary and indeed sole ostensible purpose of the circulation of such placards is to call attention to the contents of the newspaper which is thus advertised. It is also to be observed that metaphorical expressions, such as "crooked ways," when applied to the acts of an individual, may be intended to refer either to his moral or intellectual characteristics, or, it may be, to such faults of temper or breaches of the minor morals as may be criticised without exposing the critic to an action of damages. In this case the placard merely announced a paragraph in the newspaper on the subject of Mr Archer's "crooked ways." No facts are averred giving a sinister meaning to this expression, which I take to be not necessarily or obviously defamatory. The words do not naturally import a charge of deviation from moral rectitude, but rather a habit or preference for getting at results by circuitous and indirect methods, instead of by proceeding in a direct line to the object in view. Such insinuations when made with respect to the public action of an office-bearer or member of a social or political association may be disagreeable, but they are not actionable. They do not, in my opinion, amount to a charge of dishonesty. The Lord Ordinary has proposed to put in issue whether the pursuer is charged with "dishonourable conduct." But the word "dishonourable" is a mere epithet; it does not import a substantial charge, and is not self-explanatory. It is, I think, an expression of the same character as "crooked ways," and is not injurious in a legal sense. In all the circumstances I am of opinion that there is no case here for a jury, and that the defenders are entitled to be assoilzied from the action.

Lord Kinnear concurred.

The Lord President was absent.

The Court assoilzied the defenders, with expenses.

Irons, Roberts, & Company, S.S.C.—Henderson & Clark, W.S.—Agents.

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Cameron v. Panton's Trustees.

Margaret Latta or Panton or Cameron, Pursuer (Reclaimer).—*Asher*—*Aitken.*

Robert Henderson and Others (Panton's Trustees), Defenders (Respondents).—*Dickson*—*Guy.*

Discharge—Implied discharge—Annuity.—A widow was entitled under her marriage-contract to an annuity from her husband's estate. In an action by her for payment of certain half-yearly portions of this annuity her husband's trustees admitted that during the period in question she had not received the annuity directly, but stated that during that period she had resided with her husband's mother, who was liferentrix of the estate, that the money had been paid to the latter, and that the pursuer had agreed to her maintenance during that period being set against her annuity. They produced a minute of a meeting of the husband's trustees, of whom the pursuer was one, and at which she was present. The minute, which was not signed by the pursuer, bore,—"This annuity, Mrs Panton stated, had not been paid directly to her, but as she just lived in family with the late mother-in-law, "out of whose funds and the rents of Mr Panton's property the house expenses were defrayed, she was willing to let the annuity be set off against her maintenance." The pursuer deponed that she did not understand what took place at the meeting, and that she never agreed to give up her claim to the annuity during the time she resided with her mother-in-law. Parole evidence was led to shew that the pursuer acquiesced in and approved of the manner in which the annuity had been applied. The trustees also produced eleven receipts for half-yearly payments of the annuity subsequent to the death of the husband's mother. *Held* that no intention to discharge the trustees had been proved.

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Cameron v. Panton's Trustees.

Question as to the competency of parole evidence to prove the discharge.

Receipt—Discharge—Stamp.—In defence to an action by a widow for certain half-yearly payments of an annuity, to which she was entitled under the will of her husband, his trustees alleged that the pursuer had agreed to hold her maintenance by the liferenter of her deceased husband's estate as equivalent to her annuity for the time, and produced a document titled an "acknowledgment" by her, which set forth certain half-yearly moieties of her annuity, including those sued for, and which concluded,—"I acknowledge that my annuity as above detailed has been duly accounted for to me by the trustees of the late" husband. It was signed by her, but bore no stamp. *Held* that the document was of the nature of a receipt, and being unstamped could not be looked at as evidence of the alleged agreement.

2D DIVISION. Lord Kincairney. I.

THIS action was raised on 23d May 1890 by Margaret Latta or Panton or Cameron, widow of Malcolm M'Bryd Panton, Glasgow, thereafter wife of the Rev. H. P. Cameron, against the trustees under Mr Panton's settlement for payment of five half-yearly payments, due at Martinmas 1880 and four following terms, of an annuity of £100, to which she was entitled under her marriage-contract.

It was not disputed that the pursuer was entitled on the death of Mr Panton, which took place on 23d June 1880, to an annuity of £100 during the life of Mr Panton's mother, and thereafter to an annuity of £250 (subject to a restriction in the event of a second marriage).

The defenders stated that after the death of Mr Panton the pursuer resided with his mother, Mrs Panton senior, till her death on 16th November 1882, and that in December 1882 the pursuer had stated to the trustees that she was willing to let the annuity be set off against her maintenance with Mrs Panton senior from June 1880 to Martinmas 1882, and that she had discharged her claim to these payments.

They further stated that since the death of Mrs Panton senior the pursuer had regularly received her annuity and had validly discharged all the termly payments. The defenders produced more than three consecutive receipts for these payments which contained no reservation of arrears.

The defenders pleaded;—(3) The pursuer having discharged her claim to the sums sued for, the defenders are entitled to absolvitor, with expenses. (4) The pursuer having set off or otherwise abandoned her claim for the arrears of annuity sued for, the defenders are entitled to absolvitor. (6) The pursuer having been in receipt of, and having duly discharged, without complaint or reservation, the termly payments of her annuity, for a period exceeding the last three years, she ought to be held to have discharged all arrears of said annuity beyond that period, and, in particular, the arrears sued for, and the defenders are therefore entitled to be assoilzied.

The Lord Ordinary (Kincairney) allowed a proof before answer.*

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* "OPINION.— . . . . Mrs Panton [senior] died on 16th November 1882. The defenders have produced receipts for payment of the annuity of £250 since her death. The series of receipts is not quite unbroken, but there are more than three consecutive receipts. The defenders plead that in respect of these payments she ought to be held to have discharged all arrears. They plead the *apocha trium annorum*, and it was maintained that the presumption of payment thence arising could only be elided by the writ or oath of the debtor. While I think the defenders are entitled to the benefit of the presumption, I think their plea goes too far.

"I consider that the presumption may be redargued by evidence—*Cockburn* v. *Stuart*, 1669, M. 11,398; *Buccleuch* v. *M'Turk*, 24th June 1845, 7 D. 927, 17 Scot. Jur. 483; Tait on Evidence, 472; Hunter on Landlord and Tenant, ii. 445. The case of *Hunter* v. *Kinnaird's Trustees*, 5th March 1829, 7 S. 548, 1 Scot. Jur.

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It was admitted that from Mr Panton's death in June 1880 till the death of Mrs Panton senior the pursuer and her child resided with her. Mrs Panton senior drew the whole income of Mr Panton's estate, and had from that and other sources an income of about £600 per annum.

The defenders produced a minute of a meeting held by them after the death of Mrs Panton senior. It was not signed by the pursuer, although she was one of Mr Panton's trustees and was present at the meeting.

The minute, after stating that Mr Cowan, the agent for the trustees, had explained the provisions in favour of Mrs Panton under the marriage-contract, proceeded with regard to the annuity during the life of Mrs Panton senior,—"This annuity, Mrs Panton stated, had not been paid directly to her, but as she just lived in family with the late Mrs Panton, out of whose funds and the rents of Mr Panton's property the house expenses were defrayed, she was willing to let the annuity be set off against her maintenance prior to the term of Martinmas last."

The defenders further produced a document entitled "Acknowledgment" by the pursuer, and dated 18th April 1885. It was headed,—"Statement of the annuity due to the widow of the late Malcolm M'Bryd Panton under a contract of marriage between them." It contained a statement of each half year's annuity, under deduction of income-tax, from Martinmas 1880 to Whitsunday 1884, and then the following:—"I acknowledge that my annuity, as above detailed, has been duly accounted for to me by the trustees of the late Malcolm M'Bryd Panton." This document was signed by the pursuer, but bore no stamp.

The pursuer in her evidence mentioned various circumstances explaining her delay in raising the action, in particular that she was obliged to leave her second husband in April 1885 and go to Manitoba. It was before leaving Scotland that she signed, on 18th April 1885, the "acknowledgment" above referred to, which she said she did not understand. She returned to Scotland in 1888. The claim made in the action was first put forward on 23d December 1889. The pursuer's second marriage was terminated by her obtaining decree of divorce against her husband.

Mr Cowan, the agent, had died before the proof. The three trustees of Mr Panton who signed the minute above quoted deponed that at that meeting the widow had acquiesced in the proposal therein recorded.

The Lord Ordinary pronounced this interlocutor:—"Finds . . . . (4) that the pursuer and her daughter resided in family with Mrs Panton senior until her death on 16th November 1882; (5) that Mr Panton's trustees paid the full income of his estate to his mother during her sur-

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130, appears at first sight to favour the defenders' contention, where, in defence to an action for arrears of rent, discharges of rent for five consecutive years were produced, and Lord Corehouse, Ordinary, assoilzied the tenant, in respect the landlord did not offer to prove that the arrears were due by the writ or oath of the tenant. But that case presented this peculiarity, that each receipt bore to be for the balance of the rent, thereby, as observed by Lord Balgray in the Inner-House, 'necessarily implying that the balance had been ascertained, struck, and settled.' If this opinion be read along with the report in the Faculty Collection, it would rather appear that the proof was limited to the writ or oath of the debtor, rather because the receipts by their terms implied a settlement of all balances of rent than because of the force of the presumption arising from three years' consecutive payments.

"While I hold that the defenders are entitled to this presumption, I have not thought it necessary to affirm it at present in any finding, which might possibly be embarrassing, partly because I am unable to affirm any plea of the defenders on the point. . . ."

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vivance of him; (6) that the pursuer while resident with her mother-in-law did not demand, and did not directly receive, payment of the said annuity; (7) that at a meeting of Mr Panton's trustees, held on 4th December 1882, the pursuer agreed to hold her maintenance by her mother-in-law as an equivalent for her said annuity; (8) that thereafter, and till immediately prior to the raising of this action, Mr Panton's trustees paid to the pursuer the annuity due to her under her husband's marriage-contract, and that she granted receipts therefor: Finds that in these circumstances the pursuer must be held to have discharged her claim for her annuity during the period of her residence with her mother-in-law: Therefore assoilzies the defenders from the conclusions of the action, and decerns." *

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* "OPINION.— . . . After careful consideration I have found myself unable to sustain the pursuer's claim.

"She had undoubtedly a good claim against her husband's trustees for her annuity. They could not have resisted her demand for it. But it is to be noticed that the payment of it was not imposed on them as a special trust duty. She did not demand her annuity while her mother-in-law was alive, and it has never been paid to her directly. Further, I think there is nothing in process which can be received as a written discharge of the annuity during the period in question. The document No. 14 of process bears to acknowledge that it has been accounted for; but I have great difficulty in accepting that document as a discharge, or receipt, or acknowledgment. If it be put forward as a receipt or discharge, it would, I apprehend, require to be stamped. But it is not holograph nor tested, and although the pursuer has admitted her signature, I think her admission must be taken with the qualification she attached to it, namely, that she did not fully understand it. It is besides rather fictitious, and does not represent the facts as they occurred. It acknowledges the annuity half-yearly, under deduction of income-tax, when, in fact, it never was paid at all. Had Mr Cowan been alive, and had he explained the circumstances, the case might have been different. As matters stand, I do not proceed on the document.

"The unfortunate circumstances attending the pursuer's second marriage, the condition of her health, and her absence abroad, afford some explanation of her delay in bringing this action, and some excuse for it; and cases might readily be imagined in which the presumption arising from consecutive termly discharges might be more conclusive than in this case.

"I have much more difficulty in accepting the pursuer's explanation that she did not fully understand the nature of her right to this annuity. Her husband had told her of it. She knew that her annuity after her mother-in-law's death was payable by her husband's trustees, and it is not easy to see how she took up the idea that during her mother-in-law's life it was payable by her and not by the trustees. Besides, it is not explained why, if she thought so, she made no demand for it against her mother-in-law's trustees.

"I consider that the case of the defenders depends on the circumstances set forth in the minute of the trustees of 4th December 1882. The pursuer lived with and was maintained by her mother-in-law. She knew that Mrs Panton senior was receiving the whole income of Mr Panton's estate, and she made no objection. It was very fair and reasonable that she should hold that the trustees had practically paid her annuity when they paid the whole income of the estate to her mother-in law, with whom she and her daughter lived in family. It was practically a payment to her; and I think if it be proved by parole that she assented to that arrangement, that such proof, taken along with the consecutive discharges for subsequent termly payments, will competently and sufficiently instruct a discharge.

"The minute of meeting bears that Mr Cowan explained the pursuer's rights under her marriage-contract, and that she stated her willingness to allow her claim for arrears of annuity to stand against her maintenance. The three trustees who sign the minute depone to its substantial accuracy, although naturally they

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The pursuer reclaimed, and argued;—The annuity was due under the marriage-contract. It was certain that it had not been paid. There was no sufficient evidence of implied discharge, nor that the pursuer had ratified a payment improperly made to someone else. The trustees produced the alleged acknowledgment, but that was in its nature a receipt, and was worthless as a receipt, for it was unstamped.

Argued for the defenders;—The debt was discharged by the actings of parties. Such a mode of discharge had often been sustained,[1] and here the facts proved implied a discharge. A presumption arose from the existence of receipts from 1882 onwards that the annuity before 1882 had been paid,[2] and that presumption had not been redargued. The "acknow-

cannot speak to precise words. The evidence of Mr Lyon, who was one of Mrs Panton's trustees, is not, it is true, so satisfactory. But he is eighty-seven years old, and could not be expected to recollect precisely the details of a meeting in 1882.

"I am unable to hold the pursuer's evidence as meeting that of the three trustees. There cannot be any doubt that Mr Cowan went over the provisions in the marriage-contract. It is not a complicated deed, and the provisions in favour of the pursuer are clearly and simply expressed. I am really unable to accept the pursuer's explanation that she did not understand them. She is a lady of intelligence and clear apprehension as to matters of business, and I must think that, in this matter, her recollection is at fault. It would, considering her misfortunes and her illness, be no wonderful matter if it were, and the fact that she really did forget having received the £100 of aliment should not be left out of account.

"It is much to be regretted that Mr Cowan's evidence has been lost. The action, no doubt, was raised while he was alive, but his evidence would have been available but for the delay in the pursuer's claim. There can be no doubt about his view on the whole matter, for he was the author of the minute, and, perhaps, it is not going too far to say that Mr Cowan's character and professional standing exclude all doubt as to the minute expressing the facts as he understood them.

"On the whole, I think it proved that the whole liferent of Mr Panton's estate was paid to Mrs Panton senior with the knowledge of the pursuer; that the pursuer knew that she was entitled to £100 a-year out of this liferent; that she received it practically and substantially, although not directly; that she verbally agreed to accept her maintenance in her mother-in-law's house as an equivalent for her annuity; and that she afterwards, for a period of eight years, received and discharged her annuity; and I am of opinion that these circumstances amount to a discharge of the annuity during the period of her residence with her mother-in-law.

"When allowing a proof, I expressed the opinion that the receipt for so many consecutive years of the annuity gave rise to a presumption of discharge or satisfaction. That there is such a presumption is, I think, settled by authority, and it appears to me that the true question in this case is, has that presumption of satisfaction or discharge been displaced? I think not. The pursuer has proved, no doubt, that she did not receive the annuity directly, and I have held that it has not been shewn that she gave a written discharge; but the presumption of law cannot possibly be a presumption in favour of a written discharge, but in favour of a verbal or implied discharge. I consider that the weight of the evidence is not against, but is strongly in favour of such a discharge, and that the defenders are therefore entitled to absolvitor."

[1] Russell's Trustees v. Russell, Dec. 11, 1885, 13 R. 331; Laird of Polwart v. Laird of Halyburton, 1667, M. 12,704; Thomson's Trustees v. Monteath's Trustee, June 27, 1834, 12 S. 842; Ryrie v. Ryrie, June 26, 1840, 2 D. 1210, 1 Scot. Jur. 575; M'Laren v. Howie, Nov. 6, 1869, 8 Macph. 106, 42 Scot. Jur. 52. Henry v. Miller, March 18, 1884, 11 R. 713; Irvine v. Leng, March 6, 1840, 2 D. 804.

[2] Authorities in Note by Lord Ordinary, *supra*, pp. 729, 730.

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ledgment" was not a receipt. It was rather of the nature of a fitted account, and therefore required no stamp.[1] It did not come within the definition of receipt in the Stamp Act, 1870.* It was good evidence of payment, though not stamped.[2]

LORD JUSTICE-CLERK.—This is a somewhat curious case. It appears that the pursuer after her husband's death continued to live with his mother so long as that lady lived, and that during that time she did not demand from her husband's trustees payment of an annuity of £100 which was due to her during her mother-in-law's lifetime, and which after the death of her mother-in-law was to be increased to £250. The mother-in-law was well provided for. She had, we were told, about £600 a-year, and it could hardly be supposed that she intended to get the pursuer's £100 a-year, and to keep it as against her aliment. There is at least no evidence that such a thing was intended.

It appears that in December 1882, after the mother-in-law died, the trustees of Mr Panton held a meeting at which the pursuer was present, and at which questions were brought up as to her rights, and as to what money she was to receive. After dealing with the pursuer's mournings and interim aliment the minute of meeting bears to deal with "an annuity of £100 a-year so long as the late Mrs Panton was in life, commencing the first payment at the first term of Whitsunday or Martinmas after Mr Panton's death. This annuity Mrs Panton stated had not been paid directly to her, but as she just lived in family with the late Mrs Panton, out of whose funds and the rents of Mr Panton's property the house expenses were defrayed, she was willing to let the annuity be set off against her maintenance prior to the term of Martinmas last." Now, that is the statement in the minute. It is signed by the three trustees, but by no one else. If Mrs Panton was to be bound by the statement in the minute there would have been no difficulty in writing a couple of lines at the foot of it and getting her, if willing to do so, to sign that. All will admit that that was what a man of business carrying out the matter in a businesslike way would have done if that was really the arrangement come to at the meeting. But I think the minute as it stands is a mere narrative of what the trustees and the agent understood to be in the mind of Mrs Panton at the time, and I do not think that she is bound by it, or that it can be regarded as a discharge by her to the trustees.

It is said, however, that Mrs Panton's claim is barred by lapse of time. That consideration, however, tells as much against the trustees as against Mrs Panton, because if the matter had been carried out in a businesslike manner there would have been no question of difficulty created by lapse of time.

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[1] Fell v. Rattray, Jan. 28, 1869, 41 Scot. Jur. 236.

* The Stamp Act, 1870, 33 and 34 Vict. c. 97, enacts (sec. 120),—"The term 'receipt' means and includes any note, memorandum, or writing whatsoever whereby any money amounting to £2 or upwards, or any bill of exchange or promissory-note for money amounting to £2 or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand or any part of a debt or demand of the amount of £2 or upwards is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person."

[2] M'Laren v. Howie, *supra*; Arnott v. Countess of Orkney, 1611, M. 16,960; Rule v. Aiton, 1628, M. 16,961; Stephen v. Pirie, Feb. 1, 1832, 10 S. 279, 4 Scot. Jur. 270.

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The next thing founded upon is that the pursuer put her name to an account which we have had before us, and upon which we have heard a good deal of argument as to whether it is a receipt or not. The defenders say it is not. If it is anything I think it is a receipt, and, being unstamped, it is entirely invalid. The defenders say it is a fitted account. I think there is nothing of that nature about it. It is headed "Statement of the annuity due to" the pursuer. That is the sort of heading we might expect to find in an account which is to be settled or receipted. Then there follow entries of various half-yearly payments of annuity, income-tax being deducted, and at the foot, below the sum of £516, which is brought out, are these words,—"I acknowledge that my annuity as above detailed has been duly accounted for to me." There is nothing of the nature of a fitted account about that. That being so, I do not think the defenders can found on it as a discharge. They cannot therefore shew any writ entitling them to say that the pursuer has discharged them. Since then they have no writ, and have been unable to get Mrs Panton to say that she received her annuity, or discharged it, I am of opinion that we must give decree against them.

LORD YOUNG.—I am substantially of the same opinion. The pursuer sues her deceased husband's trustees for five half years' annuity due to her under the contract of marriage. There is no question that the annuity was well constituted by the marriage-contract, and that the sums sued for are due unless they have been paid or discharged, nor yet that the defenders are the debtors. The only question is whether they have been paid. It is not said that they have been paid to herself. Were they then paid to anyone else with her authority? or lastly, has she ratified a payment to someone else? The trustees say that they paid them to her mother-in-law, and that she ratified the payment as a good and effectual payment to herself. That is the only issue in the case, for it is not maintained that they were paid to someone with her authority. The sole defence is ratification or homologation of payment to the mother-in-law, and the question is if that is proved. I think that there is no evidence of that. There is some parole evidence that she stated that she was willing to set off these payments of her annuity against her maintenance with her mother-in-law, but without entering into detail I may say that I am not at all satisfied that there was any ratification.

The document founded upon as a fitted account contains a statement of the annuity from 11th November 1880 to 15th May 1884, and therefore contains more payments than the five half-yearly payments sued for. What is the acknowledgment it makes? It is,—"I acknowledge that my annuity as above detailed has been duly accounted for to me by the trustees of the late Malcolm M'Bryd Panton." That is certainly like a receipt. It is like nothing else. It is a receipt or nothing, and it is not stamped. I say this, though I think it was not intended as a receipt but as a ratification. I cannot regard it as a ratification any more than as a receipt. The defence is therefore not established, and decree must be given.

LORD RUTHERFURD CLARK.—I also think that the pursuer must prevail. The constitution of the debt is not disputed. The only question is whether the debt is discharged. There is no written discharge unless it be the document of 1885. I hold that to be a receipt, and a receipt only. It falls clearly within

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the definition of a receipt, and it is unstamped. The trustees cannot therefore by it prove that they are discharged. Is there then any other legal proof of discharge? It was maintained that the pursuer had homologated payment to her mother-in-law as a proper and sufficient payment of her funds. I entertain great doubt whether parole evidence was admissible on such a subject. Had a payment been made after a verbal agreement that it should be made, it might have been argued that the agreement could be proved by parole. But there is no such case. The payment was made to the mother-in-law without the pursuer's authority, and the question is whether she ratified or homologated that. I have great doubt if parole evidence was admissible to prove that, and apart from that legal question I am clearly of opinion that there is no sufficient proof of homologation.

LORD TRAYNER.—I agree in the result at which your Lordships have arrived. The constitution and amount of the pursuer's claim are not disputed. The question is if the claim was paid. It is clear that there is no competent evidence of payment. Payment is not said to have been made to herself. What is said is that it was made to another person, and that she subsequently ratified it as equivalent to payment to herself. I think the proof of that fails entirely.

THE COURT recalled the interlocutor of the Lord Ordinary, and gave decree in terms of the conclusions of the summons.

W. A. HYSLOP, W.S.—RONALD & RITCHIE, S.S.C.—Agents.

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ROBERT STEWART LIVINGSTONE, Complainer (Reclaimer).—*Jameson—G. W. Burnet.*
MISS MARY STEWART BEATTIE, Respondent.—*C. J. Guthrie—Macfarlane.*

Lease—"Crofter"—Tenant—Residence—Crofters Holdings Act, 1886 (49 *and* 50 *Vict. cap.* 29), *sec.* 34.—The 34th section of the Crofters Holdings Act, 1886, enacts,—"In this Act 'crofter' means any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees."

Held that a subtenant was not a crofter within the meaning of the Act.

Held further, that a person who, between 1885 and 1888, lived at a distance from his holding, visiting it only occasionally for a week or a fortnight at a time to do necessary farm work,—the house being at other times during this period unoccupied,—was not a crofter within the meaning of the above definition, in respect that he had not complied with the condition as to residence.

(ANTE, March 19, 1890, 17 R. 702.)

1ST DIVISION. Lord Kincairney. C.

In December 1889, Robert Stewart Livingstone, designed as residing at Tornain, on the farm of Barr, Morven, Argyllshire, brought a suspension of a decree of removing, obtained in the Sheriff Court of Argyllshire by Miss Mary Stewart Beattie of Crieve and Glenmorven, proprietor of the farm of Barr, ordaining him to remove from the dwelling-house and lands of Tornain.

The ground of suspension was that the complainer possessed the house and lands of Tornain as a crofter within the meaning of the Crofters Holdings Act, 1886, and as such was liable to be removed only in terms of that Act.

The respondent in answer denied that the complainer was a crofter in the sense of the Act:—(1) In respect that he was not tenant of the house

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and lands of Tornain, but only subtenant under James Thomas Shaw, the tenant of the farm of Barr at the date of the Act; and (2) in respect that the complainer was not resident at Tornain at that date.*

After a variety of procedure (*ante*, 17 R. 702) a proof was allowed. The parties put in a minute agreeing to hold the proof in the removing as proof in the suspension, and renouncing further probation.

No question was raised in the action of removing as to whether the complainer was tenant of Tornain in the sense of the Crofters Act. In the record in that action (which the complainer referred to and held as repeated in the record in the suspension) the complainer stated:—"At the date of the passing of the said Act, the defender was a yearly subtenant under the said James Thomas Shaw, of a holding at Tornain on the said farm of Barr, consisting of two acres or thereby of arable land, and right of pasturage in common with three other subtenants of the said James Thomas Shaw, together with a dwelling-house. In respect of the said holding the defender paid to the said James Thomas Shaw a rent of £6." The complainer also gave the evidence quoted below.†

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* The Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), sec. 34, enacts, *inter alia*, "In this Act 'crofter' means any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is situated in a crofting parish, and the successors of such person in the holding, being his heirs or legatees."

The Act does not give a definition of "tenant," but provides that expressions other than those defined have the same meanings as in the Agricultural Holdings Act, 1883 (46 and 47 Vict. cap. 62).

The Agricultural Holdings Act, 1883, in sec. 42, contains, *inter alia*, the following definition:—"Tenant means the holder of land under a lease."

Sec. 24 of the same Act provides that a landlord on paying compensation under the Act to a tenant shall be entitled to obtain from the Sheriff authority to charge the holding or the estate of which it forms part in respect thereof, and continues—"The Sheriff shall have power, on proof of the payment, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this Act, to grant authority to the landlord to charge the holding or the estate of which it forms part, by executing and registering in the Register of Sasines a bond and disposition in security over it for repayment of the amount paid or any part thereof, with such interest and by such instalments as the Sheriff may determine; or if the landlord has only a leasehold interest in the holding, by executing and duly registering in the Register of Sasines an assignation of the lease in security and for repayment of the amount paid, or any part thereof, with such interest and by such instalments as the Sheriff may determine."

† The complainer deponed,—"My father was born in Morven, and lived there most of his days, but went to Perth to learn his trade. I cannot tell when he returned, but it is more than sixty years since. When he returned to Morven he was a miller at Bunavullin to the Duke of Argyll. He was twelve or fourteen years miller there. He was shifted over with Miss Stewart bought the property, and she got a friend of her own as miller. He went then to Corry Kingairloch, and stayed there a year or two, and returned again to Miss Stewart. He then went to a place called Ardentibber. The size of holding we had there was a croft of two cows, a share of a horse, and a share of the pasture, which was common to ten in the township. He paid £7 for his croft in Ardentibber to Miss Stewart. He was in possession of that holding till Miss Stewart let the farm of Barr and Ardentibber to a tenant named Kirkpatrick. About eight or nine years after taking possession of the croft in Ardentibber, he was removed to a croft in Tornain. That is my present croft. We were at Ardentibber a few years after Mr K.

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Upon the question whether the complainer was resident at Tornain in the sense of the Act (which was the only question raised in the action of removing), the facts established by the proof were these. At Whitsunday 1885, the complainer, who had till then lived at Tornain with his sister, left Tornain and went to live in Oban with another sister. He retained the holding, which he visited occasionally, for a week or a fortnight at a time, as the necessities of farming required. Except during these visits the house at Tornain was unoccupied, but during the whole time it remained furnished. The complainer and his sister returned there in 1888.

The Sheriff-substitute (Maclachlan) granted decree of removing on the ground that the complainer did not fulfil the condition as to residence required by the Act. The Sheriff (Forbes Irvine) adhered on the same ground.

On 5th August 1890, the Lord Ordinary (Kincairney) pronounced this interlocutor in the suspension:—"Finds (1) That, at the date of the passing of the Crofters Holdings Act, the complainer occupied a croft or holding at Tornain, on the farm of Barr, which was then under lease to Captain James Thomas Shaw; (2) That he was not then a tenant of said croft or holding in the sense of the Crofters Holdings Act; (3) That he did not at said date reside on the said holding: Therefore finds that he is not a crofter, and that he was duly removed from said croft or holding at the instance of the respondent: Repels the reasons of suspension, and decerns."*

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patrick got the farm. During all that time I was on the holding myself. . . . My father died twenty-five years ago. Before he died, he was disabled, and I worked the croft. After his death I became the subtenant. The croft is two acres, arable land and common pasture land. It was never measured. When I became subtenant of the holding Mr Oliver was the principal tenant. I continued in the holding on the same conditions as my father had left it. Mr Oliver was principal tenant for twenty-eight years, and continued to be principal tenant for about fifteen years after I got the holding. Captain Shaw had the farm after Mr Oliver, for seven years. He entered in 1880, and held it till 1887. I continued my holding under Captain Shaw on same conditions as under Mr Oliver. There was no change made in the conditions of holding when my father ceased to be Miss Stewart's tenant. The rent when I first took possession was £7. Captain Shaw reduced it in 1887 to £6. It is now £6."

* "OPINION.— . . . The questions then are (1), was the complainer a tenant of his holding on 25th June 1886? and (2) did he then reside on the holding?

"(1) Was the complainer a tenant of his holding on 25th June 1886?

"He was not at that time the respondent's tenant, but he was Captain Shaw's tenant,—that is to say, he was a subtenant. Nothing was said about this question in the Sheriff Court, because it was assumed that the word 'tenant' in the sense of the Act included subtenant. It was quite natural that this should have been assumed, because in one case the Crofter Commissioners decided that the term 'landlord' included a principal tenant or middleman—*Keith* v. *Mackay*, First Report, p. 103. This determination was, I understand, founded on the last paragraph of the interpretation clause, which runs thus,—'Other expressions have the same meanings as in the Agricultural Holdings Act, 1883,' language which appears to incorporate the latter interpretation clause in the Crofters Act, and I think it must be admitted that, in the Agricultural Holdings Act, the word tenant may mean subtenant. The second paragraph of section 24 of that Act seems conclusive to that effect.

"I ought probably to mention that, in the case of *M'Dougall* v. *M'Allister*, 6th March 1890, 17 R. 555, I decided that the word tenant or crofter used in the Act did not include subtenant, holding that the Act related only to the proprietor and his immediate tenant. My judgment was affirmed by the Second

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The complainer reclaimed, and argued;—(1) The complainer was a tenant within the meaning of the Crofters Act. He was not a subtenant

Division, but that part of the judgment was not questioned, because the party in the Inner-House claimed only to be a cottar. I suppose therefore it was not considered. Their Lordships do not allude to it, and on that account that case cannot be quoted as a judgment on the point.

"I think, however, that when so deciding that point, I had not sufficiently considered the effect of the reference to the Agricultural Holdings Act, and I do not think I was referred to the deliverance of the Crofters Commissioners.

"The reference to the Agricultural Holdings Act gives certainly strong support to the view that a subtenant may, as such, be a crofter, and the opinion of the Crofters Commissioners is, no doubt, of great weight. Nevertheless, on a reconsideration of the question, and a renewed study of the Act, I have still great difficulty in holding that the words 'landlord' and 'crofter' can be read as meaning principal tenant and subtenant.

"But for the reference to the Agricultural Holdings Act, I would hardly have thought it doubtful that the Act dealt only with proprietors and their tenants. The interpretation clause defines a crofter as a tenant, but contains no express interpretation of the word tenant, but the word tenant may be substituted throughout the Act for crofter. Now, the various sections of the Act speak of two persons only—landlord and crofter or tenant—and none of them contemplates three possible persons—landlord, tenant, and subtenant. The landlord mentioned is the crofter's landlord. The crofter is the landlord's tenant, so that if in any section the meaning of either word is certain, the meaning of the relative word in that clause is also ascertained. It is not, I think, possible in any clause to understand proprietor by the word landlord, and subtenant by the word crofter.

"Now, if the Act be read giving the word landlord its usual meaning, and interpreting crofter as meaning the landlord's immediate tenant, there is no difficulty in so reading the Act. No contradiction or confusion or anomaly arises, at least no anomaly except what necessarily arises from the novel conception embodied in the Act. But if the attempt be made to substitute principal tenant for landlord, and subtenant for crofter, the difficulty of so reading the Act will be found to be very great.

"Section 1 specifies the statutory conditions of the crofter's permanency of tenure. Some of the subsections may be read intelligibly in whichever way the words landlord and crofter be understood, but in subsection 4 landlord can only mean proprietor, and if so tenant can only mean principal tenant, otherwise the subtenant might, with consent of the immediate tenant, subdivide or sublet the holding, or erect buildings on it, without regard to the wishes or interests of the proprietor, which, it is to be supposed, was not intended.

"The purposes for which the landlord is authorised by subsection 7 to enter on the croft are proprietary purposes.

"If crofter in subsection 8 can mean subtenant, then a house for the sale of intoxicating liquors might be opened against the proprietor's wishes if the consent of the principal tenant were obtained.

"Section 3 provides for resumption by the landlord, and the purposes mentioned are plainly purposes which only a proprietor could entertain, and it is almost impossible to imagine a case in which a tenant could resume land from a subtenant under that section.

"Under section 5 the existing rent seems to be stereotyped, unless altered by the commission or by subsequent agreement, but it would, it is thought, be strange to empower a tenant with a merely temporary right, which might be expiring, to fix by agreement with a subtenant the rent which would be payable to the proprietor, after the principal lease had run out, without the landlord having anything to say in the matter.

"By section 7 a crofter may renounce his croft on intimation to his landlord, and by section 8 he is entitled to compensation for permanent improvements. If he were a subtenant, he would intimate his renunciation to the principal

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in the sense that his holding had been let to him by Captain Shaw, the tenant of Barr. He and his father had been on the farm before Shaw tenant, and not to the proprietor, and I suppose the tenant would have to pay the compensation for permanent improvements for which he might obtain no benefit, and the landlord, who might be greatly benefited, would escape. None of these difficulties arise if the words landlord and tenant be understood in their ordinary sense.

"The provisions in division V. of the Act in regard to enlargement of holdings appear manifestly to refer only to proprietors and principal tenants. For it is surely very difficult to hold that it was intended to empower a subtenant to claim from the principal tenant an additional portion of the land held under lease. (Section 13.)

"These remarks illustrate the difficulty of holding subtenants to be within the scope of the Act.

"Taking a more general view, it appears to me that it would be very odd to hold that a tenant with a mere temporary right could put a subtenant in a position to acquire a permanent right, and that against the proprietor with whom he had no contract or relation of any kind.

"It appears to me, besides, that the Act does not contemplate that the crofter shall have a right more permanent in its character than that of the landlord from whom it is derived. It is only, I consider, a proprietor's land, and not a tenant's, which the Act appropriates.

"But no doubt the reference to the Agricultural Holdings Act creates considerable difficulty. The contention is that the interpretation clause in the Crofters Act is itself to be interpreted by the interpretation clause in the Agricultural Holdings Act. That is surely a very rough and dangerous method of construing an interpretation clause.

"The scope and general purposes of the two Acts are perfectly different. The one Act is almost limited to the regulation of the tenant's compensation on the expiry of his lease. The object of the other Act is to make the tenant's right permanent. Now when, in the Agricultural Holdings Act, an artificial meaning is put on certain words, and among others, on the words landlord and tenant, which is supposed to be adapted to the particular provisions and purposes of that Act, it could only be by a lucky chance that these artificial meanings could be appropriate to a totally different Act, which has a totally different and very much wider scope and purport, and therefore I think that the reference to the Agricultural Holdings Act must really be read with this qualification, that the interpretation clause of that Act is to be adopted only where the context permits, and that, where such an interpretation is opposed to the fair scope and meaning of the Act, it is not incumbent to adopt it.

"Accordingly, the artificial phraseology of the Agricultural Holdings Act, while it does suit that Act, does not appear to square at all with the Crofters Act.

"An illustration may be found in the word 'lease.' It does not occur often in the Crofters Act, but I think it impossible to understand the word lease in section 11 in accordance with the interpretation clause in the Agricultural Holdings Act.

"I have thought it desirable to notice this point at some length, because it is raised directly by the pleadings, and it is a point of great general importance, as to which an authoritative judgment, should this interlocutor be taken to review, might be desirable.

"It is true that the proof has not been specially directed to this point, because it does not seem to have been taken in the Sheriff Court. But the facts seem sufficiently ascertained. The case no doubt presents a certain amount of speciality, because, having in view the length of time during which the complainer and his father have occupied this croft, their position certainly approximated closely to that of other crofters who were direct tenants of the landlord. But it is fully admitted that the complainer was not, at the date of the Act, a tenant of the proprietor, but of Captain Shaw, and the case must be taken so, and

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became tenant, and were taken over with it by Shaw. Such cases were common in the Highlands, and it would to a large extent defeat the purpose of the Crofters Act to hold that it did not apply to them. Even taking it that the complainer was a subtenant, he was within the Act. The word "tenant," if construed by reference to the definition of tenant in the Agricultural Holdings Act (as the interpretation clause of the Crofters Act directed it should be), must be held to include subtenant, for sec. 24 of the earlier Act plainly shewed that that Act applied to subtenants. (2) The complainer also fulfilled the condition as to residence. He had not at the date of the Act left the croft with the intention of not returning to it. In point of fact he must be held to have had his residence there constructively, in the first place because he was in the practice of visiting the croft for considerable periods, secondly, because he kept the house furnished for use; and thirdly, because he had no residence elsewhere at the passing of the Act; he merely happened to be visiting his sister.

Argued for the respondent;—The complainer admitted on record and in his evidence that he was a subtenant, and subtenants were not within

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cannot depend on that speciality, but on the general question whether the Act authorises the appropriation of the land of a tenant, or only of the land of a proprietor.

"The Sheriffs have, however, decided the case on a totally different ground. They have held that the complainer did not at the date of the Act fulfil the condition of residence on his holding. The case on this point seems to me to be narrow; but, on the whole, I concur in the judgment in the Sheriff Court. It would be of little use to refer at any length to the evidence. There is little or no discrepancy in it, and the import of it is plain enough.

"From Whitsunday 1885, and for two years or three afterwards, it is quite certain that the complainer lived chiefly in Oban. Oban was, no doubt, within tolerably easy reach of Tornain, and the complainer visited Tornain whenever the performance of the agricultural operations connected with it was required. During the half year before the Act passed, he spent, I think, between thirty and forty days at Tornain, and the rest of the half year at Oban. I do not think that it was intended by the Act that a crofter should be always living on his croft. I think it was contemplated that he should sometimes be absent eking out a livelihood elsewhere—as, for example, by fishing, or the like. But I think it was contemplated that he should make his home on the holding, and not anywhere else. It was well remarked at the debate that the statute contemplated occupiers of crofts who did reside on their holdings, and occupiers who did not, and that the complainer was an example of an occupier who did not reside. He used it as an agricultural subject, and he allowed the dwelling-house on it nearly to fall into ruin. He was not absent on a mere occasion, or from a temporary cause, but was absent habitually, with only occasional visits to the holding.

"Reference was made to recent poor-law cases in which the principle of constructive residence has been carried very far; for example, in the case of *Dow* v. *Nixon*, 17th June 1884, 11 R. 945, a man was held to have retained a residential settlement in the parish of Port-Glasgow who had been in Australia for above five years, but who had maintained his wife and family during that time at Port-Glasgow. In the recent case of *Watt* v. *M'Guire*, 21st Dec. 1888, 16 R. 263, the same principle was applied in a question as to a qualification to vote as an inhabitant occupier. But I do not see any room for the application of that principle here. For when the complainer was absent the house was left empty altogether, and nobody resided in it. I think that a closer analogy is to be found in cases relating to the residence of a tenant on a farm, and reference was made to the case of *Edmund* v. *Reid*, 26th May 1871, 9 Macph. 782, where an offer by a tenant to keep a furnished house on the farm, with a servant therein, and to reside in it for ten days in every two months, was held an offer to implement an obligation to reside on the farm."

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the Act. In the first place, the definition of tenant in the Agricultural Holdings Act did not expressly include subtenants, and it was, at the utmost, the definitions only of that Act which were to be imported into the Crofters Act, which was to be construed as if the mere definitions had been written in it. Assuming, however, that it was legitimate to import the definition as construed by the substantive provisions of the Agricultural Holdings Act, the argument of the complainer failed, for sec. 24 had reference only to subtenants under long leases, which might be registered. (2) The complainer had failed to establish the condition as to residence in his holding.

LORD ADAM.—The question raised here is whether the complainer was a crofter in the sense of the Crofters Holdings Act, 1886, at the date of the passing of that Act. The 34th section of the Act contains a clear definition of what the Act regards as a crofter; it is, "Any person who at the passing of this Act is tenant of a holding from year to year, who resides on his holding, the annual rent of which does not exceed £30 in money, and which is in a crofting parish." Among other things, therefore, a person to be a crofter must be a tenant from year to year, and he must reside on the holding. The respondent says that the complainer possesses neither of these qualifications. The first question, accordingly, is whether the complainer was tenant of his holding within the meaning of the Act.

Now, in that matter the position of the complainer in point of fact is not doubtful. In the third article of his statement of facts the complainer refers to his defences in the action of removing, and states that they are "here held as repeated *brevitatis causa*." That reference makes it necessary to refer to the record in the action of removing, and we there find this averment by the defender:—"At the date of the passing of the said Act the defender was a yearly subtenant under the said James Thomas Shaw, of a holding at Tornain, of the said farm of Barr, consisting of two acres or thereby of arable land, and right of pasturage in common with three other subtenants of the said James Thomas Shaw, together with a dwelling-house. In respect of the said holding the defender paid to the said James Thomas Shaw a rent of £6." Then on coming to the evidence we find that this averment is in conformity with the fact, for in his evidence the complainer makes the following statement,—"The croft is two acres, arable land and common pasture land. It was never measured. When I became subtenant of the holding Mr Oliver was the principal tenant, I continued in the holding on the same conditions as my father had held it. Mr Oliver was principal tenant for twenty-eight years, and continued to be principal tenant for about fifteen years after I got the holding. Captain Shaw had the farm after Mr Oliver for seven years. He entered in 1880, and held it till 1887. I continued my holding under Captain Shaw on same conditions as under Mr Oliver. There was no change made in the conditions of holding when my father ceased to be Miss Stewart's tenant. The rent when I first took possession was £7. Captain Shaw reduced it in 1887 to £6. It is now £6." Now, that makes it quite plain that the complainer's holding was part of the farm of Barr let to Captain Shaw, and that he was not tenant of that holding, but was subtenant under Captain Shaw. The fact that Captain Shaw regulated the amount of the rent to be paid by the complainer to him makes that quite clear. I have no doubt that Captain Shaw was the tenant of the holding, and think further that there cannot be two separate tenants of the same holding,

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and if, therefore, Captain Shaw was the tenant, that is sufficient for the decision of the case, because it follows that the complainer was not the tenant.

The pursuer, however, maintained that he derived aid from the interpretation clause of the Agricultural Holdings Act, 1883. The last clause of the interpretation section of the Crofters Holdings Act says that "other expressions have the same meanings as in the Agricultural Holdings (Scotland) Act, 1883," and the complainer argued that as there is no definition of tenant in the Crofters Act we must go back for a definition to the Agricultural Holdings Act. Now, that Act defines "tenant" as "the holder of land under a lease," which is as accurate a definition as could be given of Captain Shaw's position at the date of the Crofters Act, and it is not said that it necessarily includes subtenant, but it is argued that if the definition is construed by reference to the provisions of the Agricultural Holdings Act, "tenant" is shewn to include subtenant. Upon this point the Lord Ordinary, in commenting upon a recent decision of the Crofters Commissioners, makes these observations,—"This determination was, I understand, founded on the last paragraph of the interpretation clause, which runs thus:—'Other expressions have the same meanings as in the Agricultural Holdings Act, 1883'—language which appears to incorporate the latter interpretative clause in the Crofters Act, and I think it must be admitted that in the Agricultural Holdings Act the word tenant may mean subtenant. The second paragraph of section 24 of that Act seems conclusive to that effect." There seems to me to be a fallacy in what the Lord Ordinary here says, because if you turn to the part of the 24th section of the Agricultural Holdings Act to which the Lord Ordinary refers, you find it to be there provided that the Sheriff may authorise a landlord who has paid compensation to charge the holding therewith by executing and registering a bond and disposition in security over it for repayment, "or, if the landlord has only a leasehold interest in the holding, by executing and duly registering in the Register of Sasines an assignation of the lease in security, and for repayment of the amount paid, or any part thereof, with such interest and by such instalments as the Sheriff may determine"; but the Lord Ordinary has, I think, failed to see that this provision does not refer to ordinary leases, but to long leases, and the powers given under the Registration of Long Leases Act, 1857 (20 and 21 Vict. cap. 26), which are of the nature of proprietary rights. Therein, I think, probably lay the fallacy which induced the Crofter Commission to take a wrong view of the effect of the Agricultural Holdings Act, and also led the Lord Ordinary to the conclusion that in that Act the word tenant included subtenant.

In my opinion, therefore, the complainer has failed to shew that he was a tenant of the holding in question within the meaning of the Crofters Act.

The other question, namely, in regard to the residence necessary to entitle a person to the benefits of the Crofters Act, also involves a question of fact,—that is to say, the question whether or not the complainer was resident on his holding at the date of the passing of the Act. On that matter the evidence stands thus—At Whitsunday 1885 the complainer and his family left the holding and settled in Oban. He resided there till 1888, when he returned to his holding. During this interval, which included the date of the passing of the Act, no one was left in occupation of the holding, but at various periods when the farm required his presence the complainer returned to the holding, and lived in the house, which had been during his absence standing empty. The length of his residence on the holding during these visits varied from a week to a fort-

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night or even longer. Now, I cannot say that such occasional visits by the complainer between the years 1885 and 1888 are sufficient to constitute residence upon the holding in the sense of the 34th section of the Crofters Act. During that period his real residence was in Oban. I agree with the Lord Ordinary that poor-law cases have no bearing on this question.

On the whole matter therefore I am of opinion that we should adhere.

LORD M'LAREN.—I concur, and I have very little to add. It appears to me that the theory on which the Crofters Act proceeds is that a proprietor having incurred a responsibility by encouraging persons of small means to live on his estate as annual tenants of small portions of land, and having brought this class of tenant on to his estate, should not be allowed without good cause to deprive them of their tenancy by eviction. I do not know that there was any reason to apprehend that this would be done to any considerable extent, but still it was thought desirable that, within reasonable limits, tenants of this class should have fixity of tenure so long as they fulfilled the obligations of their tenancy. If that is the principle of the Act, it is plain enough that it has no application to the case of a subtenant, because it is against all reason that a proprietor should be bound to maintain in perpetuity on his land any number of crofters who have been brought there not by himself, but by a tenant holding, it may be, only under a nineteen years' lease. Accordingly, I am not surprised that the Act contains no provision applying to subtenants. I agree in thinking that the omission is designed, and I think it is perfectly clear. The statute, whether taken by itself or with the gloss sought to be put upon it from the Agricultural Holdings Act, intends by the word "tenant" a person holding direct from the proprietor of the ground. This, I think, receives indirect confirmation from the special clause in the Agricultural Holdings Act applying to leaseholders. The terms of that clause could not be used with reference to an ordinary agricultural or pastoral lease, for they refer to leases which are capable of registration in the Register of Sasines. That a person holding under such leaseholders should have certain rights is certainly no reason for extending these rights to persons holding under an ordinary tenant farmer, who in fact are mere labourers brought on the farm for the sake of their labour.

I think, therefore, that the complainer has not made out his claim to be considered a tenant in the sense of the Act.

I am also disposed to think, though I have greater difficulty on this point, that owing to his non-residence he has not fulfilled another condition which is one of the elements in the definition of a crofter.

LORD KINNEAR.—I agree on both points.

I only desire to add a single observation. We were told that there are many places in which crofters' holdings have been included within the bounds of large farms, and it was urged very strenuously that these occupiers ought not on that account to be deprived of the benefits of the Act. If it is true that there is such a class of occupiers, nothing we have now decided will, in my opinion, affect the question between such persons and their landlord. It may well be that an occupier of such a kind may be a tenant of the proprietor notwithstanding the fact that his holding lies within the bounds of a farm, and notwithstanding even the fact that he pays rent to someone else than the landlord; but if he is a tenant he must hold of the proprietor; and the ground of our judgment, I conceive, is that the complainer by his own statement negatived the idea that he

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held under the proprietor at all, because he says that he was "a yearly subtenant, under the said James Thomas Shaw, of a holding at Tornain on the said farm of Barr," and the evidence does not in any way displace that averment, but on the contrary confirms the view that he held under no agreement with the proprietor.

LORD M'LAREN.—I desire to express my concurrence in the additional observations made by Lord Kinnear. There may be such a class of occupiers as has been described holding another position from that with which we have here to deal, and I should not like to say anything to prejudice their case.

The LORD PRESIDENT was absent.

THE COURT adhered.

D. MACLACHLAN, S.S.C.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

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JOHN LAWRENCE REID, Pursuer (Reclaimer).—*Shaw—Kennedy.*
MRS MARY SANDERSON OR HALDANE AND OTHERS (Haldane's Trustees).—*D.-F. Balfour—Clyde.*

Proof—Property—Marches—Admissibility of plan as evidence.—In a dispute in 1889 as to marches between two landowners, whose lands had at one time formed parts of the same barony, the pursuer tendered as evidence a plan bearing the date 1842. It had been found in the possession of a third person, owner of another part of the original barony, who had at one time had a claim over the disputed ground identical with the claims of the pursuer, who had bought up his rights. It was not known on whose instructions or for what purpose the plan had been made. It had at one time passed with the titles of the defenders' predecessors, and a copy of it had been used by them in connection with a projected sale of their lands. *Held* that it was competent evidence.

Property—"Right and privilege"—Superior and Vassal—Subject feu.—Jus quæsitum tertio—Res inter alios acta.—On 19th August 1723 the proprietor of the barony of Struie granted feus of four portions thereof to different persons,—(1) The wester half of Mains of Struie, with the privileges and haill pertinents thereof as marched from the other half, "with half of the right and privilege of the loan leading to and from that hill belonging to the haill Mains of Struie called Douchrie," about 600 yards distant, "according as the said loan lies meithed and marched betwixt the lands of Whitehill and Baulk of Struie." (2) The easter half of Mains of Struie described in the same way, *mutatis mutandis*. (3) Whitehill, "reserving the loan belonging to the Mains of Struie leading to the hill of the said Mains called Dochrie, as the said loan lies and is meithed and marched betwixt the lands of Whitehill and lands of Baulk of Struie from Powstink to the Overnook of Tamacreich Dyke, in which space the said loan is not to be cast upon by the possessors of Mains of Struie." (4) Baulk of Struie, "reserving the loan belonging to Mains of Struie, which leads to the hill of the said mains, . . . all along, as the said loan lies meithed and marched betwixt the said lands of Baulk and Whitehill of Struie."

In 1889 the proprietors of the wester half of Mains of Struie, who had also acquired right from the proprietor of the easter half to the latter's right to the hill of Dochrie, and to the loan, brought an action against the proprietor of Whitehill and Baulk for declarator that the pursuer had the right of property in the loan. The defender maintained that it belonged to himself, or alternatively to the superior, who, however, had no right of access to the loan. There was no trustworthy evidence of possession, the whole lands having been possessed together in tenancy for upwards of forty years. *Held* on a construction of the titles, aided by an estate plan dated in 1842, which shewed Whitehill and Baulk as non-contiguous, and included the loaning within the boundary lines of Struie and Dochrie (1) that it was not to be presumed that the property in the loaning had been retained by the superior; (2) that the property in the loaning

had not been given out to Whitehill and Baulk; and (3) that the phrase "right and privilege" was sufficient to carry it with Mains of Struie.

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2D DIVISION.
Ld. Kyllachy.

ON 19th August 1723 Dr Robert Hay, proprietor of the barony of Struihay, granted feus of portions of the barony as follows:—

1. To Edward Rutherford the wester half of All and Whole the Mains of Struie, with the privileges and haill pertinents of the same, "as this half stands presently meithed, marched, and divided from the other half of the said Mains of Strowie, presently fewed to David Condie, portioner, of Pitquhanatrie, and speciallie, without prejudice to the generality foresaid, with the rights, priviledges, and liberties after mentioned, to witt, the half of the tree yeard, and half of the right and priviledge of the loan leading to and from that hill belonging to the heall Mains of Strowie called Douchrie, according as the said loan lyes meithed and marched betwixt the lands of Whitehill and Baulk of Strowie."

2. To David Condie the easter half of Mains of Struie with the rights and privileges described in the same way, *mutatis mutandis*.

3. To John Robertson, one just and equal half of All and Haill the town and lands of Whitehill of Struie, "reserving the loan belonging to the Mains of Strowie leading to the hill of the said mains called Dochrie, as the said loan lies and is meithed and marched betwixt the lands of Whitehill and lands of Baulk of Strowie from Powstink to the Overnook of Tamacreich Dyke, in which space the said loan is not to be cast upon by the possessors of the Mains of Strowie."

4. To Robert Niving All and Haill the east half of Whitehill of Struie, reserving as in the previous lot.

5. To William Carmichael All and Haill the town and lands of Baulk of Struie, "reserving the loan belonging to the Mains of Strowie, which leads to the hill of the said Mains called Douchrie, all along, as the said loan lyes and is meithed and marched betwixt the saids lands of Baulk and Whitehill of Strowie; and reserving right and privilege to the feuars and possessors of the Milne of Strowie, and of the lands of Mains and Barnhill of Strowie, to lead their elding from the said hill of Strowie Mains called Douchrie through the saids lands of Baulk, conform to use and wont."

In August 1889 Mr John Lawrence Reid, then proprietor of the wester half of the Mains of Struie, who had also in 1888 obtained a disposition from Mrs Vale, proprietor of the easter half of the Mains of Struie, of her *pro indiviso* half of the hill of Dochrie, with her "half of the right and privilege of the loan leading to said hill," presented a petition in the Sheriff Court of Perthshire against the trustees of Robert Haldane, who had acquired Whitehill and Baulk from Mr Condie, of Perth, in 1828, praying the Sheriff to find and declare that the pursuer was proprietor of the hill belonging to the haill Mains of Struie called Dochrie, "and of the loan leading to and from said hill, according as the said loan lies meithed and marched betwixt the lands of Whitehill and Baulk of Struie, belonging to the defenders, but subject always to a servitude of road or passage, as enjoyed at present near . . . for access between said lands of Whitehill and Baulk of Struie belonging to the defenders; to find and declare that the pursuer is entitled to erect fences on both sides of said loan, and to interdict the defenders from encroaching in any way on said loan, except in the exercise of said servitude right."

The loan in question was about 600 yards long, and of varying width, averaging from 20 to 25 yards. There was a feal dyke at either side of it, but these were much worn, and no longer served as adequate fences.

The pursuer pleaded;—(1) Pursuer being proprietor of the loan in question, but the defenders contesting his right, he is entitled to declarator, in terms of the prayer of the petition, subject to the defenders' servitude

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right of road across the loan. (2) Pursuer is also entitled to erect fences on each side of the loan, and interdict should be granted against the defenders' interference. (4) In any view, the pursuer having the right and privilege of the loan, and the defenders having no right therein except the servitude right of road across it, they are not entitled to object to his fencing the loan on both sides, subject always to defenders' due exercise of such servitude right.

The defenders pleaded;—(3) On a sound construction of the titles, the pursuer is not entitled to decree, as concluded for. (4) The said loan being the property of the defenders, and the pursuer having only the right and privilege of using the same as a passage between his said properties, the defenders should be assoilzied. (5) The pursuer having no right in or to the said loan, except that of using it as a means of passage between his said properties, has no right to interfere with the state of possession of the said loan by the defenders, as the same has subsisted from time immemorial, or to exclude the defenders from the said loan, or to fence the same, and has no right to the interdict craved.

When the record was closed the defenders prayed to have the process transferred to the Court of Session, and this was done.

A proof was allowed by the Lord Ordinary (Kyllachy), with a view of establishing the state of possession, and the course of custom as regarded the fencing of the loan. The result was quite inconclusive on both points, for this reason, that from 1845 till shortly before the date of the action, the whole lands in question—both those of the pursuer and those of the defenders—were occupied together by the same tenants; while prior to 1845 the evidence was not only extremely meagre, but related to a period when, the whole country being more or less open, little attention was paid to such questions as those at issue between the parties.

Lord Kyllachy (Ordinary), on 20th March 1890, assoilzied the defenders.*

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* "OPINION.— . . . What has to be decided is, whether upon the just construction of these titles the property of the loan is with (1) the pursuer, or (2) the defenders, or (3) the superior. The pursuer of course requires to establish that it is with him. It is enough for the defenders on the other hand that the property is either with them or was not given off at all, but was reserved (intentionally or unintentionally) by the superior.

"I am unable to hold that the pursuer's title, even when construed by the aid of the defenders' title, establishes his alleged right of property. *Prima facie* a grant of a right and privilege of way or passage implies servitude and not property, and in this view it is not material whether a right of 'loan' is a mere right of passage or a right of passage plus pasturage. In either case the grant is a grant of a right and privilege, and it would require in my opinion very cogent grounds of construction to justify the conclusion that a right of property was conveyed by that expression. I do not say that such a construction is impossible, but in the first place I find nothing in the pursuer's title which at all helps such a construction. The purpose in view is quite satisfied by a grant of servitude. There seems no reason why, if a grant of property was intended, it should not have been expressed. And, on the other hand, the pursuer's argument on the application of the words 'right and privilege' to the half of the 'tree yeard' seems much too remote and conjectural, at all events in the absence of information as to what the tree yeard was, and what was the nature of the right to it which the superior possessed. Altogether, if the question had to be decided on the pursuer's title, I hardly think there could be room for doubt. The pursuer's case really rests on an appeal to the terms of the defenders' title, and assuming such an appeal to be competent (which for purposes of construction it probably is), the defenders' title appears to me to do no more at best than raise a difficulty. It is no doubt in the pursuer's favour that the reservation of the loan is not expressed as the reservation of a servitude, but as the reservation of the loan

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The pursuer reclaimed.

On 15th July 1890 the Second Division allowed a plan to be lodged by the pursuer, and allowed a proof with reference to it. That proof was taken before Lord Rutherfurd Clark on 18th November. The plan shewed the properties of Baulk and Whitehill separated from each other, each enclosed within a coloured line of its own. On the other hand, one continuous coloured boundary enclosed Struie and the hill of Dochrie, running up and down the side of the loan, so as to embrace the loan and both these properties within the same line. No evidence was led to shew by whom the plan had been prepared, or upon whose instructions. It was dated 1842. It was found in possession of a person who had purchased an adjoining estate called Pitquhanatrie, also shewn on it, from Mrs Vale, but it was shewn to have been handed in 1857, along with the titles of Baulk and Whitehill, at that time belonging to Mr Condie, to the law-agents in Perth who acted as trustees under a voluntary trust-deed granted by Mr Condie on his bankruptcy. A copy of it was also referred to in correspondence which passed in 1860 between these trustees and a person who wished at that time to buy Baulk and Whitehill.

Argued for the reclaimer;—The plan was competent evidence, or at least the defenders, whose predecessors had used it, could not be heard to object to it, and, if it were admitted, it went far to prove the pursuer's case. His case was also supported by the evidence of the feal dykes. It was not disputed that in the circumstances the superior must be presumed to have given out to one or other of the parties all he had, but he had clearly not given the loan to Baulk or Whitehill, therefore he must have given it to Struie. The phrase "right and privilege" was habile to convey a right of property.[1] And, again, since "one-half" of this "right and privilege" was conveyed, that implied that "right and privilege" meant something more than a servitude, which could not be cut into halves.

Argued for the defenders;—The plan was not competent evidence, for no one knew for what purpose it had been made or in whose interest.[2] It might well be that the superior had not given out the property in the loan to anyone, and in that case the pursuer, being the owner of a mere

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itself, and of the loan as a subject belonging to Struie, and lying betwixt the lands of Baulk and Whitehill. It is also in the pursuer's favour that at least in the Whitehill title there is an exclusion of the right of the possessors of Struie to cast (*i.e.*, I suppose, to cast peat) on a certain part of the loan. But this last clause is at least extremely obscure; and with respect to the terms of the reservation itself, it seems to me that the defenders have at least two answers to the pursuer's argument. In the first place, the language may probably be more suggestive of a reservation of property than of servitude, but making allowance for looseness of expression, it is, I think, quite consistent with, and quite satisfied by, the hypothesis of servitude. In the second place, if that be held otherwise, and the reservation be construed as a reservation of a right of property, I do not see how anything else follows than that the right of property so reserved is still in the superior. *Ex hypothesi* he has in a question with the defenders reserved the property in express terms, but *ex hypothesi* also he has in terms not less express confined the pursuer to a servitude. There is, in short, no more reason for construing the pursuer's title favourably to him by the help of the defenders' title, than for construing the defenders' title favourably to them by the help of the pursuer's title. In other words, as I have already said, the defenders' title, if appealed to, raises a difficulty, but does no more.

"I therefore decide the case on the titles and in favour of the defenders. . . ."

[1] Duke of Hamilton v. Graham, July 28, 1871, 9 Macph. (H. L.) 98, 43 Scot. Jur. 491.

[2] Place v. Earl of Breadalbane, July 17, 1874, 1 R. 1202.

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right of road across the loan. (2) Pursuer is also entitled to erect fences on each side of the loan, and interdict should be granted against the defenders' interference. (4) In any view, the pursuer having the right and privilege of the loan, and the defenders having no right therein except the servitude right of road across it, they are not entitled to object to his fencing the loan on both sides, subject always to defenders' due exercise of such servitude right.

The defenders pleaded;—(3) On a sound construction of the titles, the pursuer is not entitled to decree, as concluded for. (4) The said loan being the property of the defenders, and the pursuer having only the right and privilege of using the same as a passage between his said properties, the defenders should be assoilzied. (5) The pursuer having no right in or to the said loan, except that of using it as a means of passage between his said properties, has no right to interfere with the state of possession of the said loan by the defenders, as the same has subsisted from time immemorial, or to exclude the defenders from the said loan, or to fence the same, and has no right to the interdict craved.

When the record was closed the defenders prayed to have the process transferred to the Court of Session, and this was done.

A proof was allowed by the Lord Ordinary (Kyllachy), with a view of establishing the state of possession, and the course of custom as regarded the fencing of the loan. The result was quite inconclusive on both points, for this reason, that from 1845 till shortly before the date of the action, the whole lands in question—both those of the pursuer and those of the defenders—were occupied together by the same tenants; while prior to 1845 the evidence was not only extremely meagre, but related to a period when, the whole country being more or less open, little attention was paid to such questions as those at issue between the parties.

Lord Kyllachy (Ordinary), on 20th March 1890, assoilzied the defenders.*

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* "OPINION.— . . . What has to be decided is, whether upon the just construction of these titles the property of the loan is with (1) the pursuer, or (2) the defenders, or (3) the superior. The pursuer of course requires to establish that it is with him. It is enough for the defenders on the other hand that the property is either with them or was not given off at all, but was reserved (intentionally or unintentionally) by the superior.

"I am unable to hold that the pursuer's title, even when construed by the aid of the defenders' title, establishes his alleged right of property. *Prima facie* a grant of a right and privilege of way or passage implies servitude and not property, and in this view it is not material whether a right of 'loan' is a mere right of passage or a right of passage plus pasturage. In either case the grant is a grant of a right and privilege, and it would require in my opinion very cogent grounds of construction to justify the conclusion that a right of property was conveyed by that expression. I do not say that such a construction is impossible, but in the first place I find nothing in the pursuer's title which at all helps such a construction. The purpose in view is quite satisfied by a grant of servitude. There seems no reason why, if a grant of property was intended, it should not have been expressed. And, on the other hand, the pursuer's argument on the application of the words 'right and privilege' to the half of the 'tree yeard' seems much too remote and conjectural, at all events in the absence of information as to what the tree yeard was, and what was the nature of the right to it which the superior possessed. Altogether, if the question had to be decided on the pursuer's title, I hardly think there could be room for doubt. The pursuer's case really rests on an appeal to the terms of the defenders' title, and assuming such an appeal to be competent (which for purposes of construction it probably is), the defenders' title appears to me to do no more at best than raise a difficulty. It is no doubt in the pursuer's favour that the reservation of the loan is not expressed as the reservation of a servitude, but as the reservation of the loan

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Argued for the reclaimer;—The plan was competent evidence, or at least the defenders, whose predecessors had used it, could not be heard to object to it, and, if it were admitted, it went far to prove the pursuer's case. His case was also supported by the evidence of the feal dykes. It was not disputed that in the circumstances the superior must be presumed to have given out to one or other of the parties all he had, but he had clearly not given the loan to Baulk or Whitehill, therefore he must have given it to Struie. The phrase "right and privilege" was habile to convey a right of property.[1] And, again, since "one-half" of this "right and privilege" was conveyed, that implied that "right and privilege" meant something more than a servitude, which could not be cut into halves.

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servitude, would have no right to fence or to the interdict craved.[1] The pursuer had nothing more than a right and privilege, that was a right of loaning, well known to the law as a servitude right.[2] A servitude which would exhaust the whole possibilities of use, as a "right and privilege" to take coal, was not a servitude, but a right of property.[3] That was the principle of the *Duke of Hamilton's* case cited on the other side, but it had no application where the right and privilege did not involve the complete use or consumption of the subject, but was merely a burden on the property as here. "Right and privilege" must have its ordinary meaning, all the "rights and privileges" in the Struie titles being similarly halved. If, however, the superior were to be presumed to have given out all he had, then the defenders had the property in the loan, all that was reserved being what was given to Struie by its own title, viz., a "right and privilege," *i.e.*, a servitude.

At advising,—

LORD JUSTICE-CLERK.—The pursuer is proprietor of one-half of the Mains of Struie in Perthshire, and of a hill called the Hill of Dochrie, which is at some distance from the Mains. The access from the Mains to the Hill of Dochrie, to which hill the pursuer has now the sole right, is by a loan about 600 yards long which passes between the properties of Whitehill and Baulk of Struie, both belonging to the defenders, Whitehill being on the east and the Baulk of Struie on the west. This loan, which is from 20 to 25 yards wide, was formerly marked off by peat dykes, which are sufficiently indicated still upon the ground to mark its lines.

The pursuer maintains that this loan is his property, or at least that he has sole right to it in a question with the defenders, and he proposes to fence it on either side. This is objected to by the defenders, who maintain that the properties of Whitehill and Baulk of Struie are conterminous and include the solum of the loan, and that the pursuer has only a right of passage along it.

The pursuer in support of his contention founds upon the description of the loan in the titles, where it is described as the "loan leading to and from that hill belonging to the haill Mains of Strowie called Douchrie, according as the said loan lyes meithed and marched betwixt the lands of Whitehill and Baulk of Strowie," and the way in which the right is described in the pursuer's title is "the right and privilege of the loan."

There can be no doubt that these expressions in the pursuer's title are not altogether such as would be expected in a conveyance of property, but at the same time they can hardly be said to be words usual in a description of a mere right of passage. Being words not common in titles, and somewhat ambiguous, they require construction, and can only be construed satisfactorily with relation to the state of things existing at the time of the grant as this can be ascertained from contemporaneous documents, aided by such evidence as is necessary to make them intelligible, and by such evidence of the character of the possession had in past time as may tend to throw light on the question in dispute.

It appears that prior to 1723 the whole lands of the pursuer and defenders,

[1] Haignes v. Haliburton, 1705, M. 10,623; Hagart v. Fyfe, Nov. 15, 1870, 9 Macph. 127, 43 Scot. Jur. 97; Irvine v. Robertson, Jan. 18, 1873, 11 Macph. 298, 45 Scot. Jur. 209.

[2] Erskine, ii. 9, 12; Chatto v. Lockhart, March 5, 1790, Hume, p. 734; Malcolm v. Lloyd, Feb. 4, 1886, 13 R. 512.

[3] Dyce v. Hay, July 10, 1849, 11 D., Lord Justice-Clerk at p. 1376, 21 Scot. Jur. 506.

along with certain others, were parts of a barony called Struie. In that year it was feued off in portions, one portion going to the pursuer's authors, one portion forming the lands of Baulk, and a third the lands of Whitehill, these latter two portions being the lands which lie on either side of the loan in question, and which now belong to the defenders. These properties were possessed by separate proprietors till 1828, when they were united in the person of Mr Condie of Perth, who disponed them to the defenders' author Mr Haldane.

It appears that for many years the whole properties of the pursuer and defenders were in one occupation, but that prior to 1844 they were all separately occupied.

The title given to the pursuer's author has been already noticed. The titles given to the feuars of Baulk of Struie and Whitehill are—as regards the loan—expressed in very similar terms. In the Baulk title the following appears:—"Reserving the loan belonging to the Mains of Strowie which leads to the hill of the said Mains called Douchrie, all along as the said loan lyes and is meithed and marched betwixt the said lands of Baulk and Whitehill of Struie." Again it is referred to as "the loan belonging to the said Mains of Struie." In the titles of Whitehill the loan is described in the same manner, "reserving the loan belonging to the Mains of Strowie."

Thus the defenders' titles, obtained from the same author and on the same date, describe the loan in question as a reservation from the lands conveyed to the defenders' authors, and as "belonging" to the Mains of Strowie, and describe this loan so belonging to Mains of Strowie as "meithed and marched" between the properties of Baulk and Whitehill, which were then being feued off as separate estates. And accordingly the marching seems to have been accomplished not by mere indications defining the lines within which the loan was to run, but by peat dykes, the usual mode at that time of separating off one piece of hill ground from another.

It is very difficult to see how, in the face of the reservations and the titles of Baulk and Whitehill, the defenders' authors could at that time have asserted a right to take possession of and use as their own any part of the loan. The claim of each could only have been to come up to the centre line of the loan, crossing by a few yards only the peat dykes which were then erected, or if erected previously were recognised as existing by their titles. The value of such an addition to their properties would necessarily have been infinitesimal, and the properties being separate there could be no practical inconvenience in a strip of hill ground being interposed between them, while there would be great inconvenience in having the march of their properties left undetermined in the middle of a loan. The loan being described both in the pursuer's title and in the defenders' as "marched betwixt" the lands of Baulk and Whitehill, seems to indicate that the loan itself is to form the boundary of each property. The loan being a definite piece of land, marked off by fences, is described as marched betwixt two other properties named. It is very difficult to read such a description—which is common to the titles on both sides—as meaning that there is nothing between these two properties, but that they lie together, having only the imaginary line of a march between them. Had the loan been a mere reserved servitude to Mains of Struie as a dominant tenement, while the property went with the lands of Baulk and Struie respectively, it would have been reasonable to expect that this would have been clearly, as it certainly could have been easily expressed. It is to be noted that the loan is described as already existing in the earliest titles, and if it was at that time only a servitude

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of right of passage and pasturage in passage, the language chosen to describe it in all the titles is most unhappily chosen. It is quite true, as the Lord Ordinary points out, that the language in the pursuer's title is not that usual in describing a right of property, in so far as it speaks of it as "a right and privilege," but it is equally true that the description of it as "meithed and marched" between the defenders' properties of Baulk and Whitehill is unlike a description of a servitude over two properties directly marching with one another, and that the description of it as "reserved," because "belonging" to Mains of Struie, is scarcely consistent with its having been conveyed in halves to those to whom Baulk and Whitehill were conveyed.

The proof which has been led affords scarcely any light upon the question before us. Indeed, it was hardly to be expected that it could do so, seeing that for so many years the question of right to this loan was of no importance to anyone, as the Mains and Baulk and Whitehill were all occupied by the same tenant. But a plan has been produced at the additional proof, which, if it be competent to look at it as evidence, throws considerable light upon the matter. After mature consideration I have come to be of opinion that the plan is competent evidence for our consideration. That plan is, I think, on too small a scale to admit of very accurate test by measurement of areas, and I throw out of view altogether the evidence by which it is endeavoured to shew that the loan is not part of Baulk and Whitehill. But the really important thing to be noticed in regard to that plan, which was an estate plan dated in 1842, is that upon the face of it, it does not make the lands of Baulk and Whitehill to march with one another when they are opposite the one to the other. Baulk, Whitehill, and Mains of Struie are each enclosed by a coloured margin, and the coloured margins of Baulk and Whitehill leave the loan distinctly marked between them. It is worthy of remark that a lithographed copy of this plan was before an intending purchaser of Baulk and Whitehill in 1859, and that on examination he discovered a discrepancy between the acreage as marked on each field and the acreage marked upon the margin of the plan. The question of the contents of the plan was therefore carefully gone into, but it does not seem ever to have been suggested in the correspondence that the area of the loan had anything to do with it. Now, the plan as presented to the intending purchaser upon the face of it indicated that there was a strip of ground dividing the lands of Baulk and Whitehill from one another. Each was enclosed in lines of its own, and these lines did not touch at any point. On the other hand, the lines of Mains of Struie and of the hill of Dochrie are continued along the sides of the loan, enclosing the Mains, the hill, and the loan within one line. It seems to me to be clear that the sellers, in laying that plan before the proposing purchaser, with the boundaries of Baulk and Whitehill distinctly delineated as not marching on the same line, but as separated by a strip of ground not included in the bounds of either, and included in the continuous bounds of another property, must be held to have represented the *solum* of the loan as not forming part of the lands to be conveyed, and that no purchaser buying on missives applicable to that plan could immediately after the bargain was concluded have demanded with any chance of success a conveyance including that *solum*. The preparation of a plan on behalf of the proprietor of Baulk and Whitehill, such as that now produced, would be wholly incomprehensible if it were assumed that the *solum* of the loan formed part of these two properties respectively, and that it was his intention to convey the loan to a purchaser buying the property as shewn upon the plan

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Now, this plan was made in 1842, and must either have been made in respect that the older plans, if any existed, were similar, or that the titles as interpreted by the possession before 1842 were held by the proprietor of Baulk and Whitehill to exclude the right of these estates to a claim of property in the loan. It was against the interest of the estate, in whose office the plan was prepared, to have the boundaries shewn as they were when the properties of Baulk and Whitehill were intended to be sold together, and that they were so intended to be sold together is plain from the advertisement and correspondence.

The suggestion might possibly be made, that although the loan is held to be a strip of property lying between Baulk and Whitehill, and not forming part of these properties, that nevertheless it does not belong in property to the proprietor of Mains of Struie and Dochrie Hill, but remains still unfeued off by the superior, the feuar of Mains and Dochrie having only a privilege of loaning, and not having right to the *solum*. I am not prepared to say that the titles might not be so read, but, on the other hand, I do not think that such a reading should be adopted unless no other reading is reasonable, looking not only to the titles, but to the character of the possession. Now, it is plain that if the loan were to be held not to have been conveyed, and that only a privilege of passage and pasture was granted to the feuar of Mains and Dochrie, the anomaly would exist that the superior would possess a piece of property to which he had reserved no access, and which, it is plain, could be of no beneficial use to him after he had given off the Mains of Struie and the hill of Dochrie, on the one hand, and the lands of Whitehill and Baulk, on the other. No access to it is reserved, and none has existed except through these lands, and the possession has been entirely adverse to the idea of any such useless reservation. Holding the words of the titles not to be inconsistent with a grant of property, I am of opinion that there is no ground disclosed in this case for interpreting them in any other sense.

I have come, therefore, to the conclusion that the interlocutor of the Lord Ordinary should be recalled, and that the Court should find and declare in terms of the prayer of the petition, and grant interdict as craved, and I move your Lordships accordingly.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and found and declared in terms of the prayer of the petition, and granted interdict as craved.

GREGOR MACGREGOR, S.S.C.—W. S. HALDANE, W.S.—Agents.

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Dunlop's Trustees v. Clydesdale Bank, Limited.

JAMES ROBERTSON THOMSON AND OTHERS (Dunlop's Trustees), Pursuers (Reclaimers).—*Sol.-Gen. Pearson—Dickson.*
THE CLYDESDALE BANK, LIMITED, Defenders (Respondents).—*R. V. Campbell—Ure.*

Bank—Stock Exchange—Fraud.—A stockbroker, whose bank account was overdrawn, paid into it a sum of money by endorsing a cheque received by him from another broker, to whom he had sold certain shares, on instructions from a body of trustees to sell and invest the price on deposit with certain colonial banks. The ordinary course of business on the Stock Exchange is that the selling broker receives the buying broker's cheque, and makes payment to his own customer by his own cheque, or, where he has instructions to re-invest, by delivery of the new investments. The sum paid by the broker into his account did not extinguish the overdraft. The broker made no re-investment for the

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trustees, and within a few days absconded without having further operated on his bank account to any substantial extent. The trustees sued the bank for the sum paid in. The bank officials deponed that they believed the money to have come into the broker's hands in the course of his business as a broker.

Held that the bank was not liable to the trustees—*diss.* Lord Young, who was of opinion (1) that the pursuers had proved that the sum paid into the bank by the broker was their property; (2) that in the circumstances the bank must be held to have known that the sum was not the property of the broker, and (3) that the bank was not entitled to withhold it from the owners.

2D DIVISION. Ld. Kyllachy. I.

THE trustees acting under the trust-disposition and settlement of the deceased Thomas Dunlop, through Mr John Ross, W.S., one of their number, instructed David B. Thomson, stockbroker, Edinburgh, to sell certain Commercial Bank shares belonging to the trust-estate, and to deposit the proceeds with certain Colonial banks. The shares were sold on 7th March 1890 for settlement on the 13th, the settlement being afterwards delayed till the 19th, in consequence of there being no meeting of directors to pass the transfer till that date.

The price of the shares was received by Thomson in the form of a cheque from the buying broker for £2921, 10s. 6d., the price of the stock being £2906, 5s., the balance being stamp-duty and the bank's fee for the transfer. Thomson on 19th March endorsed the cheque to the Clydesdale Bank in Edinburgh, and directed the bank to place £2000 to his own account, which was, before that payment, overdrawn to the extent of £4870, 15s. 1d. He got a draft on London for £900, and paid it in to his account with the same bank in London, which was then overdrawn to the extent of £805, 10s. 9d. The balance he got in cash.

Thomson made no re-investment for the trustees, and on Monday the 24th March he absconded, being hopelessly insolvent. The trustees then sued the bank for the £2900 paid into Thomson's accounts in Edinburgh and in London. They set forth the facts of the sale, payment, and lodging of the money with the defenders. They averred further that the bank were aware "that the said moneys did not belong to the said D. B. Thomson, and that they were trust-funds, which he had no right or title to deal with as his own property, or to use or apply for his own purposes." The last averment the bank denied.

The pursuers pleaded;—(1) The sums sued for being trust-funds belonging to the pursuers, and having been paid to the defenders without pursuers' knowledge or authority, and being still in the hands of the defenders, the defenders are bound to deliver the same to the pursuers. (2) The said funds having been handed to Mr Thomson for a specific purpose, he was merely custodier thereof, and could transmit no right of property in said funds to the defenders, who are therefore bound to restore same to the pursuers as concluded for.

The defenders pleaded;—(1) The pursuers' statements are irrelevant, and insufficient to support their pleas. (2) The cheque in question having been paid into the bank in the ordinary course of business, and the defenders having no knowledge whatever of the purpose for which the same came into Mr Thomson's hands, decree of absolvitor should be pronounced, with expenses.

A proof was led, in which the details of the transactions narrated above were ascertained. It was proved to be the ordinary course of business for the buyer's broker to give a cheque for the price of shares bought to the seller's broker, and for the latter to give his own cheque to his employer for the price, after deducting his commission, or when he has instructions to re-invest to deliver the new investments. As regards the bank's knowledge, it was proved that the bank had no know-

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ledge of the source of the cheque in question, but that they believed that the cheque had come into the stockbroker's hands in the ordinary course of his business as a stockbroker; and that, in the course of the previous six months, they had received in the ordinary course of business several cheques from him for sums over £2000. It was also proved that they had been informed sometime previously that the broker's overdraft was in part due to a transaction in Commercial Bank shares, which he had sold out for clients, and the proceeds of which he had re-invested before receiving the price;* they did not know that these were the pursuers' shares, and did not identify the cheque in question as having to do with that transaction.

On 3d July 1890, Lord Kyllachy (Ordinary) assoilzied the defenders.†

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* "Copy letter, H. T. Thomson (who was the father of David B. Thomson, and an agent of the bank at one of its branches in Edinburgh) to Mr Henderson, joint manager of the bank at Edinburgh.—Edinburgh, 24th February 1890.—Dear Sir,—Owing to the serious illness of the sole trustee upon an estate, who had sold 58 shares of the Coml. Bank of Scotland through my son David, and the re-investment of the proceeds of same having been effected, I will thank you to allow an overdraft upon David B. Thomson's a/c. with you to the extent of three thousand five hundred pounds stg. (£3500), and I undertake to see the same repaid you. This I expect will be shortly, as the other parties interested are taking steps to go upon the bank's register.—I am, yours faithfully."

† "OPINION.—The material facts of this case appear to be these. The pursuers (a body of trustees) instructed a stockbroker to sell for them certain Commercial Bank shares, and to re-invest the proceeds in deposits in certain colonial banks. The shares were duly sold, and the stockbroker received the price, and paid it into his account-current with the defenders, the Clydesdale Bank. That account was at the time overdrawn, and the sum paid in did not wipe out the overdraft. Some days afterwards, and before further operations on the account, except to a small amount, the stockbroker absconded, and was found to be insolvent. It was also found that he had made no investment on behalf of the pursuers. In fact, he had informed them that there was a difficulty about the transfer of the Commercial Bank shares, and that in consequence he had been unable to obtain the price. In these circumstances, the pursuers demand from the defenders the price of the shares paid in, as above mentioned, to the stockbroker's account, and they have brought the present action to enforce such payment, maintaining alternatively that they are entitled (1) to the whole sum paid in, less the broker's charges, which, it is admitted, he fell to deduct in settling with his client; or (2) to such part of the sum paid in as was not drawn out by the stockbroker previous to his absconding.

"These are, I think the only facts which are really material. But I may notice, lest in other views of the case other facts may be thought important (1) that the price of the shares was received by the stockbroker in the form of a cheque by the buying broker, which cheque included the price of the shares, *plus* stamp-duty and charges; (2) that in the ordinary course of business the cheque in question fell to be paid into the selling broker's account, as it in fact was, he giving his own cheque to his clients for the amount, less charges and commission; (3) that the bank had no knowledge of the source of the cheque in question beyond this, that they believed that the cheque had come into the stockbroker's hands in the ordinary course of his business as a stockbroker; (4) that, in particular, although they had been informed sometime previously that the broker's overdraft was in part due to a transaction in Commercial Bank shares, which he had sold out for clients, and the proceeds of which he had re-invested before receiving the price, they did not know that these were the pursuers' shares, and did not identify the cheque in question as having to do with that transaction.

"In these circumstances, the legal question is whether the pursuers have a good claim against the bank. After considering as carefully as I could the pur-

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The pursuers reclaimed, and argued;—The bank dealing, as they were with a stockbroker, and being therefore aware that in all probability the money was not his own, were bound to make inquiries as to whose property it was.[1] There was no distinction in principle on this matter between

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suers' argument, and the various authorities on which they found, I have come to be of opinion in the negative.

"The broad view of the matter, as it presents itself to my mind, is this—that the case at best for the pursuers is just the ordinary case of a person paying his just debt with money fraudulently obtained or dishonestly appropriated, but received by the creditor in ignorance of the fraud or of the dishonesty. I know no authority for holding that, in such a case, the creditor is bound to restore. It may be doubted whether a cash payment can be recovered from a just creditor in any circumstances short of actual complicity on the part of the creditor with the fraud to which the payment owes its source; but at least knowledge, actual or constructive, on the part of the creditor seems essential; and such knowledge on the part of the bank is here, I think, excluded by the proof. It is true they knew, or may be held to have known, that the money was probably the price of stock sold for a client; but the right of the broker to pay such money into his own bank account depended not merely on the source of the money, or on the state of his (the broker's) bank account, but also upon the state of accounts between him and his client, and perhaps also upon the prospects which he had *fide* had of meeting his obligations to his clients from other funds. And into those matters I do not hold that the bank was bound to inquire, or that it would be consistent with the ordinary course of business that a banker should do so.

"The pursuers founded on three classes of cases, all of which, however, are in my opinion distinguishable.

"I.—(1) *Sheffield* v. *London Joint Stock Bank*, 1888, L. R., 13 App. Cas. 333; (2) *Cooke* v. *Eshelby*, 1887, L. R., 12 App. Cas. 271.—These cases, as I read them, only establish or rather recognise that, where a person deposits securities, or sells goods to which he has in the knowledge of his creditor or buyer a limited or merely representative title, he cannot confer on his creditor or buyer a higher title than he himself holds. They also, no doubt, recognise that knowledge may in certain circumstances be inferred from the nature of the business which the parties do, and the course of dealing between them; but they were not cases relating to cash payments; nor do they lay down any principle which, so far as I see, can apply to the relations between a stockbroker and his bankers.

"II.—*Ex parte Cook*, 4 Ch. Div. 123; *Knatchbull*, 1879 and 1880, L. R., 13 Ch. Div. 696.—These cases again merely establish this, that where, *e.g.*, a stockbroker has sold stock for a client and the proceeds are still extant or traceable in the broker's possession, the client has a preference in bankruptcy as against the broker's general creditors. This doctrine has, I think, obviously no application to the present case.

"III.—*Wardlaw* v. *Mackenzie*, June 10, 1859, 21 D. 940, 31 Scot. Jur. 515, and other cases which apply the maxim *nemo debet locupletari aliena jactura*.—These again are cases which do not at all apply to cash payments in the ordinary course of business. In particular, the case of *Wardlaw* related to a cautionary obligation obtained by a curator for the benefit of his ward, by means of fraud, without consideration, and challenged while matters were still entire. I do not consider that the principle there applied applies here, (1) because the defenders are not in any sense taking advantage of the fraud of their agent, or of anybody acting as their agent; and (2) because it cannot be said here that matters were entire when the bank was apprised of the fraud. It may be that the sums drawn out by the defaulting stockbroker after the payment in question were inconsiderable, but nearly a week elapsed before the pursuers' demand, and in the meantime the broker had left the country.

"Altogether, I have not been able to come to any other conclusion than that, however hard the pursuers' case may be—and it is a very hard case, undoubtedly—the defenders are not legally liable to restore the money."

[1] Earl of Sheffield v. London Joint Stock Bank, 1888, L. R., 13 App. Ca. 333.

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money and negotiable securities. There was a fiduciary relation between the pursuers and the broker, for he should have invested the price for them; he could not retain the money as against them, nor could anyone who had no higher right than he had. This consideration excluded the doctrine of *Mackenzie & Aitken's* case.[1] The condition figured by Lord Shand in that case was present here, and made all the difference. It let in the doctrine of *Knatchbull's* case,[2] viz., that you could follow the fund entrusted to the trustee, if you could earmark it, which undoubtedly you could here. The same rule prevailed in Scotland, as might be seen by a reference to the case of *Macadam*,[3] and a comparison of it with the case of *Mackenzie & Aitken*. In *Macadam's* case the trust relation was plain, and the remedy of vindication was given. It was not given in *Mackenzie & Aitken's* case, because there there were two separate transactions, viz., first, the employment of the Edinburgh broker by the client; and second, the employment of the Glasgow broker by the Edinburgh broker. The client was never put into any relation with the Glasgow broker. Nor did the case of *Gibbs*,[4] and the case of *Eyre* v. *Burmester*,[5] there cited, apply. In the first place, the doctrine of *Lord Sheffield's* case affected these decisions. In the next place, a distinction was to be taken between the case where, on the one hand, a debt was paid with stolen money, in which case the money might be vindicated by the true owner, and where on the other, an article was bought and paid for at the moment with stolen money, in which case the money could not.

The defenders argued;—The pursuers did not take the precaution they might have taken. They did not demand that the buyer's money should be paid to them directly, in which case they would have been safe. They were content to let the one broker pay the other, they themselves to get their own broker's cheque. Therefore the purchase money became Thomson's property, and he followed the ordinary course in paying it into his own bank account. That brought in the rule of *Mackenzie & Aitken's* case, and excluded that of *Lord Sheffield's* case, even if cash and securities could be treated on the same footing, which was far from being admitted. The bank then was *in bona fide*, and it gave valuable consideration for the money by discharging *pro tanto* Thomson's overdraft. The money then ceased to be Thomson's, and became the bank's, under the obligation, no doubt, if there were a balance, to repay it.[6] The bank was independent of Thomson's constituents and customers, just as his tailor would be.[7] The duty of a solicitor (*Macadam's* case [3]) or of a trustee was different. They must set client's or trust moneys aside in a separate account.

After the argument had been fully heard and the Court had made avizandum with the whole case, the Court desired the defenders to furnish them with further information as to Mr David Thomson's accounts with them. A minute was accordingly lodged, from which it appeared that the account with the Edinburgh office was opened on 2d January 1889, a sum of £100 being then paid in to his credit. The account with the London office was opened on 2d March 1889. The bank held as security for Mr David Thomson's overdraft two letters of obligation (the second of which is quoted on p. 753, the first being letter of obligation in ordinary

[1] Mackenzie & Aitken v. Robertson, Jan. 22, 1886, 13 R. 494.
[2] Knatchbull v. Hallett, 1879 and 1880, L. R., 13 Ch. Div. 696.
[3] Macadam v. Martin's Trustees, Nov. 5, 1872, 11 Macph. 33, 45 Scot. Jur. 31.
[4] Gibbs v. British Linen Co., June 23, 1875, 4 R. 630.
[5] Eyre v. Burmester, 1862, 10 Clk's. H. of L. Ca. 90, and 1863, 4 De Jex, Jones, and Smith, 435.
[6] Foley v. Hill, 1848, 2 Cl. and Fin. 28.
[7] *Cf.* Westbury, C., in Eyre v. Burmester, quoted in 4 R. p. 436.

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form), one for £600, the other for £3500, both granted by Mr H. T. Thomson, his father, who was the bank's agent at their branch in the High Street of Edinburgh. Both of these sums were paid by Mr H. T. Thomson, by cheque on his own account, and after crediting them a balance of £796. 12s. 9d. appeared as the amount of loss incurred by the bank on Mr David Thomson's account, after crediting the sum in question in this action. It was also stated in a letter from the manager of the Clydesdale Bank in Edinburgh to the manager in Glasgow, dated 29th March 1890, that the father had requested a joint manager in Edinburgh to help his son "at settlement time when required." Mr H. T. Thomson's account at the date of the second letter of obligation stood thus:—There was an overdraft of £5300, and in security the bank held securities estimated to be worth £8270.

At advising,—

LORD JUSTICE-CLERK.—The pursuers here are a body of trustees who gave instructions to a Mr Thomson, who was a stockbroker in Edinburgh, to sell for them certain stock which they held in the Commercial Bank—and to re-invest the money on deposit in certain colonial banks. They put him in the position of selling, and he accordingly sold to another broker those Commercial Bank shares. He received the price in the form of a cheque from the other broker, which cheque included the price and what other charges the other broker was bound to pay, and he paid the money into his bank account. It appears that he did not invest the money in these colonial deposits, but represented to his clients that there was some difficulty about the settlement of the Commercial Bank shares, and led them to understand that he had not received the proceeds. He was at that time very deep in debt, and ultimately he absconded. Of the £2900 odds he had received, £900 was transmitted by his direction to an account which he had with the agency of his own bank in London, he having an overdraft there. It appears that he had opened his account with the Clydesdale Bank some time before, and had got some security through his father towards advances which the bank might make on his account, and that security was afterwards added to by securities of considerable value. But in point of fact when he absconded his account was still overdrawn, and the bank now maintain that they are entitled to retain, as having been paid to them in payment *pro tanto* of their overdraft, the sum which he paid in upon that occasion.

Now, the Lord Ordinary has found that the bank are entitled to maintain that position; and after giving the matter the best consideration I can I have come to the same conclusion. There is no doubt whatever that the business as it was done was perfectly in the ordinary course of business of a stockbroker. He is entrusted by his clients with shares for sale; he is entrusted by them with the custody of the money after effecting the sale; and he is entrusted by them with the duty of making a special re-investment for them. Having sold the shares and got the money, he pays the money into his bank account, and I think that the bank are entitled to hold that money. All his banking transactions were in ordinary course; there is no suggestion that there was any collusive or fraudulent arrangement between him and the bank. It is frankly admitted by the manager of the bank that he believed this and other large sums which were passing through Mr Thomson's account to be sums which were clients' money; but as regards the transactions themselves the bank had no cognisance of them and had nothing whatever to do with them. The

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question comes to be whether or not this sum paid by a customer of the bank into his overdrawn bank account is a payment in cash which other parties having a claim against the customer and able to make charges against him of improper conduct are entitled to follow up and insist upon being paid to them. As I have said, I have come to the conclusion that the Lord Ordinary is right in the decision at which he has arrived, and I so entirely concur in the reasons which he has given for his decision that I adopt them, and do not think it necessary to add anything else.

My judgment therefore would be in favour of the bank, and of adhering to the Lord Ordinary's interlocutor.

LORD RUTHERFURD CLARK.—I am of the same opinion. I think the money that was paid to the bank was a payment in extinction *pro tanto* of the debt then due to the bank, and that that payment cannot be gone back upon. It seems to me that was a perfectly good payment to the bank, and I do not need to enlarge upon the case, for that is the ground of my opinion. I quite assent to the views of the Lord Ordinary.

LORD TRAYNER.—I, like your Lordships, agree with the Lord Ordinary, and upon the grounds which his Lordship has stated. I entirely concur in what he has said, and think it unnecessary to add anything.

LORD YOUNG.—The pursuers are trustees under the will of the deceased Thomas Dunlop, and as such vested with the testamentary estate. Part of it consisted of shares of the Commercial Bank, which they in 1890 sold through Mr Thomson, a stockbroker, who on 19th March 1890 received the price from the buyer, and at once paid the amount (£2900) to the defenders to be put to his credit with them. The pursuers now claim this money as their property. It is at the foundation of this claim that the pursuers shall trace the price of their undoubted property (the Commercial Bank shares) into the hands of the defenders, so as to identify it with the money which they received on 19th March. This they do by proving that the payment was made by transferring to them the cheque for the price which Thomson had got from the buyer only a few minutes before. It is now, I think, well settled that in order to the application of the rules of law and equity regarding the following and recovery of trust property, money may be traced and identified so that the receiver shall be answerable according to these rules, although the particular money may have disappeared.

I am of opinion therefore that the defenders must be answerable to the pursuers for the trust money thus traced into their hands, and must pay the amount, unless they have shewn that it was well transferred to them by Thomson, the broker,—that is, in such manner as to become their own,—or that they have some legal ground for withholding it from the pursuers. Whether they have done so or not is I, think, the only question in the case.

It appears that Thomson had an account-current with the defenders, which, at the time of the payment in question, was overdrawn and shewed a large balance due to the defenders, and their case accordingly is that they are, and from the first were, entitled to impute the payment in reduction of this balance. I assent to the proposition that when a customer pays money to his banker to be put to the credit of his account, the banker is *prima facie* entitled to assume that it was the customer's own money, and that he defrauded no one by paying

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his debts with it. I also agree that a payment to the credit of an account *prima facie* operates reduction or extinction of any balance then due upon it, and is thus in a sense payment of debt. But these propositions are too general and abstract to be of much practical utility in a particular case, the facts of which in detail are before the Court to be dealt with. I think it is proper, and indeed essential, to inquire into and consider the character of the particular account, the position of the customer, as the bank knew it, and also the banker's knowledge, even general knowledge, of the sources from which the money paid in came, and for the brief safe custody of which the account was opened and existed. Take for example the account of a rent and debt collector. The banker titles the account as that of "A B, rent and debt collector," and knows, or believes on sufficient grounds, the true sources of the money paid in. I could not in such a case assent to the applicability of the general abstract propositions which I have expressed. Again, to instance a case much resembling that before us, take a stockbroker's account—so entitled in the banker's books—and the purpose of which is, to the banker's knowledge, the temporary safe custody of the money of the broker's employers. Suppose that the banker lends this broker—customer—say £6000 on his bond or bill or I O U, or (worst of all) on his cheque, when he had nothing at his credit. Suppose further that in this state of matters the broker pays in £2900, which in fact is not his own money but an employer's, as the banker well knows, or on sufficient grounds believes. In such circumstances it is at least not clear that the banker could successfully support his claim to appropriate the money by the general legal propositions which I am now referring to. These are applicable (and probably sufficient for the decision) in every case of an account of such character, that it is reasonable to impute to the banker the belief that the money paid in is the customer's own, so that he may, without breach of trust, pay his debts with it. It would be unreasonable to subject a banker's claims upon money paid by a customer to his credit in account to the result of an inquiry as to the source from which it came. Take the case of a man of business who pays to the credit of his own account with his banker the money of a client entrusted to him for investment. The man of business acts with grave impropriety, and the client may lose his money, but the banker will not be allowed to suffer unless the *bona fides* which is *prima facie* imputable to him is displaced by positive evidence. Whether he would be permitted to gain, at the expense necessarily of the defrauded client, is, I think, not clear. If he knew the truth when the payment was made, he would certainly not be permitted to retain the money and apply it in payment of his customer's debt. If he did not at the moment, but received notice of the truth immediately thereafter, and before anything had occurred in consequence of the payment whereby he would or might be prejudiced if it were withdrawn, I am not sure that the case would be substantially different.

I now proceed to consider more closely, first, the character of the account and dealings between the defenders and the broker Thomson, and second, the defenders' knowledge with respect to facts, their knowledge or excusable ignorance of which I have sufficiently indicated as being material, in my opinion, to the decision of the case. These topics, though in some respects separable, run into each other, the first having certainly a very distinct bearing on the second. I therefore premise what I have to say on both by observing that by the knowledge of the defenders, who are a joint stock company, I mean the knowledge of the officers in their branch office in George Street, Edinburgh, where the business

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we are inquiring about was conducted, and particularly the knowledge of their agent and chief officer there.

1. The account is on the face of it a stockbroker's account with his banker. In the title of it in the defenders' books Thomson is designed as "stockbroker, 26 George Street"; and their agent in their George Street branch says, as a witness, that he knew him as the son of "the agent in our High Street branch in Edinburgh," and that his office was "quite near our bank." The account was opened on 2d January 1889, apparently at the request of the broker's father, "the agent in our High Street branch," who became security for it to the amount of £600, according to his letter of 14th January 1889, the terms of which shew pretty well the character of the account. He (the father) appears also to have used his personal influence with Mr Henderson, who was at the time joint agent along with Mr Greenhill for the defenders in their George Street office, to help his son at a pinch "at settlement time,"—that is of course to lend him money,—which was natural and excusable on his part. This appears from Mr Greenhill's letter of 29th March 1890, which I refer to only as shewing the character of the account, and as some explanation, although no justification, of the very large loan that was in fact given, and as I think most improvidently and irregularly given.

The account opened with a credit entry of £100, and was continued to the close without any security except that of the unfortunate father referred to in Mr Greenhill's letter of 29th March 1890. On 14th February 1890 it is balanced with the sum of £833, 10s. at the broker's credit. At the close of the following day (15th February) the balance to his debit is £1193, 1s. 7d. It thereafter goes on with balances due to the defenders, fluctuating from over £1000 to over £5000, till 18th March when the balance is £4870, 15s. 1d. due to the defenders, the broker not having had a shilling at his credit since 14th February. On the following day (19th March) the broker's cheque for £1400 was presented, and it is not surprising that the teller should have hesitated to pay it, and asked instructions from his superior, Mr Nicolson, and that he before authorising payment should have seen fit to communicate with Mr Thomson, who accordingly, as Mr Nicolson says in his evidence, "came over" on the same day, and stated "that he would be paying in in the afternoon." What he had in view was manifestly the price of the pursuer's stock which he expected to receive, as he in fact did, that afternoon from the buyer. From the order of the entries on 19th March it would seem that this cheque for £1400 was not honoured till the balance on the account was reduced by the payment immediately in question, which Thomson made after bank hours. But the teller (Riddell) explains that the cheque was honoured first—so that at the close of bank hours on 19th March Thomson was the defenders' debtor to the amount of £6200—for money which was simply lent to him within about a month, during which there was not a shilling at the credit of his account. They had, indeed, Mr Thomson senior's guarantee to the extent of £4100, and have, as they say, since got his cheques for that amount, but as his account is (independent of these cheques) overdrawn to the amount of £5300, as stated in the defenders' minute of 31st January, it is unlikely that these cheques have yielded any money.

There must, I should think, be some explanation of this very remarkable state of matters as the result of what ought to have been very familiar and commonplace banking business. What is it? Had the defenders' agents in Edinburgh authority to act as they did—that is, to advance money to Thomson to the

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amount of £6200? If not, they are plainly liable for any loss on this account so occasioned. Mr Greenhill in his letter to the manager in Glasgow of 29th March, already referred to, alleges no authority, and refers, as explanatory of the advances, only to Mr Thomson senior's guarantee and his verbal request to Mr Henderson, "to help David at settlement time when required." Do the defenders accept this as a justification of their agents' conduct? If the agents are truly responsible for the loss, the defenders may of course beneficently relieve them of it if they please. But such beneficence must be at their own cost.

2. With respect to the knowledge of the defenders,—that is, of their agents, who acted for them in this business,—it is proved, I think to the exclusion of any reasonable doubt, that they knew perfectly well that the money paid in by Thomson was not his, but his employers'. *Res ipsa loquitur.* From January to December 1889 he paid in sums to the amount of £147,465. None of these payments were allowed to remain undrawn for more than a couple of days, very few of them for more than one, and some were drawn out the same day. But sums of £7000, £8000, £9000, and even up to £11,000 stood at his credit for a night, or even two—I suppose over a Sunday or holiday. The defenders' agents who did business with him were the personal friends of himself and his father, who had requested them "to help David at a settlement time when required," and a suggestion that they honestly believed that this money was his own, which he might, without breach of trust, pay his debts with, would be extravagant. No such suggestion is made. Mr Greenhill says,—"I made no inquiry as to whether the money paid into Mr Thomson's account was in his hands as broker or otherwise. I believed that it was in his hands as broker acting for clients." Knowledge of the individual clients whose money was paid in is not necessary to knowledge of the character of the account and the sums paid into it. All that the pursuers need, in my opinion, shew is that the purpose of the account and the use made of it was the reception of clients' money for safe custody till it was paid over to the owners within a very brief period, and that the defenders were not deceived or misled, but quite knew the fact.

I have been assuming that the money paid to the defenders by Thomson on 19th March was, when he made the payment, the property of the pursuers, and that, if he meant it as a payment of debt due by him to the defenders, he committed a breach of trust. This is certainly my opinion, founded on what I think was the legal relation in which the pursuers and Thomson stood to each other, viz., that of principal and agent, and I should have thought it superfluous to say a word in support of this view had it not been seriously disputed by the defenders on the authority of the case of *Mackenzie* v. *Robertson*, 13 Ret. 494. I think it clear that a broker is the agent of his employer, and that his relation to his employer is consequently fiduciary. Nor is this proposition affected by the fact that by a rule of the Stock Exchange, quite in accordance with law and legal principle, a purchasing and selling broker are *inter se*, or with respect to each other, principals—that is, stand in the relation of buyer and seller. It is not inconsistent with this rule, or with any of its consequences, that each of the brokers who are *inter se* principals should, with respect to his employer, be an agent. In the case of *Mackenzie* v. *Robertson* the dispute was between a selling broker and the general creditors of another broker, to whom he had sold (a purchasing broker),—the employer of neither of them having any interest in it; and the decision proceeded on the character of the relation of the two brokers *inter se*, which the Court held to be that of principals—buyer and seller. A

similar question would have arisen here had Hyslop, the broker who bought from Thomson, become bankrupt without paying Thomson, and had Thomson in competition with Hyslop's general creditors been claiming a preference over a cheque or money which Hyslop had received from his employer. As it is, the case of *Mackenzie* v. *Robertson* is, in my opinion, inapplicable.

The property which Thomson was employed by the pursuers to sell for them consisted of bank shares, and when he received from them the transfer to be delivered to the buyer in return for the price, he was entrusted with the property itself, and the price when he received it was his employers' money in his hands, which he was bound to deal with accordingly by handing it over to his employer, or disposing of it according to instructions. If he appropriated it to his own use, keeping it and absconding with it, or paying his own debt with it, he was not a mere defaulting debtor, but a criminal guilty of the very serious crime of breach of trust and embezzlement. We have not here to consider any question of criminal law, but I notice in passing that we have no such technicality as I believe prevails, to some extent at least, in England, that in order to the crime of embezzlement the delinquent must stand in the relation of a clerk or servant to the person defrauded. The cases in our criminal Court to the contrary are numerous and familiar. It appears from the evidence that Mr Ross, the pursuers' man of business, having occasion to go from home on the 19th of March, instructed Thomson to deposit the money in certain banks (having agencies in Edinburgh) in the pursuers' name, which he says he would have done himself had he remained in town. Instead of doing so, Thomson paid the money to the defenders. He was, on this 19th March, as the event proved, at the end of his resources, indebted to the defenders in £6200, resolved to abscond, but without money enough to take him out of the country. In these circumstances, the resolution which he took, as shewn by his conduct, is remarkable, and may throw some light on the relation between him and the defenders' officers in Edinburgh, from whom, or by whose means, he had received this large sum of £6200 within a month. He resolved to defraud the pursuers of their money then in his hands. This is plain from his false and fraudulent letters spoken to by Mr Ross. These letters were obviously meant to delay inquiries after him till he had time to be off. They could have no other meaning or object. Further, he resolved to pay his debt to the defenders with the pursuers' money, and so benefit them to the exact extent that he defrauded the pursuers, *minus* £55 to carry him out of the country. What is the explanation of this conduct, for there must be one. It is hard to believe that he spontaneously and willingly wrote deceptive letters and committed a heinous crime only from a kindly disposition towards this joint stock company, the Clydesdale Bank, or an ill feeling towards the testamentary trustees of the deceased Thomas Dunlop, or the family of whose interests they had charge. But whatever the motive, the fact is certain that Thomson did deliberately resolve to rob these testamentary trustees of £2900 in order to relieve, to that extent, the defenders or their agents of the loss consequent on advances which had been made to him between 14th February and 19th March, and which I think the defenders will now acknowledge ought not to have been made. I should indeed have been the reverse of surprised had the defenders disdained to take benefit by this very gross fraud, the fact and purpose of which they cannot fail to see. But they have judged otherwise, and we have therefore to decide whether or not they have the legal right which they urge.

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The view of the matter on which the defenders rely as true in fact and sound in law is stated by the Lord Ordinary, who adopts it, thus,—"The broad view of the matter, as it presents itself to my mind, is this, that the case at best for the pursuers is just the ordinary case of a person paying his just debt with money fraudulently obtained or dishonestly appropriated, but received by the creditor in ignorance of the fraud or of the dishonesty. I know no authority for holding that in such a case the creditor is bound to restore. It may be doubted whether a cash payment can be recovered from a just creditor in any circumstances short of actual complicity on the part of the creditor with the fraud to which the payment owes it source, but at least knowledge, actual or constructive, on the part of the creditor seems essential, and such knowledge on the part of the bank is here, I think, excluded by the proof. It is true they knew, or may be held to have known, that the money was probably the price of stock sold for a client, but the right of the broker to pay such money into his own bank account depended not merely on the source of the money, or on the state of his (the broker's) bank account, but also upon the state of accounts between him and his client, and perhaps also upon the prospects which he *bona fide* had of meeting his obligations to his clients from other funds. And in those matters I do not hold that the bank was bound to inquire, or that it would be consistent with the ordinary course of business that a banker should do so."

This broad view of the matter assumes that there is no distinction, with respect to the right and duty of the banker, between a stockbroker's account opened and used for the purpose, and substantially only for the purpose, of enabling him to pay into bank the money of his clients to be kept safe till he can pass it over to them, and any other account between a banker and a customer. My opinion is adverse to this assumption. I think the distinction may be material to the duty and consequently to the right of the banker. The subject is of general importance and very material in the case before us. In order to explain my opinion upon it, I must take leave to offer some remarks on the familiar enough expression "overdrawn account," and on another cognate to it, and used by the Lord Ordinary, "to wipe out an overdraft," not that the meaning of either expression is doubtful, but that it is important to see and appreciate clearly what is the reality and legal character of the things signified by them. Now, I venture to say that an account with nothing in it, either at the credit or debit, is no account at all. Accordingly, every account is opened with a sum put to the customer's credit, whether consisting of money paid in by him or of money which he has arranged with the banker to place to his credit, with or without security, so that he may draw on it, which last is in its legal character a loan from the banker. Money at the credit of an account, whether originally the property of the customer, or borrowed by him from the banker, or a third party, is drawn upon by cheques which are legal instruments for that purpose and no other. When the money at the credit of the account is all drawn out there is plainly nothing to draw on, or for a cheque to operate on, and if the customer desires to continue to draw he must have more money placed to his credit—whether his own, or borrowed from the banker, or a third party as before. This is the regular business course with respect to every account, and in business or trade banks is always strictly followed—so that when the money at the credit is all drawn out no cheque is honoured till money is paid in, or till by arrangement with the banker such sum as may be

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required is placed to the credit. In family banks (such as Coutts') the same strictness is not always observed, and in business banks in Scotland (not in England) it is sometimes neglected. When the regular course is followed an account cannot be overdrawn although the customer may very well be his banker's debtor for money placed to his credit by arrangement, and which his cheques shew that he has in fact received from the lender. An account is overdrawn when a banker honours the cheque of a man who once had an account with money at his credit, but who has ceased to have such account—for a longer or shorter period,—I know of no rule for limiting the period. Such conduct by a banker is safe or not according as the confidence in the drawer of the cheque, which he necessarily acts on, is misplaced or not. If not misplaced, and the drawer of the cheque subsequently pays in as much as he had thus through the banker's confidence in him personally been permitted to draw in anticipation, the overdraft is wiped out. But this is not regular banking. It may be practically safe and the irregularity insignificant when the account is such that no others besides the banker and the customer have any legitimate interest in it or in the manner in which it is kept, or the amount of loans or advances by the former to the latter. A stockbroker's account with his banker is I think clearly not of that character. The defenders not only admitted but contended that when a selling broker receives a cheque for the price of a client's property which he has sold, it is in the ordinary course of business that he shall pay it into his own bank account, giving his own cheque to his client for the amount, less charges and commission; and the Lord Ordinary in his judgment refers to this "ordinary course of business" as indisputable and well known. I assume that such is the ordinary course of business, and that it is known all round—that is, to bankers as well as to stockbrokers and their clients. It seems to follow that the accounts of stockbrokers with their bankers ought to be kept and operated on with a due regard to this ordinary course of business respecting them and the interests therein thence legitimately arising. Nor does there seem to be any reason why the duty in this respect, if there be any, should be confined to the stockbrokers and not be extended to their bankers. The ordinary course of business, thus appealed to by the defenders themselves, necessarily and of itself announces to the clients of stockbrokers the bankers with whom they have accounts into which their (the clients') money is paid and out of which they get it on the broker's cheques; and the bankers are parties to the announcement. Now, I would ask this plain question,—Are there any bankers who would venture to notify to all concerned,—that is to the public who employ stockbrokers,—that while they allowed accounts to be kept with them into which in the ordinary course of business stockbrokers paid their clients' money they held it to be consistent with their duty to permit overdrafts to any amount they pleased and that on the footing that they should be wiped out with clients' money? So long as this ordinary course of business prevails no stockbroker can conceal from his clients who are the bankers with whom he keeps his account, and I much doubt whether any broker could afford to continue his account with bankers who were known, or even suspected, to be capable of acting on such a view of their duty; he would be so likely if he did to experience the effect of —well the effect of "exclusive dealing." He would cease to be employed. The only alternative view, and it is simple and obvious enough, is that a stockbroker's account ought to be kept with strict regularity, and so that it shall never be overdrawn even for an hour. The banker may of course accommodate a stock-

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broker to any amount and on any terms he pleases, but he ought in my opinion to do it if so minded by putting to his credit in account the sum he is willing to accommodate him with—the broker becoming his debtor therefor as for so much money lent to him on the terms agreed to. This course is attended with no hardship or inconvenience to either the broker or the banker, and any other exposes innocent clients, to whom not even the least negligence or inattention can be imputed, to the risk of being scandalously defrauded.

I have pointed out that between 14th February and 19th March the defenders allowed Thomson to overdraw on his Edinburgh account to the amount of £6200, his own drafts to that amount standing as a debt against him unwiped out when the pursuers' money was paid in. In London his account was within the same period (or about the same period) allowed to be overdrawn to the amount of £672, 18s. 6d., which was the sum at the debit on 18th March. Adding this to £6200, it appears that this needy broker was allowed by the defenders within a month to overdraw £6872 on the account into which he was invited and expected in the ordinary course of business to pay the money of his clients. I am of opinion that having regard to the character of the account, and as in a question with the pursuers, it was a violation of duty on the part of the defenders to allow these overdrafts. As in a question with Thomson himself, who got the money, I have no occasion to consider the matter, but suggest no doubt of his liability.

But the defenders are entitled to have their case and claim considered as if they had done what I think they ought if they were willing to accommodate Thomson to the amount of £6872, so as to enable him to continue his drafts on these two otherwise exhausted accounts, viz., as if they had put £6200 to the credit of his account in Edinburgh, and £672 to the credit of his account in London. In this view the case is not one of overdrawn account and the wiping out of overdrafts, but a simple case of loan by the defenders to Thomson—not the less so because the lent money was put to the credit of the borrower's account to be drawn out as it suited him.

I have already expressed my belief, and the grounds of it, that Thomson intended to benefit the defenders with the pursuers' money, which he intended should never reach the pursuers at all, and this may be represented as intention by him to pay to that extent his debt to the defenders. Did the defenders receive the money in the knowledge of this intention on his part and with a corresponding intention on their own? If they did, and I regret to feel obliged to say that there are in my opinion very serious grounds for believing that they did, it is, I think, impossible to regard the proceeding as one "in the ordinary course of business." If they did not, but, in ignorance of Thomson's fraudulent intent, received the payment from him "in the ordinary course of business," according to which, to use the Lord Ordinary's language, "the cheque in question fell to be paid into the selling broker's account, as in fact it was, he giving his own cheque to his clients for the amount, less charges and commission," then they did not in fact receive it as or towards payment of their own debt for money lent to the broker.

There are no doubt cases in which a creditor who has in good faith received payment from his debtor of a just debt will not be ordered to restore the money on proof that it was not the debtor's own, and that he committed a breach of trust in paying it away. But it is the primary condition of every such case that the money was *bona fide* received in payment of the debt, and this condi-

tion fails here. If it were otherwise, we should have to determine whether the equities on both sides here are equal, taking account of all the facts to which I have referred at great, I fear too great length, and I have to express my own opinion that they are not. I think, indeed, that there is no equity on the defenders' side.

The case then comes to this, that the defenders having lent Thomson £6872 on such security as they were content to accept, subsequently received from him a sum of £2900, and in the ordinary course of business put it to his credit in his broker's account, which, for the reasons I have explained, I must decline to regard as an overdrawn account. The money is identified as the price of the pursuers' property, and paid into this account "in the ordinary course of business" in its passage from Thomson to the pursuers. Thomson then became bankrupt, and absconded, and the question is, ought the defenders to be allowed to impound this money in payment of his debt to them? In support of their contention that they ought, they say that when they lent Thomson £6872 on insufficient security they had in view that, should misfortune overtake him, there would certainly or probably be some of his clients' money within their reach through the medium of this account into which clients' money was paid in the ordinary course of business, which they might seize in payment. What does this amount to? I think to this, that the defenders regarded and meant to use this account as a snare which might trap for their use and benefit the money of innocent people. If this view be admissible it is a grave misfortune to the defenders, which no doubt they deplore, that there was only £2900 in the trap when the collapse came. Had there been £7000 they would have seized it all, arguing that it was (again to use the language of the Lord Ordinary) "just the ordinary case of a person paying his just debts with money fraudulently obtained." And what, I venture to ask, would have been the result in the view I am now considering had this just debt been well secured to the defenders by the bond of solvent cautioners or by a heritable bond? Thomson was the debtor in it, and if the case is to be dealt with on the footing that he paid it the cautioners would apparently be relieved, and any security held for it set free. Would the case be different if the defenders held Thomson's bond with sufficient (or insufficient) security for the amount of his debt to them? I can conceive no reason for thinking so. Nor can I see any ground for thinking the nature or origin of the debt material. It might have been on a bill or bond of caution for the debt of another customer of the defenders. The question of their right to retain the pursuer's money in payment would have been precisely the same. They got it from Thomson, who was their debtor in a just debt, with which the pursuers could not possibly have less concern than they have with the loan or advance to him of £6872.

The money was paid in after bank hours on the 19th March. Suppose that Thomson had at the same time handed his cheque to his clients for the amount, less charges and commission, and that they had presented it to the defenders on the opening of the bank next morning. Could they have refused to honour it "in the ordinary course of business," on the ground that they had received the money honestly and in good faith in payment of their own debt? Or is their claim to keep the money to be rested on Thomson's failure to give his cheque to his clients, and his success in artfully delaying their application therefor till he was safe out of the country? If the first alternative is maintainable the facts on which the second is based are quite immaterial. If, again, the first alterna-

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tive is ill-founded the second cannot possibly be maintainable. It seems to me, at least, that there are no grounds for holding that the pursuers have lost their claim, which they once had, by undue delay in asserting it.

I am of opinion that the defenders have instructed no good ground in respect of Thomson's prior debt for withholding from the pursuers the £2900 which they received on 19th March.

With regard to their claim to retain the money in respect, and to the extent, of subsequent advances to Thomson, I do not feel myself in a condition usefully to say much. Your Lordships, agreeing with the Lord Ordinary, are of opinion that the defenders are entitled to prevail in respect of the prior debt, which greatly more than exhausts the money in question, and so have not adverted to the subsequent advances. The Lord Ordinary refers to them as inconsiderable, and only, I think, with reference to the topic of the time that elapsed, and of matters not being entire, when the defenders were apprised of Thomson's fraud. We really had no argument on the subject, and as the case is necessarily, according to the opinion of your Lordships, to be decided irrespective of it, it would really be useless for me to enter upon it. It is, of course, speaking quite generally, indisputable that advances made in good faith in respect of money received in good faith may be made good out of that money.

THE COURT adhered.

J. & J. ROSS, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

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THOMAS WATT, Petitioner (Respondent).—*Dickson—C. N. Johnston.*
JOSEPH BACKHOUSE (Mr and Mrs Burgess' Trustee), Respondent (Appellant).—*Blair—Sym.*

Property—Tenement in burgh—Conveyance of attic storey—Right to roof.—A, the proprietor of a building feu within burgh, having built thereon a tenement of houses, disponed to B "these two dwelling-houses or flats, being the second flat above the shops and the attic story of the tenement with two cellars, a necessary-house, and a right to the water-pipe in common with the other proprietors, under burden of payment of one shilling of feu-duty, and a fourth part of the expense of upholding the roof of the said tenement." Other flats were disponed to other persons in terms *mutatis mutandis* identical with the above, but the granters retained part of the basement and of the upper flats in their own hands.

A disponee of B to the attic flat presented a petition to the Dean of Guild for authority to convert the attic flat into a square story, and to build another story above it.

A opposed the petition.

The Court *refused* the petition, in respect (1) (*dub.* Lord Trayner) that as a question of contract each buyer from A obtained right only to the parts of the tenement as described in his disposition, and the claim of the petitioner amounted to a claim to more than that; and (2) that as a question of real right A, the proprietor of the *solum* on which the tenement was built, had not conveyed to B the right of indefinite extension upward, but only the right to the stratum of space occupied by the attic story.

2D DIVISION, with three consulted Judges.
Dean of Guild Court, Edinburgh.

IN 1799 Mrs Margaret Fell, wife of the Reverend Richmond Fell, was infeft in All and Whole that lodging or dwelling-house, stables, coach-house, and pertinents thereto belonging, lying on the south-west corner of St Andrew Square, Edinburgh, together with the area or lot of ground

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whereon the said subjects were built, and together also with the area or lot of ground lying immediately to the south thereof, and reaching to the Meuse Lane between St David Street to St Andrew Street, which dwelling-house and stables had been built by David Hume, and had (with the other subjects) been disponed by him to his brother, John Home, of Ninewells, who obtained a charter therefor from the magistrates in 1779.

Between 1799 and 1804 Mr and Mrs Fell erected on the back-ground, and on the ground occupied by the stables and coach-house, a tenement of houses, which became Nos. 13, 15, 17, and 19 South St David Street.

In 1804 the Fells sold to John Cockburn "these two dwelling-houses or flats, being the second flat above the shops and attic storey" of this tenement with two cellars and a necessary-house, and a right to the water-pipe in common with the other proprietors, under burden of payment of one shilling of feu-duty, and a fourth part of the expense of upholding the roof of said tenement.

In 1820 Peter Hewat, who had come to be in right of the subjects sold to Cockburn, disponed the attic storey to Michael Carr, "with a cellar, together with a right to the water-pipe in common with the other proprietors of the said tenement," and the disponee was taken bound to pay sixpence as his proportion of the feu-duty, and "to be at one-eighth part of the expense of upholding the roof of said tenement, being the proportion it has been agreed on he is to bear of the same, in all time coming, and also to keep in repair the pavement above his cellar."

After various transmissions this attic storey was in 1889 conveyed by the trustee of the late Mordaunt Gray to Thomas Watt, saddler, in terms similar to those last above quoted.

Besides the subjects sold to Cockburn in 1804, Mr and Mrs Fell sold other parts of the tenement in terms *mutatis mutandis* identical with those in the disposition to Cockburn, but had retained, of the tenement, a dwelling-house and two shops and part of the basement.

In November 1889 Watt presented a petition in the Dean of Guild Court for warrant to convert the attic storey belonging to him into a square storey, and to erect another storey above the same.

Answers were lodged by the trustees under the settlement of Mr and Mrs Burgess, who were in right of the whole remaining rights belonging to the Fells under their original infeftment.

The respondents stated;—(Stat. 2) With exception of the subjects sold by them, "the respondents' authors retained the sole right of property in the whole subjects contained in the original charters and infeftments thereof, and the respondents are now feudally vested in, and are the heritable proprietors of the same." (Stat. 4) "The titles produced by the petitioner shew that his rights are confined to the attic storey. The respondents are proprietors of the roof, or at least they are proprietors thereof in common with the other owners of the tenement. The respondents and their authors have retained said roof, and have upheld the same and kept it in repair since the tenement was erected nearly a century ago, . . . and have by themselves or their agents recovered from the other owners the proportion of the expense for which they are respectively liable to relieve the respondents."

The petitioner pleaded;—2. As the proposed operations are confined to the petitioner's own property, and can be executed without danger, and without infringing the rights of the respondents, or any of them, the answers ought to be repelled, with expenses.

The respondents pleaded;—2. The petition should be refused, with expenses, in respect (1) that the proposed operations encroach on the rights and property of the respondents; (2) that the proposed operations are

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unsafe and dangerous; (3) that the petitioner has not produced or condescended on any right or title to execute said operations.

On 20th February 1890 the Dean of Guild, after a report by men of skill, pronounced this interlocutor:—"Finds that the proposed operations are confined to the petitioner's own property, and, if carefully executed, can be carried out without prejudice to the other portions of the tenement, provided that an inside cast-iron 9 inch by 9 inch beam be introduced over the triplet windows on the third floor; and in respect that the petitioner has now shewn on his plans a beam of the specified dimensions and in the specified situation, approves of the plans as altered; repels the pleas in law for the respondents: Grants warrant to the petitioner as craved, but on condition that he find caution *de damnis* before extract."

Burgess' trustee appealed.

After a hearing the cause was appointed to be heard before seven Judges.

Argued for the appellant;—The appellant's author had not conveyed to the respondent the right of extension upwards. All that had been conveyed, on a sound construction of the respondent's titles, was the property in the attic storey. The *solum* remained with the appellant, whose right was *a centro ad cœlum* except in so far as he or his author had conveyed away strata of space, termed stories.[1] The obligation of the respondent was not an obligation to maintain the roof, but an obligation to pay the appellant a proportion of the expense of maintaining the roof. Such an obligation was inconsistent with a right of property in the roof being in the respondent.[2] *Taylor* v. *Dunlop*[3] decided no question as to raising the height of the walls, but at most shewed that the property of the roof was in the proprietor of the upper storey; and even if the respondent had a right of property in the roof, that gave him no right to build additional stories if, as was contended, everything *a centro ad cœlum* remained in the disponer of the undivided tenement, except in so far as expressly disponed. But assuming that the appellant's title to object was only one of common interest with the other part owners of the tenement, that was a sufficient title. No one proprietor in common was entitled to impose additional burdens on the other proprietors without their consent and for his own sole advantage. It was not necessary to shew danger. Mere prejudice was enough; but in any case a report by men of skill was no answer to an allegation that the proposed alterations involved danger to the whole building, or at least alteration of the gable.[4]

Argued for the petitioner;—The appellant merely had a right of common interest; the property in the roof was in the petitioner, and he might make any alterations thereon that he pleased, provided he did not prejudice the other proprietors.[5] Here there would be no prejudice, for there would be no danger. The Dean of Guild had held that there would be no danger, and the Court would not readily interfere with that finding. The petition ought therefore to be granted.

At advising,—

LORD M'LAREN.—The petitioner, Thomas Watt, is the proprietor of the upper most or attic floor of a four-storey tenement in St David Street, Edinburgh, and

[1] Sharp v. Robertson, Feb. 5, 1800, M. App. "Property," No. 3.

[2] Barclay v. M'Ewen, May 21, 1880, 7 R. 792.

[3] Taylor v. Dunlop, Nov. 1, 1872, 11 Macph. 25, 45 Scot. Jur. 24.

[4] Gellatly v. Arrol, March 13, 1863, 1 Macph. 592, 35 Scot. Jur. 360; Arrol v. Inches, Jan. 27, 1887, 14 R. 394.

[5] Taylor v. Dunlop, *supra*; Johnston v. White, May 18, 1877, 4 R. 721; Lamond v. Cumming, June 11, 1875, 2 R. 784.

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he claims to be entitled to dismantle his dwelling and to rebuild it in the form of a two-storey house, interfering as little as possible with the underlying part of the tenement. The petition is addressed to the Dean of Guild, and is in the usual form, praying for authority to dismantle and reconstruct according to plans to be approved by the Dean of Guild Court.

The application is opposed by the proprietors of the subjacent storeys, and the defences include a denial of the petitioner's right to extend his possession, and an averment that the proposed extension cannot be made consistently with the stability of the tenement.

The Dean of Guild, proceeding in this matter on the report of builders, has found "that the proposed alterations can be carried out without prejudice to the other portions of the tenement," provided certain precautions are used; and having also considered the objections which depend on legal grounds, he granted the desired warrant by his interlocutor of 20th February 1890, being the interlocutor appealed from. In the argument addressed to us it was admitted, or at least assumed, that the walls are capable of supporting the new building, and the appeal was maintained solely on legal grounds.

The rights of the parties, so far as expressed in the title-deeds, may be very shortly stated. The original feu-right of the tenement is a charter granted by the Lord Provost and Magistrates of Edinburgh in the year 1777, which is said to include other subjects; and on this site, about the commencement of the present century (the exact date being immaterial) the tenement was built by Mrs Margaret Carmichael or Fell and her husband. The tenement was originally constructed for occupation in flats, and it consists of a basement and shop flat, and three upper flats, the uppermost floor only being the property of the petitioner.

By disposition, dated 6th September 1804, Mrs Fell, with her husband's consent, sold and conveyed to John Cockburn, baker in Edinburgh, "All and Whole these two dwelling-houses or flats, being the second flat above the shops, and attic storey lately built by us." The property is then described in terms which it is not necessary to read at length. Cockburn is then put under an obligation to relieve the granters of the payment of one shilling of feu-duty, and as the deed proceeds, "he is likewise to be at one-fourth part of the expense of upholding the roof of the said tenement, being the proportion it has been agreed on he is to bear of the same in all time coming, and is also to be bound to maintain and keep in repair the pavement above his cellars."

The two dwelling-houses or flats thus sold to Cockburn came to be vested in separate owners; and the petitioner's possession is described in the title-deeds as the attic storey with a cellar and right to the water-pipe in common with the other proprietors, together with the whole pertinents thereto belonging. The petitioner's right is then declared to be burdened with the payment of sixpence of feu-duty, and it is declared that he is to be at one-eighth part of the expense of upholding the roof of the said tenement, being the proportion it was agreed by said disposition should be borne in all time coming by the disponees.

It thus appears (1) that the title-deeds of the petitioner's property do not contemplate any extension of the building in a vertical direction; (2) that no right to extend is conferred in express words or by implication on the disponees of the attic storey; (3) that so far as depends on the title-deeds the petitioner has only the same kind of right in the roof as the other proprietors, because that right is given to each in the form of an obligation to uphold, which is divisible amongst the proprietors of the different flats approximately in proportion to the values

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of their several possessions; (4) there is no conveyance of the *solum* to the owners of the flats, and so far as it can be held to exist as a separate subject in this peculiar kind of position of property the *solum* would seem to remain untransferred in the persons of the heirs or singular successors of the original proprietors of the basement.

If then the proprietor of the attic floor has the power to build which he asserts, this power or faculty must be rested on some inherent quality of the right of a proprietor of an urban tenement, and not on the title-deeds of his possession, because these deeds give to the petitioner an attic storey and no more. The difficulty which meets the petitioner in this view of his case is very evident. If the power of extension is a quality of the right it cannot be confined to the proprietor of the attic, but must belong to all the proprietors within the tenement. That their rights as to extension are identical is easily seen if we consider the case of a tenement which is destroyed by fire or pulled down.

In a question of rebuilding, everyone would admit that the tenement must either be rebuilt according to the original design, or that each proprietor should be entitled to duplicate his storey.

It has not been contended by anyone that in the present condition of the building the proprietors of the first or second floor should be allowed to build above the petitioner's floor, and it is materially impossible that they can interject a new storey below the attics. So the condition of the question is, whether the petitioner can insist on a supposed right of adding to his possession under circumstances in which it is impossible that the other proprietors (all having equal rights) should exercise corresponding privileges.

If the question is to be decided by authority there is a very distinct authority to the contrary in the case of *Sharp* v. *Robertson*, decided in the year 1800. The Faculty report of the case, which is transcribed verbatim in Mor. Dic., App. *voce* "Property," 3, does not say much regarding the grounds of judgment. In this respect the report is not different from the other reports of that period. But I have had the opportunity of reading the arguments in the Faculty Collection of Session Papers. These are ably written and instructive, and they prove that the case was argued (and presumably decided) on general principles, and not on the specialties of the particular case. Specialties indeed it had not, no more than the present case. In the absence of any contrary authority, I must hold the decision in *Sharp* v. *Robertson* to be entitled to all the weight due to a precedent in point.

It has, however, been thought desirable that we should consider the present case on its merits apart from authority. The question may be considered from the point of view of contract, or as a question of real right. The former is probably the less influential consideration of the two. Yet it is not undeserving of consideration that when the tenement came to be divided the bargain which each purchaser made was a bargain for one flat in the tenement. The price which he paid was the estimated value of a flat already built; and the price paid for the attic floor in all such cases is less than the price paid for any of the other floors, because the attic floor, from its situation and construction, is the least valuable.

But when the question is considered as one of real right, the condition of the case is that the first proprietor of the undivided tenement had the right of indefinite extension of his use of this fraction of the earth's surface, upwards and downwards, without any limitations except such as result

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from physical difficulties. His right to this small area of land was, in law, of the same nature as that of the proprietor of a substantial estate, who may work mines below the surface and build above it as high as he pleases. He parted with that right only to the extent, so far as the petitioner is concerned, of conveying to the petitioner's predecessor in title a stratum of ten or twelve feet in height defined as a storey in the tenement. I am unable to find in a conveyance so defined any possibilities of extension against the will of the proprietor from whom the conveyance proceeds. The estate of the petitioner is merely a stratum carved out of the larger estate, which extends theoretically from the centre of the earth upwards, and it follows in my opinion that whatever is not conveyed remains with the granter. It is true that the granter is not himself entitled to build above the petitioner's storey. But this disability, as it appears to me, is the result of implied contract, because a proprietor who has sold a subject described as the uppermost of a certain number of storeys could not, without derogating from his grant, put an additional storey on to the tenement. These considerations lead to the conclusion that there can be no expansion of the right of any of the proprietors of the different floors. The representatives of the original grantee in the feu-charter, who retained the basement floor, are barred by implied contract, or by warrandice, which is the same thing, from interfering with the property which they conveyed for value to the owners of the upper floors, and the owners of the upper floors are disabled from extending their possessions upwards, because they have no right under their conveyances to anything beyond the particular strata respectively conveyed to them.

I have not overlooked the distinction which is taken in reference to cognate questions between common property and common interest. If it were clearly settled that the interest of the defenders in the roof was only common interest, that would be an important, though in my view not a decisive, argument in favour of the petitioner's contention. But as the nature of the right to the roof has not been itself the subject of an authoritative decision, this undetermined point cannot be used as a step to the solution of any other question. I have therefore considered the question in this action on its own merits, and will only add, that as I read the title-deeds, the petitioner is not able to establish such an exclusive right of property in the roof as would displace the inference resulting from theoretical considerations depending on the way and manner in which the different parts of the tenement have been given off. My opinion is that the interlocutor of the Dean of Guild ought to be recalled, and the prayer of the petition refused.

LORD ADAM.—I agree in the opinion that has just been delivered.

LORD YOUNG.—I concur generally in the opinion which has just been given by Lord M'Laren. I shall state shortly what is the import of my opinion upon the matter which I think is sufficient for the decision of the case.

The house in question was built between 1799 and 1804 by Mr and Mrs Fell, who had acquired the property of the *solum*, *i.e.*, the feu, and who built the whole tenement, let me say, in 1804. They sold it to different parties, and eventually the parties to this case acquired different parts of it. Now, I regard this case in the same way as if the original proprietors had sold this garret to the present respondent, the petitioner in the Dean of Guild Court, retaining the rest of the property and the *solum* in their own hands.

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In my opinion, when the proprietor of a tenement, containing it may be two or three storeys and an attic, sells the attic, he sells nothing else, and he sells no right to the buyer of the attic to load the *solum* with anything more. I do not think that this case is different from what it would have been if this tenement had consisted of three square storeys only, and the proprietor of the *solum* had sold—as he might have done—the right to someone to erect an attic. The right that was sold in that case would not give the purchaser a right to erect anything else. I think the position of the seller and of his disponee are exactly the same, whether he builds an attic and sells it, or whether he sells the right to build an entirely new attic.

I wish only to guard myself from being thought to say anything that would prevent improvements from being carried out on any house. I think that if the proprietor of the *solum* were to object to any of the improvements being carried out on a house which the civilisation of the day thought were proper and expedient improvements, that his objections would be unreasonable and would probably not be carried into effect. But converting a garret into two square storeys is a perfectly different matter from making such improvements, and one that will not be sanctioned here any more at this time than if the Feu had sold the garret directly to the petitioner.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I am able to agree with Lord M'Laren in so far as he puts his decision upon the question of real right. I am not so sure that I agree with the further deduction that the warrant for this proposed operation should be refused as being contrary to the contract.

The LORD JUSTICE-CLERK concurred.

LORD ADAM intimated that the LORD PRESIDENT, who was not present at the advising, concurred in Lord M'Laren's opinion.

THE COURT sustained the appeal, recalled the judgment of the Dean of Guild, and remitted to him to refuse the petition.

MACKENZIE, INNES, & LOGAN, W.S.—BLAIR & FINLAY, W.S.—Agents.

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EDWARD BARNETT AND OTHERS (Liquidators of the Mount Morgan (West) Gold Mine, Limited), Pursuers (Respondents).—*J. C. Lorimer—C. J. Guthrie.*

JOHN M'MAHON, Defender (Reclaimer).—*Jameson—Dundas.*

Company—Liquidation—Forfeiture of shares prior to liquidation—Liability for unpaid calls—Fraud.—When shares in a public company are forfeited for non-payment of calls, the holder of such shares ceases to be a member, and becomes merely a debtor of the company, and therefore is not barred by the subsequent liquidation of the company from pleading in answer to a demand for payment of the calls that he was induced to take the shares through the fraudulent misrepresentations of the company.

1ST DIVISION. Lord Kincairney. C.

THE Mount Morgan (West) Gold Mine, Limited, was incorporated under the Companies Acts on 25th October 1886, with a capital of £200,000 in 200,000 shares of £1 each.*

* Among the articles of association of the company were the following:—"(20) If any member fails to pay any money payable by him to the company in respect of his shares, on the day appointed by the directors for payment

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John M'Mahon, photographer, Aberdeen, applied for and had allotted to him 100 shares of the company, and paid 2s. per share on application and 3s. on allotment.

On 25th November 1886, the directors resolved that the remaining 15s. per share should be called up by three calls of 5s. each, payable respectively on 22d December 1886, and 4th February and 12th March 1887.

M'Mahon declined to pay these calls, and on 24th March 1887 the directors passed a resolution declaring his shares forfeited, and thereafter removed his name from the register.

Early in 1887 various actions had been raised against the company, and petitions for the liquidation of it were presented, and on 19th April a committee of shareholders was appointed to investigate its affairs. The committee returned a report, dated 25th July 1887, in which they stated that they had made inquiry about the property of the company in Queensland, and were of opinion that it should be retained and developed, and that the vendors had agreed to return 50,000 fully paid-up shares, which had been a part of the original price, to pay £5000 in cash, and to pay legal expenses not exceeding £2000, on condition that they and the promoters should be released from further claims. The committee recommended the acceptance of these terms, and further, that the company should be wound up voluntarily with a view to its reconstruction.

The committee also reported that the holders of forfeited shares should be entitled to the benefits accruing from this arrangement.

This report was approved of, and at an extraordinary general meeting

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thereof, the directors may at any time afterwards, during such time as such money remains unpaid, serve a notice on him, or his executors or administrators, requiring payment of such money, together with any interest that may have accrued by reason of such non-payment.

"(21) The notice shall name a further day, and a place or places on and at which such money is to be paid. It shall also state that, in the event of non-payment at the time and place appointed, the shares in respect of which such money is payable will be liable to be forfeited.

"(22) If the requisition of any such notice as last aforesaid shall not be complied with, any share in respect of which such notice has been given may be declared forfeited by a resolution of the directors, and may thenceforth be treated by the directors as a forfeited share.

"(23) Any money which shall be payable to the company in respect of any forfeited share shall, notwithstanding the forfeiture, continue to be payable to the company, and shall be recoverable by them, with interest, from the forfeiting member or his representatives.

"(24) The directors may sell, or otherwise dispose of, re-allot, re-appropriate, or extinguish any forfeited share in such manner as they may think proper; and the directors may, in their absolute discretion, remit or annul the forfeiture of any share, upon payment of all arrears and of all interest due thereon, together with such sum of money, if any, by way of fine, or upon such other terms and conditions as the directors shall determine.

"(25) A declaration made by the secretary (in the form and manner required by law in the case of declaration in lieu of voluntary oaths) that the former holder of a forfeited share made default in payment of the calls thereon, and that the share had been declared forfeited at a board meeting after due notice, and the receipt of any two directors and the secretary of the company, for the price or purchase-money of such share, shall together constitute a good title to the purchaser, and he shall be discharged from liability to any calls which may have become due prior to his purchase (unless otherwise expressly agreed), and his title to the share shall not be affected by any irregularity in the proceedings in reference to any such forfeiture or sale."

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of the shareholders, held on 9th August, it was resolved (1) that the company should be wound up voluntarily; (2) that certain persons should be appointed liquidators; and (3) that they should be authorised to enter into an agreement with the new company for the sale and transfer of their assets, after payment of all liabilities, on the terms set forth in the draft agreement submitted to the meeting.

These resolutions were confirmed on 25th August, the directors having previously on the same day passed a resolution cancelling all forfeitures of shares which had been declared, subject to compliance on the part of the forfeited shareholders with the terms of the reconstruction agreement.*

On 5th September the liquidators issued a list of contributories, of which the third head was entitled, "Holders of shares not fully paid up and which were forfeited, but forfeiture since cancelled." M'Mahon's name was entered under this head without his consent, and without compliance by him with the terms of the reconstruction agreement.

Thereafter the liquidators raised an action against M'Mahon in the Sheriff Court at Aberdeen for payment of the amount of the calls which had not been paid by him.

In defence M'Mahon stated that he had been induced to take the shares by fraudulent misrepresentations in the prospectus, and that these misrepresentations had been knowingly made by the directors for the purpose of inducing the public to take shares in the company.

The pursuers pleaded;—(1) The sums sued for being due by the defender as calls and interest on calls on shares in a company of which when the calls were made he was the duly registered proprietor, the pursuers, as liquidators, are entitled to decree as craved, with expenses. (3) Notwithstanding the forfeiture of the defender's shares and his removal from the register of members, he is, in respect of the 23d article of association, liable for the said calls, with interest as concluded for.

The defender pleaded;—(2) The defender is not due to the pursuers the sum sued for in respect that he is not liable as a contributory to or member of the said company; or otherwise, if the said sum is sued for as an ordinary debt, that he is not liable therefor in respect of the fraud after mentioned. (3) The defender should be assoilzied in respect that he was induced to apply for shares in said company by false and fraudulent statements contained in the said prospectus. (4) The alleged liquidation having been in fact no more than a reconstruction of said company.

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* The agreement, signed 5th September, *inter alia*, provides that the new company shall be incorporated with a nominal capital of 150,000 shares of £1 each: (2) that the old company shall sell all its property to the new company; (3) that the liquidators of the old company shall pay its debts; (4) that the new company shall issue to each holder of a fully paid-up share of the old company one fully paid-up share of the new company, under the exceptions and conditions specified (5) that the new company shall fulfil the contracts of the old company. Clause (6) embodies the agreement with the vendors to the effect stated in the committee's report above mentioned. Clause (8) regards forfeited shares, and provides that "if the holders of forfeited shares should pay the full amount unpaid upon their shares," then the forfeiture should be cancelled, and the holders should be forthwith entitled to require the new company to allot to them fully paid-up shares equivalent in amount to the shares held by them in the old company. Clause (12) provides for the rescission of the agreement in case of the old company finding it impracticable, from dissent of shareholders or otherwise, to carry it out. Clause (13) provides that "these presents are intended to operate as an agreement, and not as a conveyance, transfer, or assignment."

The new company was thereafter incorporated, and the agreement was on 5th October 1887 confirmed by the newly incorporated company.

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and no new liabilities being thereby imposed upon the defender, he is not barred from pleading fraud as aforesaid.

On 4th March 1889 the Sheriff-substitute (Dove Wilson) allowed a proof on the question of fraudulent misrepresentation,* and on 10th June the Sheriff (Guthrie Smith) adhered.

The pursuers having appealed for jury trial, the Court on 18th July remitted to Lord M'Laren (Ordinary) to allow a proof before answer, the defender to lead.

The necessity for proof was to a great extent obviated by a joint minute of admissions, in which, *inter alia*, the pursuers admitted that the prospectus of the company contained misrepresentations which would have entitled the defender to rescind his contract for taking the shares in question if he had raised an action for that purpose before the liquidation and reconstruction.

It further appeared that other shareholders had had their names removed from the register of the company by order of the High Court of Justice in England (where the company was registered), on the ground that they had been induced to take the shares through the fraudulent misrepresentations of the company, and the amount already paid by them on their shares had been returned. It also appeared that all the ordinary debts of the old company had been paid.

On 16th July 1890 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) that 100 shares of the company in liquidation were allotted to the defender; (2) that he applied for these shares on the faith of a prospectus which contained misrepresentations which would have entitled him to reduce the contract before the company went into liquidation; (3) that the calls, payment of which is now sued for, were made by the directors of the company; (4) that the defender did not pay said calls, and that in respect thereof his shares were forfeited on 24th March 1887; (5) that notwithstanding he remained liable for the calls in respect of the provisions of the 23d section of the articles of association of the company; (6) that the company went into voluntary liquidation by resolution dated 9th and confirmed 25th August 1887; (7) that the defender is not entitled after the liquidation of the company to plead that he is not liable to pay the said calls in respect of the misrepresentations aforesaid in the said prospectus; (8) that he is liable for all the said calls, with interest as sued for: Therefore decerns against the defender in terms of the conclusions of the summons," &c.†

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* "NOTE.—No ground is alleged for fixing liability upon the defender as a contributory. He cannot be made liable as a contributory in respect of being a present member of the company, inasmuch as he ceased to be a member before the company went into liquidation; and he cannot be made liable as a contributory in respect of being a past member, there being no allegation that the present members are unable to meet the company's obligations. The only ground upon which the defender can be sued is that at the date of the forfeiture he was debtor to the company in certain sums, and if he is to be sued as a debtor, it seems clear enough that he has the rights of a debtor, and therefore, among other rights, that of shewing that the alleged debt was induced by fraud, and was invalid. I think there is no other question involved in this case. If the defender succeeds in shewing that he was defrauded into taking the shares, he will get quit of the present claim. If he fails to shew reason for not paying his calls, it will be his duty to pay them up before he can be heard upon any inquiry as to whether the company has been conducted rightly or wrongly since the time when he repudiated."

† "OPINION.— . . . The defender contended, and I did not understand the pursuers to dispute, that the cancellation or attempted cancellation of the

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The defender reclaimed, and argued;—The present case was not within the rule of *Oakes* v. *Turquand*[1] and *Burgess*,[2] for the defender had ceased to

forfeiture is not a fact of importance in the case. It may be that under section 24 of the articles of association the directors had an absolute power and discretion in the matter; but whether they had or not, they did not exercise their power absolutely, but only subject to conditions which were admittedly not fulfilled, so that I think the forfeiture of the shares remains unaffected. Further, it was maintained that the defender ought not to have been put on the list of contributories, and could not be treated as a contributory, and I did not understand that this contention was disputed, and think it could not be disputed successfully—*Needham's* case, 4 Eq. 135; Buckley, pp. 135, 452. The result is that the cancellation of the forfeiture may be eliminated from the case, that the entry of the defender's name as a contributory must be treated as a mistake, and that, at the date of the liquidation, the defender was not a shareholder, and could not be put on the list of contributories. . . .

"In respect of that clause [23d article of association] the defender was undoubtedly at the date of the forfeiture liable for calls on his shares, and if there were no question arising on the misrepresentations in the prospectus, the calls would of course have been recovered. The defender adopted no means, by action of reduction or other application to the Court, to get himself relieved of the liability before liquidation; and the question in this action is whether the liability can now be enforced.

"I have felt very great difficulty in deciding this case, and it is only with much hesitation that I have ultimately formed an opinion in favour of the pursuers.

"A shareholder of a joint stock company who has taken his shares on the faith of a fraudulent prospectus may obtain rescission of the contract with the company if he raises an action for that purpose before liquidation, at least if there has been no material alteration in the condition of the company; but it is well settled that he cannot obtain rescission, or have his name removed from the register, or resist calls after liquidation, if he have taken no judicial steps for the purpose before liquidation,—*Oakes* v. *Turquand*, L. R., 2 H. L. 325; *Stone* v. *City and County Bank*, 1877, 3 C. P. Div. 282. The same principle is involved in *Graham* v. *The Western Bank*, Feb. 2, 1864, 2 Macph. 559, 36 Scot. Jur. 272; March 8, 1865, 3 Macph. 617, 37 Scot. Jur. 304; *Addie* v. *Western Bank*, June 9, 1865, 3 Macph. 899, 37 Scot. Jur. 473, and May 20, 1867, 5 Macph. (H. L.) 80, 39 Scot. Jur. 437; *Tennant* v. *City of Glasgow Bank*, Jan. 22, 1879, 6 R. 534, affirmed May 20, 1879, 6 R. (H. L.) 69; and *Houldsworth* v. *City of Glasgow Bank*, July 4, 1879, 6 R. 1164, affirmed March 12, 1880, 7 R. (H. L.) 53. From these authorities it may be deduced as a well-settled general rule that a resolution to wind up a company bars a reduction of an otherwise voidable contract to take shares. For a contract though induced by fraud is valid until rescinded, and it is too late to rescind it after the rights of third parties who have relied on the fraudulent contract have emerged, and after the character of the company and of its shares has been altered by the liquidation. The doctrine is (it has been said on high authority) 'that after the company is wound up, it ceases to exist, and rescission is impossible,' per Jessel, M. R., in *Burgess'* case, 1880, 15 Ch. Div. 509; so that in this case if there had been an ordinary liquidation, if the whole of the creditors had not been paid, and if the defender's shares had not been forfeited, there would have been no question at all about his liability for calls.

"But it is said that in all the cases in which liquidation has been held to be a bar to a reduction, the liquidation has been of the ordinary kind which brings the company to an end, and it is contended that in this case there has been no true liquidation, but only a reconstruction of the original company under a new name and slightly modified conditions. The agreement it is said, so far as it

[1] Oakes v. Turquand, 1867, L. R., 2 H. L. 325.

[2] Burgess, 1880, 15 Ch. Div. 509; see also Marshall v. Glamorgan Coal and Iron Co., 1868, L. R., 7 Eq. 129.

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be a member of the company at the date of the liquidation. While therefore he remained liable for arrears of calls, that was only as debtor, not as

was between the old company and the new, was not a real agreement at all, but only a resolution of the old company under guise of an agreement. I was a good deal impressed with the argument in support of this view, but after consideration have come to think that it should not prevail. The liquidation was not a mere fanciful or artificial proceeding, not falling under the provisions of the Companies Acts, but was precisely such a liquidation as is contemplated by the 161st section of the Companies Act, 1862; and in the cases which establish the position that liquidation is a bar to reduction, there seems to be no suggestion of any distinction between one kind of liquidation recognised by the statute and another, and I see no sufficient ground for making an exception in the case of a liquidation under section 161 with a view to reconstruction, in regard to the application of the rule in question. One of the objects of the voluntary liquidation was the continuance of the undertaking under more favourable conditions, and the liquidators were authorised, by the same resolution by which they were appointed, to enter into an agreement with the new company. Still the resolution to wind up was confirmed on 25th August, and the agreement was not completed until 5th September; and it does not appear that the continuance of the undertaking was the sole or the principal reason for the liquidation, because various petitions for liquidation of the company had already been presented in Court, and they were dropped on the resolution to wind up voluntarily being adopted; and it rather appears that the liquidation of the company could not have been avoided. Further, it might have happened that the endeavour to reconstruct the company failed, and provision is made for that possibility in the agreement; and if that had happened there would have been nothing but the simple winding-up of the old company. Looking to the litigations which had arisen about the old company, it appears to me that its extinction by liquidation was a prerequisite of the construction of the new company; and on the whole, although I think the argument on the point well worthy of consideration, I do not think it can be denied that there was here a liquidation to which the principle referred to is applicable.

"But again, all the foregoing cases involved questions with creditors of the company, whereas in this case there is no such question. All the creditors have been paid, and all the benefit or loss resulting from the decision of this case will affect the contributories only. The principle in question was however extended to a case where all the creditors had been paid in *Burgess'* case, 15 Ch. Div. 609, decided by the Master of the Rolls Jessel. He quotes in support of his judgment the *dicta* of Lord Cairns in *Tennant* v. *City of Glasgow Bank* and in *Huddsworth* v. *City of Glasgow Bank*, and shews in a manner which commands my assent, that the rule has relation to the adjustment of the rights of contributories *inter se*, as well as to the claims of creditors. It appears to me that this must be so, and I take leave to adopt the reasoning in that judgment.

"But still further, it was contended that the fact that prior to the date of the liquidation the defender's shares had been forfeited, and that he was not at that time a shareholder, makes a very material distinction, and renders the previous decisions wholly inapplicable. The contention was that the defender was thereafter nothing but an ordinary debtor to the company under a contract induced by fraud, and that that contract could not be enforced.

"The contract in question was that whereby the defender on the one hand received the shares and became entitled to all the benefits of a shareholder, and whereby on the other hand he undertook to fulfil all the obligations which the articles of association and the law imposed on a shareholder. Among these obligations were liability for calls up to the limited amount so long as he remained a shareholder, liability to be put on the B list of contributories even after he had transferred his shares, and liability to pay the calls even after his shares had been forfeited in respect of the provisions of article 23. That contract has not been reduced, and although the shares have been forfeited all the other incidents of the contract remain, and that being so, it is not very easy

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a shareholder. Hence he was entitled to plead the fraud of the company as an answer to the demand for these arrears. It was impossible to construe the articles of association relating to the forfeiture of shares as meaning that notwithstanding forfeiture the person forfeited remained a member; and it was equally difficult to maintain that if the member had ceased to be a member through forfeiture, the directors could by cancellation of the forfeiture restore him to his position as a member without his consent, and without compliance by him with the conditions of the cancellation. But assuming that the defender was a member at the date of the liquidation, the liquidation was not a liquidation in the sense of *Turquand's* case, and the cases following thereon. It was not a credi-

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to see how the right to enforce these obligations can be resisted. But no plea has been taken in this case founded on the mere want of a reduction, and that being so, I am disposed to hold that the case may be considered as if the question were whether the contract could now be rescinded, for, if it is not treated as rescinded, it must of course be enforced.

"I think that the decisions which have been referred to cover the case in point of principle. There is no doubt that after the forfeiture of the shares the defender's relation to the company was not destroyed. He still remained under certain obligations. He was liable to pay the money payable to the company in respect of the forfeited shares under section 23, and he was further liable to be placed as a contributory on the B list as a past shareholder—*Creyk's* case, 5 Ch. 63, Buckley, 135, Lindley's Company Law, 845. Now the only contract into which he entered with the company was the contract to take shares; therefore that contract to take shares was a subsisting contract at the date of forfeiture and at the date of liquidation. Now it is true that some of the reasons which have been stated against an action of reduction after liquidation hardly seem to apply in the present circumstances. One of these reasons has been that the shareholder is not in a position after liquidation to make *restitutio in integrum*, because he cannot restore the shares in the same condition or with the same qualities as when he got them. It may be doubtful how far that reason could operate in this case, for the defender has no shares to return; and I doubt whether it could be maintained that just on that account he cannot rescind because he is not in a position to make any restitution at all, not to speak of *restitutio in integrum*. Further, I doubt whether section 38 of the Companies Act, 1862, on which Jessel, M. R., rested a good deal in *Burgess'* case, applies to the case of a member whose shares have been forfeited. But if these are not the only reasons for the rule in question, and if the true principle involved is as stated by Jessel, M. R., that after the company is wound up it ceases to exist and rescission is impossible, or as stated by Blackburn, J., in *Stone* v. City *and County Bank*, 3 C. P. Div. 309, 'that wherever the rights of other persons intervene a contract to take shares though induced by fraud cannot be rescinded,' then the application of these principles is nowise affected by the forfeiture; they apply just as much to this incident in the contract, viz., the liability to pay calls after the shares have been forfeited, as they would have applied to the liability for calls had there been no forfeiture. Various points in regard to this question are dealt with by Mr Buckley at pp. 109, 110, 5th ed., and I adopt and refer to his statement of the law.

"Further, it does appear to me that the same conclusion may be reached by an easier and simpler route, because I think that section 23 of the articles may and ought to be read as meaning that the obligation of a shareholder to pay the capital unpaid on his shares shall not be affected by their forfeiture; from which it follows that if he must have been held liable in this case had there been no forfeiture, that liability must remain the same, the forfeiture notwithstanding. For these reasons, although conscious of the cogency of the arguments supporting the opposite view, I am, on the whole, of opinion that the defender is, because of the liquidation, too late in challenging his liability to pay the calls made on his shares."

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or's liquidation, but was a mere step in the reconstruction of what practically remained throughout the same company.

Argued for the pursuers;—The defender by becoming a member of the ompany became bound by its articles, and remained so liable until rescision of the contract,[1] and there had been no rescission here. The 23d rticle declared that the "forfeiting member" should remain liable for alls, which implied that, notwithstanding forfeiture, he remained a member." The meaning of that and the 24th article was that forfeiture etermined membership only as regarded the future. As regarded past alls a "forfeiting member" remained a member to all intents and purposes; he was indebted to the company in respect of such calls just s a member still on the register would have been. He was thus in an ssentially different position from that of an ordinary outside debtor. he principle therefore of *Oakes* v. *Turquand* and *Burgess'* case applied ere, for the liquidation here was a liquidation in the sense of these decisions. The Lord Ordinary's reasoning was well founded on that point lso.

At advising,—

Lord Kinnear.—This action for payment of calls was originally instituted in e Sheriff Court of Aberdeenshire. As originally brought, it appears to have en based on two separate grounds—(1) That the defender was a shareholder, nd was thus liable for the payment of the calls; and (2) that if he were no longer a shareholder, he was liable as a debtor under an obligation to pay calls which had been made while he still held that character. The first of these two rounds is no longer insisted in. It is conceded that the defender was not a ember of the company at the time of the liquidation, but it is said that he is he company's debtor.

The facts are few, and so far as material, are mainly proved by the statements n a minute of admissions for the parties. The defender applied for shares in his company, which was incorporated on 25th October 1886, and 100 shares of 1 each were allotted to him upon his application. But then he avers that he as induced to make this application for shares by the false statements which ere contained in the prospectus, and he alleges not only that the representations, n the faith of which he was induced to apply for the shares, were in fact false, ut that they were made by the directors of the company in the knowledge that hey were false, and for the fraudulent purpose of inducing the public, to whom hey were addressed, to invest in the shares, and it is now admitted that both of hese statements are true. The pursuers admit that the whole statements contained in certain articles of the statement of facts for the defender, which embodied at somewhat greater length the averments to which I have now referred, are correct, and that the prospectus therein mentioned contained misrepresentations which would have entitled the defender to rescind his contract after taking the shares in question if he had taken action for that purpose before the liquidation and reconstruction after mentioned. Now, the defender having been thus fraudulently induced to take these shares, paid 5s. per share on application and allotment, but then after he became a shareholder three calls were made. On the 25th November 1886 it was resolved that the remaining 15s. per share should be called up by three calls, payable on 22d December, 4th February, and 12th March 1887. The defender paid none of these calls, but, on the contrary, inti-

[1] *In re* Scottish Petroleum Company, 1883, L. R., 23 Chanc. Div. 413.

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mated to the directors that he declined to pay. The pursuers judicially admit that the defender on the faith of the prospectus of the company applied for and had allotted to him 100 shares, and paid the amount payable on application and allotment, but that he declined to make any further payment when the calls were made by the directors. The ground upon which he so declined is not stated, but it is not suggested by the pursuers that there was any other ground for his declinature than that which is very plainly suggested in the former part of the admission, that the defender having found that he had been defrauded declined to make any further payment in respect of the liability which he had thereby formally incurred. Upon that declinature, it is further admitted that the directors forfeited the shares, and that on or about the 24th March 1887 the defender received intimation that the 100 shares held by him were by resolution duly passed on said date forfeited.

Now, of course upon the forfeiture the shares ceased to be the property of the defender, and his name was accordingly removed from the register of members. It does not clearly appear when this alteration of the register was made, but it is conceded by the pursuers that the defender's name was in fact so removed, and in their pleas in law which they were allowed to add they found upon the fact, or, at all events, they refer to it as one which they admit, because they plead that "Notwithstanding the forfeiture of the defender's shares, and his removal from the register of members, he is, in respect of the 23d article of association, liable for the said calls." I take it therefore as admitted, for the purposes of this case, that following upon the forfeiture of the shares the defender's name was removed from the register. The effect in law of that operation does not appear to me to be doubtful. The shares having been forfeited in respect of the defender's repudiation of liability, and his consequent refusal to pay calls, and his name having thereupon been removed from the register, the defender ceased from that time to be a member of the company. But while the defender's rights and liabilities as a member of the company were thus determined by the forfeiture of his shares, which passed to the company itself, he still remained liable according to the form of the contract into which he had entered for payment of the calls which had been already made, in accordance with certain articles of the association upon which the present action is founded. The 20th and following articles of the association provide for the forfeiture of shares, and the 23d article provides that any money which shall be payable to the company in respect of any forfeited shares shall, notwithstanding the forfeiture, continue to be payable to the company, and shall be recoverable by them, with interest, from the forfeiting member or his representatives, and therefore the effect of a valid forfeiture would be this, that the contract of copartnership or membership of the company would be determined as from the date of removal of the shareholder's name from the register, but there would still remain the liability of the shareholder as a debtor to the company in respect of the obligation embodied in these articles.

That, then, was the position of the defender, according to the form of the documents, after the forfeiture of his shares. He had ceased to be a member of the company, but he had not ceased to be liable for the calls which he had already declined to pay. That was the formal effect of the contract. But there can be no doubt, upon the admissions before us, that there was no real liability on the part of the defender to pay these calls, because it is admitted that he has a perfectly good defence to any action in respect that his liability had arisen

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from a fraud. The fraud having been discovered, he did not repudiate his shares to the extent of insisting for the rescission of the contract, but he repudiated all liability under the shares. The directors, acting as agents of the company, gave effect to that repudiation, not merely by forfeiting the shares, but by abstaining from making any demand against him for payment of the calls. That is clearly the result of the arrangement, and that it was a perfectly just result appears from what is proved in evidence. It appears that other persons, who were in the same position as the defender, applied to the Court to have their names removed from the register, and to have the amounts paid by them paid back, and that their applications were successful. It is evident that the company could not have enforced payment from the defender if they had taken steps to do so before the liquidation. The company therefore did for the present defender what the Court did for the applicants in other cases, by removing their names from the register of shareholders. His position after the forfeiture differed from that of those persons in two points only. He did not recover the money he had paid on allotment, and the original contract which he had been induced to make was not formally rescinded. But it was determined to the same effect as if he had transferred his shares. The company gave him no formal discharge for the past calls, but it is plain that if they had brought any action for payment of the calls he would have had a valid defence, and the action must have failed.

That being the position of matters, the company resolved to wind up for the purpose of reconstruction, and in order to carry into effect an agreement with certain persons who had been vendors of the property, the value of which had been misrepresented in the prospectus. At the same time the directors agreed that the holders of forfeited shares should be entitled to the benefits accruing from the new arrangement, and accordingly, before the resolution to wind up, the directors passed a resolution by which they resolved that all forfeitures of shares should be cancelled, subject to compliance on the part of the holders of such shares with the terms of the reconstruction agreement. By the articles of association the directors had discretionary power to cancel, and I assume from the terms of their resolution that they had been advised, no doubt correctly, that after liquidation the liquidators would have no power to cancel forfeitures which had been validly made, and therefore it was thought desirable that they should pass this general resolution with the view to give those of their shareholders whose shares had been forfeited the benefit of the reconstruction. But that is a mere resolution to cancel. It was conditional, and did not operate as an actual cancellation of the forfeiture of the defender's shares, because it was conditional on the defender's acceptance of the new agreement. The defender never became a party to the new agreement and therefore this resolution in no way affected him. After liquidation the liquidators, assuming that the defender would be disposed to take advantage of this resolution, but without any notice to him, put his name upon the list of contributories, but it is conceded that no effect is to be ascribed to that action of the liquidators any more than to the resolution of the directors, and therefore, although it is necessary in the history of the case to mention these proceedings, they appear in no way to affect the position of parties. The question is, what was the position of the defender after the company had gone into liquidation with relation to the company and its liquidators? I do not think it is now maintained that he was at that time a member of the company, and, at all events, I am of opinion that his membership had

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ceased. It had been validly determined by the directors acting as the agents and representatives of the company, and his name had thereupon been removed from the register. He might still have been liable to the creditors of the company, not as a present member, but because he had been at one time a member, and therefore if the conditions upon which such liability exists had arisen, it may very well be that the defender as a past shareholder would have been in the same position as if he had transferred his shares to a purchaser, and might have been put upon the B list. But that does not appear in any way to affect the question which is now to be considered between the parties, because it is not maintained that the circumstances arose in which it would have been necessary to make up such a list. The liability of such a contributory is limited by the statute, and arises only in the case of the actual shareholders not being able to pay the contributions required from them, and of there still remaining unpaid debts contracted during the period he was a member. There is no doubt that these conditions did not arise in this case and that being so, it appears to me that there is no ground, as between the liquidators and the defender, for holding that he can be treated as a member of the company liable to be placed on a list of contributories either in respect of a past or of a continuing membership.

But then the pursuers maintain that the defender is still liable as a debtor to the company for past calls under the articles of association which I have read, and this came to be the ground of action which required consideration, and which induced the learned Sheriff to allow a proof. The Sheriff-substitute in his note to the interlocutor allowing a proof says this,—"The only ground upon which the defender can be sued is that at the date of the forfeiture he was a debtor to the company in certain sums, and if he is to be sued as a debtor, it seems clear enough that he has the rights of a debtor, and therefore, among other rights, that of shewing that the alleged debt was induced by fraud." I agree with this, and I think the ground so stated for allowing a proof may now be adopted as the ground for giving judgment in favour of the defender. If the defender was not a member but a mere debtor of the company, then I am unable to see how the fact of the liquidation can in any way affect the respective rights and liabilities of the parties. If he had ceased to be a member of the company before the resolution to wind up, his liability as a debtor of the company would be in no way affected by that resolution. It is the duty of a liquidator to recover moneys which may be due to the company, and to take legal proceedings for that purpose if necessary, but he has no higher right against the company's debtors than the company itself possessed, and if the persons whom he may sue as debtors have a good answer to the claim by the company, it appears to me to be of no consequence to them whether the proceedings are instituted against them by the directors, while the company subsists for its original purpose, or by the liquidator, when it subsists only for the purpose of winding up. They cannot be deprived of their right to state a valid defence against an alleged claim of debt by the voluntary resolution of the company to wind up its affairs.

But it is said that after liquidation it is too late to plead the company's fraud and that this has been decided by a series of decisions, of which *Oakes* v. *Turquand* is a well-known example. It is perfectly well settled by those decisions, which are in that respect merely examples of a more general doctrine well established in law, that a shareholder cannot be allowed to repudiate his shares after a winding-up order, or after a resolution to wind up has been passed

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The grounds upon which this has been decided are stated by the Lord President in the case of *Tennant* v. *The City of Glasgow Bank*, 6 R. 554. He says—"It appears to me that the law on this subject may be stated in three propositions. In the first place, a contract induced by a fraud is not void, but only voidable at the option of the party defrauded; secondly, this does not mean that the contract is void till ratified, but means that the contract is valid till rescinded; and third, the option to void the contract is barred where innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be defeated by its rescission"; and this statement was approved by the House of Lords (May 20, 1879, 6 R. (H. L.) 69). The material proposition is the third one, that when a purchaser of shares has allowed his name to be put upon a register of shareholders, and when creditors have acquired rights by contracting with the company upon the strength of the register which contained his name, it is too late after liquidation, when the creditors' rights against the company have been converted into rights against the shareholders, to rescind the contract to take shares, and withdraw from the register on the allegation that the contract was procured by fraud.

The case of *Tennant* went a little further, because there the application for the reduction of the fraudulent contract was brought before the resolution to wind up had been passed by the company, but then it was not brought until after the directors of the company had taken steps which declared the insolvency of the company to be irretrievable, and therefore had affected the position of their creditors in the same way as if the resolution to wind up had been actually passed, and therefore in this case too it was decided that the shareholder could not be relieved, his challenge having come too late.

The doctrine was again applied in somewhat different circumstances in the case of *Burgess*, which was pressed so much on us. It was decided by Sir George Jessel that even when the assets in the hands of the liquidator were sufficient to pay all the debts of the company, a shareholder, whose name was on the register at the date of the winding up, could not be allowed a year afterwards to rescind his contract and get rid of his liabilities as a member, while the rights and liabilities of the shareholders, *inter se*, still remained to be adjusted. But the ground of judgment was that the liquidation had altered the position of the shareholders towards each other just as it had altered the position of the company's creditors towards the shareholders. This alteration is effected by the 38th section of the statute, which imposes new liabilities upon the members of the company, both towards the creditors and towards one another, and the learned Judge points out that the other shareholders were therefore to be considered as innocent parties who had acquired rights under the 38th section, which would be taken away from them if the applicant were allowed to withdraw. They were exactly in the same position in so far as regards the claim of one of their fellow-shareholders to withdraw from the company after liquidation as the company's creditors were in the case of *Oakes* v. *Turquand*.

Now, if that be the ground of judgment in the case of *Burgess*, it appears to me very clear that it has no application to the present case, because what was decided there was that a shareholder who had been induced to take shares by fraud, but who had retained his shares until innocent third parties had acquired rights against him in his character of shareholder, was not thereafter entitled to rescind his contract and relieve himself of his shares to the prejudice of such

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innocent parties. He might have had a good claim against the company while it existed, but he had no claim against the contributories after the company had ceased to exist. But the defender does not seek to rescind the contract to take shares. He has no need to do so. It has been determined by the valid act of the directors. He has been relieved of his shares, and is converted, as the Sheriff-substitute I think rightly says, into a mere debtor of the company; and his liability, if it exists, is still a liability to the company and to no one else. The liquidation makes no such change in the position of the company towards its debtors as to give to individual shareholders any personal demand against such debtors, or any new right in the debts due to the company which they did not possess before. They cannot therefore be represented as innocent third parties who have acquired a right, by virtue of winding-up, to enforce a claim against the defender which could not be enforced against him by the company itself. It is still the company which is the creditor if the claim be a good one; and it appears to me to follow that a defence which would have been good against an action by the directors on behalf of the company must be equally valid against an action by the liquidators, who have come into their place as the company's agents. The rights of the company against its debtors must be the same whether it is going on or whether it is winding up. If the action is maintained on the ground that the other shareholders have an interest in enforcing the obligation of the defender, that is not putting those other shareholders into the position of third parties who ought not on account of the fraud of the company to be deprived of a right which they have innocently acquired, but of persons who are seeking to procure a gain in knowledge of the fraud.

I am therefore of opinion that the Lord Ordinary's judgment should be recalled and the defender assoilzied.

LORD M'LAREN concurred.

LORD ADAM.—I also concur, and I am authorised by the Lord President to say that his Lordship is of the same opinion.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defender from the conclusions of the libel.

JOHN C. BRODIE & SONS, W.S.—HENRY & SCOTT, W.S.—Agents.

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Allan v. Gronmeyer.

THOMAS CRANSTOUN ALLAN AND ANOTHER, Petitioners (Respondents).—*Dickson—Sym.*

RICHARD GRONMEYER, Respondent (Reclaimer).—*W. C. Smith.*

Judicial Factor—Appointment—Partnership.—By the contract of copartnery of a wholesale wine and spirit business it was provided that on a dissolution of the firm the business should be realised by one of the partners named with all convenient speed. This partner contributed no capital to the business. The firm was dissolved in 1888. In 1890 the remaining partners presented a petition for the appointment of a judicial factor on the partnership estates, averring that the partner whose duty it was to realise had been carrying on the business instead of realising. This averment he denied. The accounts were by consent remitted to an accountant, who reported that since the dissolution of the firm the business had been carried on as a going concern. The Court *appointed* an accountant to be judicial factor to wind up the business.

Observations, per Lord M'Laren, on the competency of looking at reports and other informal evidence without allowing parties an opportunity of adducing proof in considering whether a judicial factor should be appointed.

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1st DIVISION.
Lord Low.
C.

IN May 1881 a contract of copartnery was entered into between Thomas Cranstoun Allan, Albert James Allan, and Richard Gronmeyer, to carry on the business of wine and spirit-merchants in Leith, under the firm of Scott & Allan.

The capital of the business, amounting to about £22,000, was contributed entirely by the Messrs Allan.

The 14th article of the contract of copartnership provided,—"That on the termination of this contract, whether at its natural expiry or sooner, the books of the company shall be brought to a balance, and the value of the stock in trade, property, and outstanding debts, and the obligations of the company shall be ascertained," and the stock, property, and outstanding debts of the company should be realised by Gronmeyer, "and the debts due by the company shall be cleared off with all convenient speed, and the capital and profits of the company shall be divided between or among the partners, or their representatives, according to their respective interests therein."

Early in 1888 the partners agreed that that partnership should be dissolved, and that Gronmeyer should wind up the business in terms of the above article.

In October 1890 the Messrs Allan presented a petition for the appointment of a judicial factor on the partnership estate.

The petitioners averred that they were not satisfied with the way in which Gronmeyer was dealing with the business; that instead of winding it up he was carrying it on as a going concern; that he had since 1887 increased the liabilities of the company, and almost entirely renewed the stock in trade; and that, looking to the large amount of their capital still in his hands, it was of great importance that the partnership property should be realised with all convenient speed.

Gronmeyer lodged answers in which he averred that he was managing the business with a view to the judicious realisation of the large stock of wines and spirits held by the firm; and that the appointment of a judicial factor would lead to a sacrifice of the stock, and cause loss to the petitioners.

The respondent, by minute, agreed that the books of the firm should be submitted to Messrs R. & E. Scott, C.A., for audit, who had audited the books annually, and further undertook that the realisation should be completed not later than Whitsunday 1892.

Messrs Scott lodged a report for the period from 11th February 1887 to 31st October 1890. It shewed that the amount due at the latter date to Mr T. C. Allan was £11,282, 8s. 3d., to Mr A. J. Allan, £11,723, 19s. 8d., and by the respondent, £2118, 0s. 2d. The value of the stock was stated at £17,986, 0s. 7d. It stated that a loss had been incurred in the conduct of the business of £2330, 6s. 8d. during that period, and that the liabilities of the firm had materially increased from £2078, 17s. 8d. to £8132, 16s. 11d. The amount due by customers was £9323, 13s. 10d. in February 1887, and £11,816, 9s. 7d. in October 1890.

The report further stated "that the books appear to have been carefully and accurately kept, and that the statement of balances appears to exhibit the position of the business at the date of the balance. The accountants were under the impression, from what they were told by the agents for Messrs Allan, when the examination of the books was made in 1888 for the year ending 11th February 1887, that the business was only to be continued for the purpose of gradually winding it up, but they find that, instead of this having been done, the business has been carried on as a going concern, and that the whole of the stock of spirits and wines in bond, valued at £11,624, 2s. 2d., with the exception of about £1000, has been purchased subsequent to that date."

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On 5th March the Lord Ordinary (Low) appointed Mr E. E. Scott, C.A., to be judicial factor on the partnership estate for the purpose of winding up the business, with the usual powers.*

The respondent reclaimed, and argued;—Mere dissolution of the firm would not warrant the appointment of a judicial factor on partnership estates; there must be some breach of duty on the part of the partners appointed to realise. Here there was averment on the one side and denial on the other; in that case there must be a proof, for otherwise the Court had no evidence on which to proceed.[1] It was most inexpedient for the petitioners themselves that the whole of this considerable stock should be thrown on the market at once. In any case, an accountant was not qualified to wind up a wine-merchant's business.

Argued for the petitioners;—Under the contract of copartnership it was the respondent's duty to realise the business when the partnership had been dissolved. But he had been carrying on the business instead of winding it up. Messrs Scott's report abundantly shewed that. That report was made of consent, and was competent evidence. It was nothing to the point that immediate realisation might result in a loss; the petitioners alone were interested in the result of the realisation, and they desired that course.

LORD ADAM.—In this case it is obvious that the petitioners, the Messrs Allan, have a very overwhelming interest in the matter, because they have a capital in the firm of between £20,000 and £30,000, and the respondent has no capital at

* "OPINION.— . . . It thus appears that the respondent has not been winding up the business and realising the stock, as in 1888 he undertook to do. On the contrary, he has been carrying on the business as a going business, and carrying it on at a loss, and the stock, instead of being reduced, has actually been increased.

"The respondent had, so far as I can see, no legitimate interest in failing to realise stock as speedily as possible when the partnership was dissolved. He had no capital in the business, only a trifling sum being due to him, and there seems to be no doubt that the assets of the firm were greatly more than sufficient to meet the liabilities. Notwithstanding this, he has, while leading his partners to believe that he was winding up the business, been carrying it on as a going concern, with the result that the capital of his partners has been reduced, a year's loss has been incurred, the liabilities of the firm have been largely increased, and also the amount of outstanding debts due to the firm, he himself has become a debtor to the firm, and the stock on hand is larger than ever.

"In these circumstances, I am of opinion that the petitioners are entitled to have the winding up of the business taken out of the respondent's hands. What-ever his motives may have been, he has broken faith with the petitioners, and I think that they have reasonable grounds for fearing that their interests may be imperilled if he is allowed to continue in the management. I shall therefore appoint a judicial factor.

"It is probably right to add, that apart from the fact that the respondent has carried on the business instead of winding it up, notwithstanding the dissolution of the partnership and the express wish of his partners, I do not see any reason to suppose that he has acted dishonestly. The books are accurately and properly kept, and, so far as they are concerned, there appears to have been no disposition on the respondent's part to conceal or misrepresent the true state of matters. But he seems to have been determined to carry on the business instead of winding it up. To do so was contrary to his duty, . . . and has been to the prejudice of the petitioners; and as they have really the sole interest in the realisation of the stock, I think that they are entitled to demand that it should be entrusted to someone else."

[1] Collins v. Young, March 14, 1853, 1 Macq. 385.

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all. The petitioners therefore have a very clear interest to see that that capital is safe. The facts, as I understood them, are these,—The late firm of Scott & Allan, which consisted of the petitioners the Messrs Allan, and the respondent Mr Gronmeyer, came to an end in the spring of 1888. It then became the duty of Mr Gronmeyer to wind up the concern and realise the business, and he has had from 1888 till 1891 to carry out that duty, with the result that the business is as far from being wound up as ever. After the case came into Court, the parties agreed that the accounts of the firm should be remitted to Messrs Scott, accountants, and we have a report from them, which is binding on both parties, and is not objected to by either party. In that report the reporters state "that the books appear to have been carefully and accurately kept, and that the statement of balances appears to exhibit the position of the business at the date of the balance. They were under the impression, from what they were told by the agents for Messrs Allan, when the examination of the books was made in 1888 for the year ending 11th February 1887, that the business was only to be continued for the purpose of gradually winding it up, but they find that, instead of this having been done, the business has been carried on as a going concern, and that the whole of the stock of spirits and wines in bond, valued at £11,624, 2s. 2d., with the exception of about £1000, has been purchased subsequent to that date." Now that report shews that this business which the partners resolved in 1888 should be wound up has, instead of being wound up, been carried on as a going business, with the result that the whole stock now belonging to the firm has been purchased since the dissolution, and purchased with the capital of the petitioners, the Messrs Allan. It has been urged that the business has been successfully carried on, but that is not the question. The question is whether the Messrs Allan wish it to be carried on or not, and they say they do not. It was suggested that the appointment of a judicial factor is not an advantageous way of winding up a business like this. It may be so, but that again is a matter for the Messrs Allan to consider. In these circumstances I think we should adhere to the Lord Ordinary's interlocutor.

LORD M'LAREN.—There is no doubt that at the expiration of the term of the contract of copartnery it was the right of the Messrs Allan, who formed the capitalist part of the concern, to require that the business should be wound up. Under one of the clauses of the contract of copartnery the winding-up is to proceed under the supervision of Mr Gronmeyer. That stipulation was inserted mainly, I think, in the interest of the Allans. Having the whole capital of the concern, it was their interest that the winding-up should be economically managed. Gronmeyer's interest having practically come to an end with the dissolution, it is intelligible that the Allans should stipulate that they should be entitled to have the benefit of his services in carrying out the winding-up.

If we are entitled to look at the evidence upon which the Lord Ordinary has proceeded we have these facts: an increase in the liabilities of the firm, an increase in the debts due to the firm, and an increase in its stock in trade, almost the whole stock now belonging to the firm having been purchased since the dissolution. Upon these facts, if we are to take them as facts, there can be no doubt that Gronmeyer has failed to carry out his undertaking to wind up the business, but on the contrary has been carrying it on as a going business.

My only difficulty is as to whether we are entitled to take these facts into consideration at the present stage of the proceedings, keeping in view the obser-

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year 1886 or beginning of the year 1887 the defenders, without leave asked or obtained from the pursuers, and at their own hand, and without any warrant or authority, lifted the said gas-pipes and removed them from the place where they had been originally laid. . . . The defenders have, in consequence of the pursuers' demands, made some slight repairs on several occasions, but they have not carried out these in such a manner as to prevent the loss of gas, or to reduce the loss to a minimum. . . . The principal pursuers reserve all their right for damages and for the loss of gas for the period since 6th June 1886, up to which time the claims of the pursuers were settled by the defenders. . . ."

The defenders in answer stated,—(Ans. 4) "Admitted that in course of laying a branch line of railway from the pit mouth at Calderhall to their works, which the defenders were authorised to do under an agreement with the proprietor of the land, the defenders had occasion to lift and relay some pipes which passed through the ground leased by them from the proprietor for the purpose of the said railway. Explained and averred that this was done with the pursuers' knowledge and concurrence, and they turned off the gas and made the necessary preparations to enable the defenders to carry on their operations. [The pursuers denied this.] Admitted also that certain claims of the pursuers have been settled up to 6th June 1886. Explained that no liability was thereby admitted, and that at the same time an intimation was made to the pursuers that the pipes between the gate and Calderhall House having recently been relaid, and, where necessary, renewed and generally put into good order, the defenders would be no longer responsible for any gas leakage."

The pursuers pleaded;—(1) The gas-pipes mentioned having been through the mining operations of the defenders, or their predecessors, for whose acts they are responsible, injured or destroyed, the pursuers are entitled to the warrants craved. (2) The defenders having, unwarrantably and illegally, lifted and destroyed or injured the gas-pipes belonging to the pursuers in the manner condescended on, the pursuers are entitled to the warrants craved, to the effect of ordaining the defenders to lift and renew and repair and relay said pipes in a satisfactory manner.

The defenders pleaded;—(1) The action is irrelevant. (3) The defenders are not bound to repair or renew the gas-pipes referred to.

At a proof it was established that the escape of gas arose partly in consequence of the subsidence of the ground which followed on the defenders' operations, and partly owing to the defective manner in which the defenders had relaid the pipes which they had removed without consulting the pursuers.

On 20th January 1890 the Sheriff-substitute (Rutherfurd) (after certain findings in fact) found further that in consequence of the original Oakbank Oil Company's excavation of the shale underlying the lands of Calderhall, there was in several places a subsidence of the surface of these lands prior to the month of June 1878; that the pursuers having complained of the displacement of their pipes and the leakage of gas thereby caused, by arrangement between the oil and gas companies a meter was placed to ascertain the amount of leakage; that from 3d June 1878 till 2d June 1884 the original oil company paid the price of the gas lost, and also from time to time uplifted and repaired portions of the pipes with the view of preventing further loss; that about the end of 1886 or beginning of 1887 the defenders constructed a line of railway in connection with their oil works, which necessitated the uplifting and removal of a part of the branch line of gas-pipes within the policy of Calderhall; that the defenders accordingly (without consulting the Gas-Light Company) uplifted a portion of the said pipes, some of which they relaid in a different line; that the

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pursuers the Gas-Light Company complained to the defenders of their conduct in uplifting the said pipes without leave asked or obtained, and also of the manner in which the defenders had put down the pipes, some of which were laid upon the surface of the ground; that, after some correspondence between the parties, the defenders relaid the pipes, which they sunk to a depth of about eighteen inches below the surface of the ground; that the defenders have paid the pursuers the Gas-Light Company for leakage and loss of gas arising from defects in the said branch line of pipes from the 2d of June 1884 to the 3d of February 1887, and they also on several occasions caused repairs to be executed on the said pipes down to about the end of December 1888; "(12) that between the beginning of February 1887 and the present time there has been great leakage of gas from the said pipes, caused either by subsidence of the ground, owing to the mining operations of the defenders and the original Oil Company, or to the defective manner in which the defenders replaced that portion of the said pipes which they uplifted and relaid as aforesaid, but the defenders refuse to make any further alterations or repairs thereon, with the view of putting a stop to said leakage: Finds in point of law that the defenders are bound to take such steps as may be necessary for the purpose of preventing as far as possible further loss of gas by leakage as aforesaid: Therefore repels the defences, and decerns and ordains the defenders forthwith to execute such alterations and repairs upon the said line of gas-pipes between the meter near the lodge at Calderhall and the mansion-house as will prevent as far as possible further leakage of gas therefrom, and that at the sight and to the satisfaction of Mr George Stratton," &c.

On appeal the Sheriff (Crichton) adhered, and remitted to the Sheriff-substitute to proceed with the cause.

On 24th March 1890, the Sheriff-substitute in respect of the defenders' failure to comply with the interlocutor of 20th January, authorised the principal pursuers to execute the alteration and repairs specified in the interlocutor, and that at the sight and to the satisfaction of Mr George Stratton, and remitted to him to see the work done and to report.

Mr Stratton having thereafter lodged his report, the Sheriff-substitute approved thereof and ordained the defenders to pay to the pursuers the sum of £21, 16s. 4d., being the expense of performing the operations specified in his interlocutor of 20th January, together with the sum of £8, 8s. as the reporter's fee.

The defenders appealed, and argued;—The gas company had no title to sue the action. The gas-pipes were laid down on Colonel Hare's land, and there was no averment that he or anyone else was bound to maintain them. The pipes were in the ground merely on sufferance, and the company might be ordered at any moment to lift and remove them. The fact that Colonel Hare appeared as a concurring pursuer could not make the title to pursue good.[1] The defenders did not deny that they were bound to make good any damage, if such there was, to that small portion of the piping which they had lifted and re-laid in constructing their branch line, but the proof was not clear whether in point of fact there was such damage. As regarded the damage done by subsidence of the ground, it was not averred that the defenders were working illegally or without proper precautions. Further, under their contract the defenders were entitled to create surface damage subject to payment therefor to Colonel Hare. In the absence of any agreement by the mineral tenants that they should repair damage done to the pipes by their workings, the

[1] MacRitchie's Trustees v. Hislop, Dec. 17, 1879, 7 R. 384, rev. June 23, 1881, 8 R. (H. L.) 95.

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pose of ascertaining his rights to the English estate and for obtaining administration of the testator's real and personal estates, but only in so far as it might be necessary or proper for the purpose of obtaining for himself the English real estate free of all liabilities. The Scots Court *sisted* procedure in the declarator, to await the decision of the English Court as to the right to administer the English heritage.

1st Division. Lord Kinnear. M.

DAVID GAVIN HEWIT, a domiciled Scotsman, who had, however, carried on business in London as well as in Edinburgh, died on 1st August 1887. He left a trust-disposition and settlement, executed in London, but in Scots form, by which he conveyed to trustees his whole estates.

To enable his trustees to carry out the purposes of his settlement he conferred on them "all requisite powers, and particularly (but without prejudice to said generality, and without prejudice to the powers hereinbefore contained with reference to my businesses in Edinburgh and London), I empower them to retain the property and securities in which my means and estate may be invested at the time of my death, and also, whenever they think fit, to sell, realise, and convert into money the whole estate or any part thereof (whether as left at my death or at any time invested), and that either by public roup or private bargain, and to execute and deliver all deeds and writings necessary for divesting themselves of the premises, binding the trust-estate in absolute warrandice."

By the ninth purpose of his trust-deed the truster directed his trustees to pay certain legacies, amongst others the following to charitable institutions:—(8) To the Corporation of the Scottish Hospital, whose office is in Crane Court, Fleet Street, London, payable on the receipt of the treasurer or secretary, or honorary treasurer or honorary secretary thereof, for the time being, £1000. (9) To the Caledonian Asylum, whose office is in Holloway, London, payable on the receipt of the treasurer or secretary, or honorary treasurer or honorary secretary thereof, for the time being, £500. (10) To the Royal Infirmary of Edinburgh, payable on the receipt of the treasurer or clerk thereof for the time being, £1000.

He also left legacies of £105 to each of his trustees who should accept, and a legacy of £3000 to his nephew William Lawson, who was also one of the trustees who accepted.

With regard to the residue of the trust-estate, the operative purpose of the deed was as follows:—"(Fourteenth) In the event of my having no child or children, or in the event of the failure of such child or children and their issue before the period of vesting, then I direct my trustees to dispose of the free residue as follows:—To pay to my said wife a legacy of £5000 sterling, and to each of my said three nephews, William Lawson, Robert Lawson, and George Lawson, an additional legacy of £3000, payable, said several legacies, at such time as my trustees may find convenient, and without any interest thereon; and whatever balance may then remain, I authorise my trustees to divide and apportion, in such shares as they may consider best, among the following charitable institutions, viz., the Corporation of the Scottish Hospital, London, the Caledonian Asylum, London, the Royal Infirmary of Edinburgh, the Longmore Hospital for Incurables, Edinburgh, the Royal Blind Asylum, Edinburgh, the Leather Trades' Benevolent Institution, London, and the Leather Trades' Benevolent Institution, Glasgow, declaring that my trustees shall be the sole judges as to the time or times when any sum or sums shall be so divided and apportioned, and they shall not be liable to be called in question by the said institutions, or any of them, or those acting for any of them: And also declaring that if there be any dubiety as to any of the institutions in respect the precise name thereof may not have been given, my trustees shall be entitled themselves to decide conclusively and finally as to the institution entitled to the benefit."

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In the trust-deed Mr Hewit desired that his affairs should be "administered and wound up, as far as practicable, in accordance with the law and practice of Scotland."

Mr Hewit was survived by a son, who died three weeks after his father, being only a few weeks old, and without having attained the age at which any benefit under the trust was to vest in him. He was also survived by a sister, Mrs Lawson, who died three months after him intestate, survived in her turn by her eldest son, William Lawson, the nephew and legatee of the truster already mentioned, who thus became the truster's heir.

The estate of the truster consisted of (1) heritage in Scotland to the value of £7300; (2) heritable estate in England to the value of £11,934; (3) personal estate in the United Kingdom to the amount of £99,519; (4) Scottish bonds, excluding executors, to the amount of £9017; and (5) personal estate abroad to the amount of £1372, together £129,142.

His debts amounted to £13,837, his legacies to £37,420, and the value of certain annuities to £18,700, together £69,957.

The residue amounted to about £60,000. To some extent these figures were estimates only, but in the action they were accepted as approximately correct.

The trustees entered on the administration of the trust, and among other payments paid Mr Lawson his legacies of £3000 and £105.

Questions arose between Mr Lawson and the trustees as to disposal of the English real property. To settle these the trustees raised an action of declarator against Mr Lawson to have it found, first, that they were bound to administer the estate in terms of the trust-disposition, that the balance of residue left to the charities was not liable to suffer abatement in respect that part of the trust-estate consisted of English real estate, and that Mr Lawson had no claim to any part of the trust-estate beyond his three legacies, and in particular had no claim to the English real estate. Alternatively, the summons ran, it should be found that Mr Lawson was not entitled to claim both the three legacies and the English real estate, and that he was now barred by his acceptance of two of the legacies from claiming any part of the English real estate. Thirdly, if Mr Lawson should be found entitled to the English real estate, the summons concluded that he should be ordained, first, to repay the two legacies received and to renounce the third, and, second, "to bear a rateable proportion of the whole debts, legacies, and bequests payable from the trust-estate corresponding to the value of the said real estate, together with all expenses incurred or to be incurred by the pursuers, and all duties payable to Government effeiring to the said real estate."

The pursuers in their condescendence thus stated the claims of both parties;—"The defender maintains that by the law of England the said bequests to said institutions are liable to abatement in so far as the same are exigible out of or from real estate in England, and that he is entitled to said real estate in so far as the same or the proceeds thereof, if duly administered under said trust-disposition and settlement, would fall to said institutions. The trustees deny this, and maintain that the said legacies are subject to no abatement; or otherwise that, if they were, the defender was bound to elect between the said three legacies and any right he might have had to said real estate, and that by accepting payment of said two legacies he has concluded his election; or otherwise that, if he is still entitled to elect, he is bound, in the event of his electing to claim said real estate or any part thereof, to repay said two legacies already paid to him, with interest, under deduction always of legacy-duty, and to renounce his right to the said second legacy of £3000. By the law of England the said legacies are not subject to any such abatement."

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The defender admitted that his contention was as stated by the pursuers, but denied that the pursuers' statement of their own rights and duties was as they stated. He further stated:—"The estate left by the testator being of the amount and character above set forth [*i.e.* as narrated above], the pursuers are not in the circumstances entitled, as against the defender, according to the law of England, to sell the said freehold estate. The trust-disposition and settlement does not, according to its true construction by the law of England, create a constructive conversion of the English real estate."

The pursuers pleaded;—(1) The defender not being entitled to claim the freehold estate in England, decree ought to pass in terms of the first conclusion of the summons. (2) *Separatim*, In respect that the defender has accepted payment of the legacies of £3000 and £105 he is barred *personali exceptione* from claiming the freehold estate, and decree ought to pass in terms of the second conclusion of the summons. (4) If it shall be found that the defender can claim the said freehold estate, and upon his so claiming it, he is bound (first) to renounce all claim to the legacy of £3000, and to repay the legacies of £3000 and £105 already paid to him; and (second) to bear a rateable proportion of the whole debts, legacies, and bequests payable by the trust, and of the expenses of the administration, proportionally to the value of the freehold estate so claimed. (5) In any view the defender is bound on taking said freehold estate to bear a rateable proportion of the said legacies, debts, and expenses, as aforesaid. (6) In respect of the terms of said settlement, and especially of the terms of the conveyance therein, and of the directions as to sale therein contained, (1) the pursuers are entitled and bound to administer the estate irrespective of the law of England; and (2) the defender's pleas ought to be repelled.

The defender pleaded;—(3) By the operation of the Mortmain Act (9 George II. cap. 36) the bequest of the residue of the testator's estate to the charitable institutions mentioned is null and void, so far as such residue consists of the testator's freehold and leasehold estate in England, or the proceeds thereof; and to that extent the testator died intestate. (5) The defender is not put to his election between the legacies bequeathed to him under the testator's settlement and his right to the said heritage in respect the said heritage is withdrawn from the settlement not by any act of the defender, but by the statutory law of mortmain. (6) The testator having left sufficient personal estate, and the debts, legacies, annuities, and other provisions left by the deceased, together with the expenses of administration, being primarily chargeable thereon, the pursuers are not entitled to apply any part of the English heritage in payment of the said debts, legacies, annuities, and provisions and expenses. (7) *Separatim*, The liability of the English freehold estate to bear any part of said debts, legacies, annuities, provisions and expenses, must be determined according to the law of England, and the freehold estate is not liable for any part thereof, in respect they are all primarily chargeable by the law of England against the personal estate and English leasehold estate.

In answer to a case submitted to the Chancery Division of the High Court of Justice in England to ascertain the law of England on several points involved in the contentions of the parties, the Court (Mr Justice Kay) returned the following opinion, viz.:—"This Court is of opinion that the bequests to charitable institutions set forth in the 9th purpose of the trust-disposition dated the 21st of May 1887, so far as they are payable out of the proceeds of the English freehold and leasehold estates, are not valid or effectual according to English law, but are null and void

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by virtue of the provisions of the 9th George II. chapter 36, re-enacted by the 51 and 52 Vict. chapter 42; and is of opinion that the bequests of shares of the residue of the trust-estate bequeathed to charitable institutions in the 14th purpose of the said trust-disposition, so far as they are payable out of the English freehold and leasehold estates, are also invalid and ineffectual according to English law, and are null and void by virtue of the provisions of the said Act; and is of opinion that in the event of the trustees of the said trust-disposition exercising the powers of sale of the freehold and leasehold estates conferred on them by the truster, David Gavin Hewit, the bequests of shares of the residue of the trust-estate bequeathed to charitable institutions, so far as payable out of the proceeds of the English freehold and leasehold estates, would still be invalid and ineffectual, and would be null and void by virtue of the said Acts: And is further of opinion that the bequests aforesaid in so far as payable out of the English freehold and leasehold estates or out of the proceeds of the sale thereof, being null and void as aforesaid, the persons entitled to take the sums which would have gone to satisfy the said bequests are, as to the English freehold estate or the proceeds thereof, the heir-at-law of the testator, or of the last purchaser within the meaning of the 3d and 4th William IV. chapter 106, and as to the English leasehold estate or the proceeds of sale thereof, the persons entitled at the testator's death to take his personal estate according to the English Statute of Distributions; and is of opinion that if and so far as the testator was the last purchaser within the meaning of the 3 and 4 William IV. chap. 106, the said William Lawson will take the English freehold estate of the proceeds of sale thereof, as heir-at-law of the testator, and not as heir-at-law of his mother, or of the child Thomas David Hewit; and is of opinion that, according to English law, the Court would, on the facts being brought before it, hold the said bequests to be void whether the heir-at-law of the testator, or of the last purchaser as to the freehold estate, or the persons entitled to the testator's personal estate, according to the English Statute of Distributions, made claim thereto or not: And even in the event of the said heir-at-law, or the persons entitled as aforesaid to the testator's personal estate, consenting to waive his or their right thereto, the said freehold and leasehold estates would not, according to the law of England, fall to be distributed in the terms of the settlement, but would be treated as undisposed of; and that the heir-at-law or the next of kin, as the case may be, may dispose of such estates by a proper deed or deeds, but, if in favour of a charity, such deed or deeds should be enrolled in accordance with the provisions of the 51 and 52 Victoria, cap. 42."

Thereafter, on 12th July 1889, Lord Kinnear (Ordinary) pronounced this interlocutor:—"Assoilzies the defender from the conclusions of the summons, with the exception of the second branch of the third conclusion."*

* "OPINION.—It is established by the opinion of the Court in England that the bequests to charitable institutions, in so far as they are payable out of the English freehold and leasehold estates, are null and void; that, in the event of the trustees exercising the powers of sale of these estates conferred upon them by the truster, the bequests would still be null and void in so far as payable out of the proceeds; that the Court would hold these bequests to be void whether the heir-at-law made claim to the freehold estate or not; and that, even in the event of his waiving his right, the estates would not fall to be distributed in terms of the settlement, but would be treated as undisposed of.

"It would seem to me to follow that the defender cannot be required to renounce his claim to the English freehold estates as a condition of his taking

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The pursuers reclaimed.

While the case was pending in the Inner-House a sist was granted,

the legacies which the testator has bequeathed to him, or to repay the legacies he has already received in the event of his taking up the English estates. It is said that by claiming these estates as undisposed of he will reprobate the settlement by which he has already taken benefit. But the bequests to charities, in so far as they might have affected the estates to which he is entitled as heir-at-law, are not merely ineffectual but null and void. It is obvious and elementary that a nullity can neither be reprobated nor homologated. The plea of approbate and reprobate assumes, as the Lord President explains in *Douglas* v. *Douglas*, 24 D. 1207, 'the power of making an election, and a consequent obligation to make an election,' and his Lordship adds, that 'to make a proper case of election the facts of the case must be such as to satisfy three conditions. In the first place, the person making the election must have a free choice. In the second place, the necessity of making the election must arise from the will, express or implied, of someone who has power to bind the person put to his election; and, in the third place, the result of the election of one or other of the alternatives must be to give legal effect and operation to the will so expressed or implied.' Neither of the two last-mentioned conditions are satisfied by the facts of the present case. The testator must be held to have expressed no intention to give his English freehold estates to charities, because, according to the opinion of the English Court, the bequests which might otherwise have had that effect are null and void. This does not mean that they are inoperative by reason of any technical rule of law, which the heir may enforce or may waive as he thinks fit; but that they are not to be read as expressing the testator's intention. They are struck out of the will, as effectually as if they had been cancelled or revoked by the testator himself. But even if they could be read as part of the will, the defender has no power to give legal effect and operation to the testator's intention. If he were to accept his legacies as in full of all claims arising to him through the testator's death, and were to waive his right to the English freehold estates, the will would still be inoperative as regards these estates. The bequests are null and void in so far as payable out of these estates or their proceeds, whether the defender makes claim to them or not.

"It is true that if the defender takes the estates in question, as heir-at-law, they will become his absolute property. He may dispose of them as he pleases, and he may give them to a charity if he thinks fit, provided he complies with the conditions of the Statute 51 and 52 Vict. c. 42. It is said that he is thus in the same position as a legatee whose private property a testator has assumed to dispose of by the will under which he takes benefit. But the two cases are essentially different. When a testator disposes of property which he knows to belong to another, the proprietor can take no benefit under the will if he refuses to give effect to the clear intention of the testator. But it is indispensable in order to bring this rule into operation, that the testator should know that the property is not his own, or at least that he has no direct power to dispose of it; and, if that condition is satisfied, it is also necessary that the legatee should be in a position, by reason of his right of property, to approbate the will with effect. But it cannot be assumed that the testator in the present case was aware that the Mortmain Acts would prevent his will from being carried into effect. On the contrary, it is manifest, from the frame of his settlement, that he had no doubt of his power to dispose of his whole estate as he desires it to be disposed of. There is no reason to suppose that if he had known his bequests to charities to be inoperative, so far as they bear to affect his estates in England, he would have imposed an obligation upon his heir-at-law to make a gift in favour of these charities in accordance with the provisions of the statute. I assume that would have been a legal condition. But it certainly is not expressed, and it does not appear to me to be necessarily implied in anything that the testator has done. But if it were implied, it cannot be certain, when the legacies become payable to the heir, that he will be able to comply with it; for

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after parties had been partly heard, to await the realisation of the English real estate, which the trustees proposed to carry out.

That sist having been granted, the defender issued and served on the pursuers a writ of the English Court, wherein he claimed (1) a declaration that the gifts to charities were null under the Statute of Mortmain,—"(2) A declaration that upon the true construction of the said trust-disposition and settlement the personal estate of the said testator was the primary fund for payment of his funeral and testamentary expenses, debts, and legacies; and that, having regard to the condition and amount of the said personal estate and to the foregoing declaration, the plaintiff as heir-at-law is now absolutely entitled to the whole of the English real estate of the said testator, freed and discharged from all liability to contribute to the payment of the testator's debts, funeral, and testamentary expenses or legacies; (3) an injunction to restrain the defendants, their solicitors, auctioneers, and agents from selling, offering, or advertising for sale the

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he cannot dispose of the estates in favour of a charity except in accordance with certain statutory provisions, and one of these is that he shall live for twelve months after the gift is made. Assuming, therefore, contrary to the opinion I have expressed, that the will can be read as importing such an intention as the pursuers suppose, it is still uncertain whether the defender will be in a position to approbate with effect. But there is no authority for holding that a legatee can be put to an election, whereby he shall be required, in order to obtain a legacy which has been bequeathed to him, to dispose of his own property in favour of others, without its being certain that he will, after all, be able to secure to those others the benefit which the testator is presumed to have intended.

"The decision which appears to be most favourable to the pursuers is that of the House of Lords in *Dundas* v. *Dundas*, 4 W. and S. 460, because, in that case, the point taken in the House of Lords, in contradistinction to the case of *Ker* v. *Wauchope*, was, that the deed disposing of real estate in England was not merely challengeable but null, and therefore that it could not be read in so far as it bore to affect English land. But I cannot read that decision as fixing a principle which will govern the present case. The distinction on which it proceeded was regarded by Lord Eldon in *Ker's* case, and by Lord Brougham in that of *Dundas*, as 'thin and unsubstantial' in itself, although it had been established by a series of decisions following upon that of *Cuningham* v. *Gainer*, in which it was first promulgated by Lord Hardwick. This might be a reason for hesitating to adopt it in a case not directly ruled by the same precedents. But there appears to me to be no room for the distinction in question in the circumstances of the present case. It was held that although a will was not duly executed according to the statutes to affect land, yet, if in the same will personalty is given upon condition that the legatee shall convey land, the words which cannot be read as affecting the land may be read for the purpose of putting the heir to an election, because the gift to him and the condition on which it is made are inseparable, and therefore the bequest of personalty cannot be read without reading at the same time the condition on which it is given. The present case appears to me to be distinguishable on the two grounds already indicated; first, because it is not an inseparable condition of the bequests to the defender that he shall make a gift in favour of charities; and, secondly, because the invalidity of the bequests to charities is owing to the nullity of the bequests themselves, and not to any mere defect in the particular form by which they are made. In the case of *Dundas* the bequest of land was invalid because the will was not duly executed. But the intention to bequeath land was perfectly legal, and words expressing that intention, although they could not affect the land directly, might therefore be read as importing a condition attached to a bequest of personalty. But a bequest of lands in England to charity is null and void in whatever form it be expressed, and words expressing an intention so to bequeath must therefore go for nothing."

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said English real estate, or any part thereof; (4) an order that the defendants convey the said English real estate, for all their estate and interest therein, to the plaintiff and his heirs, or as he shall direct; or in the alternative (5) a declaration that the said trust-disposition and settlement does not on its true construction operate any conversion of the testator's English real estate into money, and that so much of the proceeds of sale of the said real estate when sold as is not in due course of administration required for payment of the testator's debts, funeral, and testamentary expenses, and legacies capable of taking effect, remains unconverted, and as unconverted belongs to the plaintiff; (6) in either case, but only so far as may be necessary and proper for the purposes aforesaid, administration of the real and personal estate of the said testator."

The Court granted an interim injunction against sale, and thereupon the pursuers in the Scots Court moved to have the sist recalled, and the case proceeded with.

Argued for the pursuers;—(1) On the question of administration.—They were entitled to a declarator, which would result in this, that the charitable institutions might be paid entirely out of the personalty. The effect of any such declarator would be, that the questions pending in England would become theoretical, and of no practical value. There was in the deed a direction to sell, for there was to be a "division and apportionment" among a number of beneficiaries, and the reasonable way of carrying out that direction was by selling the heritage to begin with. But if there was not a direction, at least there was a power of sale, and there was no bequest of specific heritage to the charities. Therefore, the trustees might sell the English heritage, bring the money to Scotland, and then divide it as their author had directed. This in fact they would have done by this time, had they not been stopped by the heir's application for an injunction, an act on his part plainly hostile to the will. On principle and on authority it was clear that the trustees could and should "marshall" the legacies, *i.e.*, apportion them *pro rata* both upon heritage and moveables. The English law of mortmain was a purely local law, with a local operation. To ensure that operation it had been found in England to be necessary to exclude the doctrine of "marshalling," for, if it were applied, its effect would be to throw a proportion of the whole liabilities of the trust-estate on the heritage, and so, *pro tanto*, set free the moveables to satisfy the charities. But that would cheat the Mortmain Act, and therefore in England this rule of "marshalling" would not, in such circumstances, be applied. But what application had that law to a succession, which was a foreign succession and not English? The Scots law saw nothing wrong in the bequests to charities; why should an administration conducted by it take any pains to exclude these bequests? There was no specific bequest of English heritage to charities, but only general bequests in their favour, and the law of Scotland, so far from interposing to prevent the payment of these bequests, should see to it *ut res magis valeat quam pereat*. Besides, even in England, "marshalling" might take place so as to favour charities if the testator so directed. The declaration here that the administration should be according to Scots law was tantamount to such a direction. On authority, again, it had been decided in England[1] that the English rule of "non-marshalling" would not apply in the case of the succession of a domiciled Scotsman, but that his estate would be so administered as to give effect to his charitable intentions, although the *lex rei sitæ* (India forbade bequests to charities in the circumstances which there existed.

[1] Macdonald v. Macdonald, 1872, L. R., 14 Eq. 60.

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Nor was the case of *Harrison*[1] of any avail to the defenders, for the doctrine of Lord Selborne was carefully hedged by the qualification that it was true only "in the absence of any trust."

(2) On the question of election.—Was there an obligation put upon the defender to elect, so that, if he succeeded in his claims in England, he must give up what he had taken or could take in Scotland? Now, there was no impossibility of the heir making good the wishes of the testator by allowing the charities to get their full share in the shape of money. The testator had no desire to give them English heritage. Again, it was quite lawful to look at the disposition in favour of the charities to ascertain what the testator's intention truly was. It might well be that what a testator could not do directly he could do indirectly, by forcing a beneficiary to make choice between implementing the whole deed, or renouncing the whole deed.[2] The Lord Ordinary had misread the cases of *Ker*[3] and *Dundas*.[4] The distinction described as "thin and unsubstantial" was a distinction of English law, which was by these decisions held not to be applicable to a Scots instrument. This was the interpretation put on those decisions by Mr Jarman.[5] The result was that although the will as a devise of foreign heritage was bad, it would yet be looked at to ascertain the testator's intention, and effect would be given to it so far as might be, through the application of the doctrine of election. The bequest to charities was not therefore an absolute nullity, but was so only in England. In *Douglas's* case,[6] certain general requisites for raising the application of an election were defined, and these were present here. But as regarded the decision in that case, which held that an obligation to elect did not arise, that proceeded upon the consideration that the testator, who was said to have imposed the condition, which involved an election, did not impose that condition in the full knowledge of the true state of the ownership of the estates the succession to which was said to be affected by the doctrine of election. Such an erroneous belief excluded the application of that doctrine,[7] but here of course there was no such ignorance, for the whole bequest was in one settlement. As regarded the citation from Bell's Commentaries[8] by the defender, Mr Bell wrote in ignorance of the decision in *Dundas's* case.

Argued for the defender;—(1) On the question of administration.—The question now came to be, admitting that the bequest of English heritage was illegal, could that be evaded by realisation in England and subsequent division, not in England, but in Scotland? But Mr Justice Kay's opinion settled that the law of England applied to charities whether English or foreign, and to the proceeds of heritage as well as to heritage, and would prevent any such evasion of the prohibitions of the Mortmain Act. But the law of the *situs* must settle all questions regarding the burdens to be imposed on heritage, and the capacity of the testator to dispose of it.[9] So long as the estate remained real estate the law of England must

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[1] Harrison v. Harrison, 1873, L. R., 8 Ch. App. 342.
[2] Bonhotes v. Mitchell's Trustees, May 27, 1885, 12 R. 984; Dundas v. Dundas, Dec. 22, 1830, 4 W. and S. 460; see also Bennet v. Bennet's Trustees, July 1, 1829, 7 S. 817, 1 Scot. Jur. 342.
[3] Ker v. Wauchope, 1819, 1 Bligh, 1.
[4] See note 2.
[5] Jarman on Wills, p. 448, note *k*, and case of Dewar v. Maitland, *ibid. cit.*
[6] Douglas's Trustees v. Douglas, June 27, 1862, 24 D. 1191, 34 Scot. Jur. 642.
[7] Bell's Pr., sec. 1884.
[8] I. p. 148 (5th edn.), and p. 143 (Lord M'Laren's edn.)
[9] M'Laren i. pp. 26, 32-3; Storey, Conflict of Laws, secs. 474, 478-9.

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continue to govern it,[1] and could forbid its realisation, if an illegal application was to be made of the proceeds of that realisation. It was vain to argue from the testator's intention as against the Mortmain Act, which set the testator's intention at naught. The question was, what had the testator done with his English heritage? Now he had undoubtedly given it to charities. [LORD PRESIDENT.—But the doubt is whether your argument applies to residue. Must not residue, the product of a mixed estate, be distributed by the law of the domicile?] The law of England would look at the nature of the instrument and at the purpose of the trust before it would allow the trustees *adire hereditatem*. It would not stop short at the clause of conveyance to the trustees, but would inquire what would become of the heritage or its proceeds if they were allowed to go into the trust. Otherwise the sphere of operation of the Mortmain Act would be much restricted. *Harrison's* case[2] supplied the rule as to the incidence of debts, and therefore of legacies, and the rule was that of the *lex situs*. Lord Selborne's limitation, "in the absence of any trust," meant "in the absence of any express direction," and there was none such here. *Macdonald's* case[3] was to be met in this way. It was not doubtful that the law of the *situs*, *i.e.*, India, was to be applied to Indian heritage. But, then, on further examination, it was seen that there was no rule of "marshalling" in India. Had there been, the result would have been different, and here therefore, as the *situs* had a law of "marshalling," *Macdonald's* case had no application.

(2) On the question of election.—It was necessary to see under what conditions that plea arose. The heir here could not surrender the heritage to the uses of the will. If he left the heritage alone the Crown would take it, the trustees could not. He could not convey it directly to the trustees, for Mr Justice Kay's opinion implied that in that event the English Courts would track it, and stop any such proceedings by injunction. He might perhaps sell it and give the trustees the money, but that was a very complicated transaction to be implied. *Dundas's* case[4] was distinguishable on that point, for there the heir could make up a title and convey to the trustees. Here he could not do so *cum effectu*, for the vice of the original bequest would still adhere to any such conveyance. The foundation of the doctrine of election was the equitable plea that an heir should not oppose trustees in doing what, but for him, they would be able to do. But the difficulty here was not the interference of the heir. The thing the trustees wished to do could not legally be done. Why should a Court of equity interfere to enable a testator to do what the law forbade him to do? The distinction in the matter of election between English estate on the one hand; and Scots or foreign estate on the other, had been recognised in *Dewar* v. *Maitland*.[5]

At advising,—

LORD M'LAREN.—The questions which we have to determine in this case arise under an action of declarator instituted by the testamentary trustees of Mr David Hewit against his heir for the purpose of determining the relative rights of the heir and the testamentary disponees to the testator's real estate in England, which is admittedly affected by the English law of mortmain. The

[1] Thomas v. Tennent's Trustees, Nov. 17, 1868, 7 Macph. 114, 41 Scot. Jur. 59; Tennent v. Tennent's Executor, June 28, 1889, 16 R. 876.

[2] See note 1, *supra*, p. 801.

[3] See note, *supra*, p. 800.

[4] See note 2, *supra*, p. 801.

[5] 1866, L. R., 2 Eq. 834.

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testator was survived by a widow and one child. By his will Mr Hewit directed his trustees to pay certain legacies, including a legacy of £3000 to the defender personally, and a legacy of 100 guineas given to him as a trustee, and in the event, which has happened, of his child dying without issue, the trustees were directed to pay certain other legacies, including an additional legacy to the defender of £3000, and to divide the balance of the residue amongst charitable institutions named by him in proportions to be determined by the trustees.

It is objected by the heir that according to the provisions of the statutory law of mortmain real estate cannot be bequeathed by will to charitable uses, and it is now admitted that the testator's intentions in favour of the charities cannot be carried into effect in the manner directed by him. But this action contains alternative conclusions to the effect that the heir by acceptance of the legacies bequeathed to him has come under an obligation "to renounce and discharge all claims competent to him against the estate and effects of David Hewit or against his trustees," or otherwise "to bear a rateable proportion of the whole debts, legacies, and bequests payable from the trust-estate corresponding to the value of the real estate." These are the material conclusions. Lord Kinnear, sitting as Lord Ordinary, has decided the case adversely to the trustees on the first of the two conclusions which I have quoted, and has reserved the question argued under the second conclusion, and his Lordship's judgment has been brought under review by the reclaiming note which we are now to dispose of.

The hypothesis of the first of these conclusions (the second conclusion of the summons) is that the heir is put to his election between the benefits which he may claim in the character of heir and legatee, and the question whether the heir is put to his election is a question to be determined by the law of the testator's domicile, in this case the law of Scotland. It is true that under a testamentary disposition of mixed estate the validity of a disposition or bequest of immovable property must be determined by the law of the *situs*, and accordingly in the present case a judicial opinion was obtained from the High Court of Justice in England, which, as we know, was adverse to the validity of the charitable bequests so far as consisting of or payable from the real estate in England. But the question whether the heir is put to his election is a question involving the construction and effect of the will as an expression of the mind of the testator, and is therefore a question for the Court of construction, the Court which has jurisdiction over the will in its entirety. This is a point which has perhaps only a theoretical interest, because, undoubtedly, the Courts of England and Scotland have professed to treat such questions on common principles, and in the Court of last resort the decisions of the English and Scottish Courts on questions of election have been cited indifferently in illustration of the principles which regulate this chapter of the law.

It is not necessary for the purposes of the case to define strictly the conditions of a case of election under a will, but I may say that a case of election will generally arise where a testator is professing to dispose of property over which he has only an imperfect power of disposition which can be made perfect by the assent of the legatee to the testamentary instrument. The case of a father disposing of the legitim fund, and the case of a proprietor disposing of his heritable estate on deathbed are illustrations. The assent of the child having a right to legitim in the first case, and of the heir in the second case, suffices to perfect the title of the disponee. In such cases the child or the heir

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if he claims a legacy, must in the language of our old decisions surrender his legal claims to the uses of the will. In the cases raising an election it is in general not necessary that the heir, or person having the adverse interest, should take any active step to set up the will; it is enough that he makes no adverse claim, in which case the trustees or executors may proceed to administer the estate, on the assumption that the testator's power of disposal is unchallenged. This much, at least, seems to be reasonably clear. In order to put a legatee to his election it must be in his power by waiving his objection to the will, or adverse claim, to perfect the right of the testamentary disponees. There is certainly no case in which a legatee who had not the power of perfecting the right of the disponees has been called on to give an equivalent benefit. Nor has any opinion to this effect been cited. Such an obligation could only arise under a provision of the will itself, as in the case of *res aliena scienter legata*, where the testator is held to have impliedly directed the purchase of the thing by his heir for the benefit of the special legatee.

Applying the principles to the present case we find in the opinion of the High Court of Justice, returned by Mr Justice Kay, that not only are the bequests to charities null and void so far as these are payable out of English freehold and leasehold estates, but in the words of the opinion of the learned Judge, even in the event of the heir-at-law, or the persons entitled to the testator's personal estate, consenting to waive his or their right thereto, the said freehold and leasehold estates would not, according to the law of England, fall to be distributed in the terms of the settlement, but would be treated as undisposed of.

It is pointed out in his Lordship's opinion that the heir may dispose of the estate in question by a proper deed, but that, if in favour of a charity, such deed or deeds should be enrolled in accordance with the provisions of the Statute 51 and 52 Vict. cap. 42. It therefore appears that the defender cannot, by any waiver of his claim or assent to the will, bring the will into operation as an appropriation of the English estates to charitable uses. He may give an equivalent sum out of his own means, or he may in his own right dispose of the estates to charitable uses; but in the latter case the validity of the new conveyance would depend on the conditions of the statute, and would be contingent on the heir's survivance for the period prescribed by the statute.

It is not within the defender's power to surrender the real estate in England to the uses of the will, and it follows, in my opinion, that the defender's rights to the legacies bequeathed to him is not conditional on his making such surrender. In other words, he is not bound to elect between his rights as heir and his rights under the will. I do not add more on this point, because I agree with all that is said by the Lord Ordinary regarding it, and adopt entirely his Lordship's interpretation of the decisions in which this subject is discussed.

The Lord Ordinary has left open the question of the liability of the real estate to contribute to the payment of debts and legacies. If the claim of the trustees under this head were confined to the subject of the right to charge a proportion of the debts and personal legacies on the real estate, we should be in a position to dispose of the question at present. But the trustees claim the right to charge a proportional part of the charitable bequests on the English estate, and it is evidently impossible to separate the two questions so as to give an effective decision applicable to the one class of testamentary charges while the other point is left open. Since this case came into the Inner-House a sum

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has been instituted in the Chancery Division of the Supreme Court in England for the purpose of ascertaining the rights of the heir-at-law and the trustees in relation to the English estate. If the administrative title of the trustees is sustained in relation to the real estate, it will then be for this Court to determine to what extent the English estate can be affected with payment of debts and legacies consistently with our recognition of the invalidity of the disposition of that estate in part to charitable uses. If the trustees do not succeed in establishing their administrative title a different question will arise, viz., the question whether the claim of the trustees to burden the English estate with debts and personal legacies can be made good by withholding payment of the pecuniary legacy payable to the defender. Nothing that we decide this day is intended to prejudice these claims. In the meantime I agree with Lord Kinnear that the case is not in shape for the decision of any question except the question of election which we are now considering, and I suggest that your Lordships should affirm the Lord Ordinary's interlocutor and sist procedure in the meantime, leaving it to the parties to move, when by the decision of the English suit, or from other causes, the difficulty I have referred to may be removed.

LORD KINNEAR.—I am of the same opinion, and I only wish to add one observation in reference to a point which was made in the argument for the reclaimers. Mr Murray made a criticism on what was said by me in my note to my judgment in the Outer-House as to Lord Brougham's opinion in the case of *Dundas*. I desire to say that that criticism was just, and that what I said in the note as to Lord Brougham's opinion was inaccurate. But I am still of opinion that the distinction between this case and the case of *Dundas* remains, and that the heir here is not put to his election.

LORD ADAM concurred, and intimated that the LORD PRESIDENT also concurred.

THE COURT adhered, and *quoad ultra* sisted proceedings.

DAVIDSON & SYME, W.S.—MORTON, SMART, & MACDONALD, W.S.—Agents.

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NIDDRIE AND BENHAR COAL COMPANY, LIMITED, AND ANOTHER, First Parties.—*Dickson—Salvesen.*
JOHN HURLL, Second Party.—*Clyde.*

Company—Division of profits—Rights of preference and ordinary shareholders.—The shares of a limited company were divided into A or preference, and B or ordinary shares, the former to rank prior to the latter on the profits of each year for a dividend at the rate of 10 per cent on the amount paid up, and the latter to rank on the balance of the profits of each year remaining after payment of the preferential dividend, also for a 10 per cent dividend. Any surplus was to belong to both classes of shares without any priority between them. It was also provided that "no deficiency in dividend in any year shall be made good out of the profits of future years."

For several years there was a loss on the revenue account resulting in a debit balance at 30th April 1889 of £7867. During the year ending 30th April 1890 net profits were earned to the amount of £6909, which sum was applied in reducing the debt previously incurred, and no dividends were declared. During next year, ending 30th April 1891, net profits were earned sufficient to wipe out the remainder of the debt, and leave a surplus for division, after paying a 10 per cent dividend to the A shareholders as for that year.

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In a special case between the A and B shareholders the former contended that they were entitled to have this surplus applied in payment to them of a 10 per cent dividend, as for the year ending 30th April 1890, in respect of the net profits of £6909 earned during that year.

Held that the A shareholders were not entitled to a dividend for the year ending 30th April 1890, Lord Adam and Lord M'Laren holding that the profits of that year had been properly applied in reducing the debt, Lord Kinnear holding that the A shareholders were barred from raising the question by the statement in the case that the sum of £6909 was not available for dividend in that year.

1st Division. M.

THE NIDDRIE AND BENHAR COAL COMPANY, LIMITED, was incorporated under the Companies Acts, 1862 to 1880, with a memorandum and articles of association. By the memorandum the capital of the company was declared to be £152,500, divided into 15,000 shares therein termed A or preference shares of £5 each, and 62,000 shares, therein termed B or ordinary shares, of £1, 5s. each, having the following rights and privileges, as set out in the memorandum of association, namely,—"The A shares shall rank prior to the B shares on the profits of each year for a dividend at the rate of 10 per cent per annum on the amount paid up thereon. The A shares shall also rank prior to the B shares on the capital of the company and its undertaking for the sums paid up on the said A shares. The B shares shall, for the purpose of calculating dividends from profits be credited with £3, 15s. per share as paid thereon, in addition to such part of the said £1, 5s. as may be paid up thereon at the time. The B shares shall rank on the balance of the profits of each year remaining after payment of the said preferential dividend on the A shares for a dividend of 10 per cent per annum, calculated after crediting each B share with £3, 15s. as aforesaid. Any surplus divisible profits which may remain after payment of the said dividends shall belong to both classes of shares without any priority between them—the B shares always receiving credit as above mentioned. No deficiency in dividend in any year shall be made good out of the profits of future years. . . ."

This special case was brought by the company and a B shareholder as the first party, and by an A shareholder as the second party, under the following circumstances:—"For some years prior to 30th April 1886, there was a loss on the ordinary revenue account of the company, resulting in a debit balance on that account as at that date of £12,065, 13s. 8d. This debit balance was, by the transactions of the subsequent year, reduced to £7867, 0s. 2d., at which figure it stood as at 30th April 1889, the 30th April being the date on which the annual accounts of the company are made up. During the year from 30th April 1889 to 30th April 1890 net profits were earned to the amount of £6909, 8s. 7d. This sum was not available for division and was not divided among the shareholders by way of dividend owing to the debit balance on the profit and loss account from previous years. Deducting this sum of £6909, 8s. 7d. from the debit balance with which the year ending 30th April 1890 commenced there was left a debit balance of £957, 11s. 7d. as at the close of the year on 30th April 1890.

"During the current year, commencing 1st May 1890, profits have been earned sufficient both to wipe out the said debit balance of £957, 11s. 7d. and leave a surplus available for division."

The question put was,—"Is the second party, as the holder of A shares, entitled to have the balance of the profits of the current year (after satisfying the 10 per cent dividend for the current year) applied, to the extent necessary for that purpose, in payment of a preference dividend on the A shares as for the year ending 30th April 1890? or Are the B share-

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holders entitled to have the said balance applied in payment of a dividend to them for the current year without deduction of such dividend to the A shareholders for the year ending 30th April 1890?"

The claims of parties were thus stated,—"Both parties admit that out of said surplus the A shareholders are entitled to a preferential dividend of 10 per cent as for the current year. They are, however, not agreed as to the disposal of the balance of the said surplus, after paying the said preference dividend. The second party, as a holder of A or preference shares, claims that he is entitled to have the said balance, to the extent necessary for that purpose, applied in payment of a 10 per cent dividend to said A shareholders as dividend for the year ending 30th April 1890, in respect that the profits for that year were not available for division, or were not actually divided and paid as dividend, owing to a debit balance on revenue account from previous years. He claims that, under the provisions of the memorandum of association, as between the two classes of shareholders, there is to be an annual accounting, and that the loss in a previous year is not to be wiped out by the profits of a succeeding year in such a way as ultimately to deprive the A shareholders of dividend for the year in which such profit was earned. The first parties, as for the B shareholders, claim on the other hand that they are entitled to have the said balance applied in paying dividend to them as for the current year. They contend that under the memorandum of association no deficiency in dividend in any year is to be made good out of the profits of future years; and that, as the profits earned during the year ending 30th April 1890 were *de facto* not available for division, there was a deficiency in the sense of the clause in the memorandum of association, and that such deficiency cannot be made good out of the profits of a future year."*

Argued for the first parties;—The provision in the memorandum that "no deficiency in dividend in any year shall be made good out of the profits of future years" was conclusive against the second party's claim. This was an attempt to go in the teeth of that clause. The fallacy lay in this, that according to the view of the second party there was no period at which profits would be available for the debts of the company. The case of *Dent*,[1] which was cited upon the other side, was unfavourably commented upon by Mr Buckley,[2] and could not be taken as an authority.

Argued for the second party;—The general rule was that preference shares carried cumulative dividends, and any restriction upon that rule fell to be strictly construed.[3] The "profits of each year" meant the gross earnings of the year, subject only to deduction for working expenses and depreciation for the same period.[1] Any expenditure relating to former years, or necessary to make good losses previously incurred, was not a

* The articles of association of the company provided, *inter alia*,—"121. No dividend shall be payable except out of the profits arising from the business of the company. 122. The board may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper, as a reserve fund to meet contingencies, or for equalising dividends, or for extraordinary repairs or objects; and also a sum to provide for the redemption of the capital of the company. . . . . 128. A balance-sheet shall be made out in every year and laid before the company in general meeting, and such balance-sheet shall contain a summary of the assets and liabilities of the company arranged under convenient heads."

[1] Dent v. London Tramways Company, 1880, 16 Chanc. Div. 344.

[2] Buckley on the Companies Acts (6th ed.) 516.

[3] Henry v. Great Northern Railway Company, Nov. 1857, 1 De Gex and Jones, 606, *præsertim* pp. 637-9; Webb v. Earle, 1875, L. R., 20 Eq. 556.

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proper deduction in estimating the "profits of each year." The A shareholders being entitled to "rank" on the "profits of each year," it followed that a "deficiency in dividend" occurred only when the net profits of the year were insufficient to pay the 10 per cent preferential dividend. It was not inconsistent with this view that the profits of any particular year might be devoted to provide against depreciation, or to extinguish an old debit balance, the right of the preference shareholder having attached simultaneously with the appearance of a net profit balance in the accounts of the year, and entitling him to recover his dividend out of the profits of subsequent years. To hold otherwise would be to enable a majority of ordinary shareholders to defeat the A shareholders' preference.[1] It was said that Mr Buckley had commented unfavourably upon the case of *Dent*,[2] but his comments were confined to a criticism on the question of the payment of dividend out of capital, which did not arise here.

At advising,—

LORD ADAM.—The question raised in this special case is one between A and B shareholders of the Niddrie and Benhar Coal Company, as to the disposal of the profits earned, or which will be earned, during the year now current ending on 30th April 1891.

The facts which raise the question are set forth in the special case, and the question put just comes to this—Whether the A shareholders are entitled to have the profits of this year applied in payment of a dividend for the previous year. That is the contention shortly stated on the part of the A shareholders.

The first article of the memorandum of association which bears upon the matter is the one first in order—The A shares shall rank prior to the B shares on the profits of each year (ending on 30th April) for a dividend at the rate of 10 per cent per annum on the amount of the paid-up capital. That is the right of the A shares. The answer to the first part of the question depends upon this, whether there were any profits available for dividend for the year ending 30th April 189. That leads one to consider, What are profits properly so called? and on that matter I quite agree with Mr Buckley's definition, which is, that profits are the excess of the ordinary receipts over the expenses properly chargeable to revenue account. I also agree with him when he says that when a loss on the revenue account has been sustained, there is, of course, no profit until that loss has been made good either by set-off of previous undivided profits still in hand, or by profits subsequently earned. Now, that is the case we are dealing with here. We are dealing with a case of proper revenue account—with a proper revenue account shewing a debit balance of £957, 11s. 7d. at the end of last year—and accordingly on a proper statement of accounts it is clear that there was no profit earned by the company last year at all—I mean profit available for dividend; and if that was so, then it is clear that the A shareholders were not entitled to dividend last year at all. Now, if that be so, they cannot be entitled to have a share of the current year's earnings applied to a dividend which never was earned. The statement in the case makes that very clear, because during the year from 30th April 1889 to 30th April 1890 net profits were earned amounting to £6909, 8s

[1] Henry v. The Great Northern Railway Co., Nov. 1857, 1 De Gex and Jones, 606, Lord Chancellor Cranworth, pp. 637, 639; Crawford v. The North-Eastern Railway, 1856, 3 Kay and Johnston, 723.

[2] Dent v. London Tramways Co., 1880, L. R., 16 Chanc. Div. 344.

7d.; but although that is called net profit, according to the definition which I have read net profit only arises on the debit balance on the revenue account being made good, so that the sum in question cannot properly be called profit, for the whole of these so called profits were applied towards the extinction of a debit balance amounting to £7867, 0s. 2d. Therefore upon that ground I think that the only answer that can be given to the question is that the A shareholders are not entitled to have any part of the profits of the current year applied to payment of a dividend which was not earned last year. The clause in the memorandum says that the A shares shall rank prior to the B shares on the profits of each year. That is their whole right. And the fourth article distinctly says that no deficiency of dividend in any year shall be made good out of the profits of future years. I cannot see how, in the face of articles in these terms, it can be said that the dividend which amounted to nil in 1890 is to be made good out of the profits of the current year.

We were referred, as dealing with this question, to the case of *Henry* v. *The Great Northern Railway Company*. What was decided in that case was this—where a company having power so to do, issued preference capital carrying a dividend of 10 per cent per annum payable half-yearly, and with no words to restrict the preference shareholders to the profits of the current year, it was held that if the profits in any one year were insufficient to pay 10 per cent in full, the deficiency was, as between the preference and ordinary shareholders, to be made good out of the subsequent profits. Now, that shews that we have in the present case exactly what was desiderated in the case of *Henry*, because we have in the memorandum and articles of association words restricting the preference shareholders to the profits of the current year. Therefore I think the case of *Henry* has really no bearing upon this question.

I am quite aware that the conduct of the affairs of a company having articles such as are contained in this memorandum of association may be liable to abuse, because it is obvious enough—as was pressed upon us—that the directors by manipulating the accounts might by carrying large sums from profits to a reserve fund, or in other ways, at the expense of the A shareholders benefit the B shareholders. That is quite true, but if any attempt of that sort was made I have no doubt the Court would find a remedy.

I am therefore of opinion that the proper disposal of the surplus which the company has earned is, first, to extinguish the debt of £957, 11s. 7d.—although that question is not before us—and in the next place, that the A shareholders are entitled to 10 per cent, and after that that the B shareholders are entitled to have the balance applied in payment of dividend to them, the remainder, if there is any, to belong to both. I therefore think that we ought to answer the first part of the question in the negative, or, in other words, the second part in the affirmative.

LORD M'LAREN.—I concur. It was contended by one of the parties that profit means merely the result of the operations of the financial year,—the difference between the income and the expenditure of that year. I think that that is an incomplete definition, and is neither consistent with the law nor with sound commercial accounting. Profit and loss in my view represent the aggregate of all the commercial transactions of the company from the time when it commenced business, and the way in which it is reached is by bringing into the account of any year the balance of profit or loss resulting from the close of the previous

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year's transactions; and when that principle is applied it is plain enough in this case that the supposed profit has no real existence, because it is only obtained by leaving out of account the loss which falls to be extinguished, and which was at the debit at the commencement of the year's account.

LORD KINNEAR.—I have come to the same conclusion. The A shareholders are to have a preference over the profits of each year. Now, the word "profits" no doubt may have various meanings, but I agree with your Lordship in the chair that the word must be taken to mean here the excess of the receipts in any year over the expenditure which has been incurred in order to earn those receipts. Now, the preference shareholders having that right over the profits, there is a further stipulation in the contract that no deficiency in dividend in any year shall be made good out of the profits of future years; and that of course must mean that if the profit in the sense in which your Lordship has defined it in any one year is insufficient to pay any dividend, or to pay the full dividend to which the preference shareholders are entitled, they must submit to the failure, and cannot make good the deficiency of that year out of the larger profit of any subsequent year. So far there does not seem to be very much difficulty in considering the matter.

But then these definitions do not solve the practical question which is raised in this case, and which may be one of difficulty, because it must always be a question in the conduct of the business of the company what is the expenditure which is to be deducted in order to ascertain the excess of earnings over the expense of realising them. If the company has sustained losses, there may be a question for the members or administrators of the company to consider whether such losses are payable out of current receipts, or whether they are not so payable; and I presume that in the ordinary case that is a question which would be determined by a majority of the members of the company—by a majority of the partners if it was an ordinary firm, and by a majority of members if it was a company of this kind, unless there was any provision in the contract which would over-ride the judgment of the majority. It appears to me that it might be a question in the absence of such provision in the contract whether the excess of earnings in any year might not be divided as profits although some portion of the capital might have been lost. That might possibly be; there is no rule of law, so far as I know, which would prevent a copartnery so treating their account. But then the difficulty arises where according to the constitution of the company the shareholders are divided into two classes having adverse interests; and in such a case it would be impossible to hold that the shareholders having a preference, or being subject to postponement as the case might be, were necessarily to be bound by the judgment of the whole shareholders having a different interest from theirs merely because the one body was larger than the other. It therefore appears to me that the question which is raised in the statement of fact which is put before us might be one of some delicacy.

It is said that there had been a loss upon the ordinary revenue account of the company, resulting in a debit balance at 30th April 1886 and that it so remained until 30th April 1889, and that during that year profits had been made to the amount of £6909, 8s. 7d., and that these net profits were applied by the company in wiping out the debit balance on the profit and loss account of previous years. Now, I must say that if I were required to determine whether

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that was a proper mode of treating the account or not, I would require some further information. But then I do not think that is a question which is raised for our determination at all, not only because there is nothing set forth in the special case to challenge the method in which the accounts were stated, but because upon the face of the special case the parties are agreed that that was a proper mode of treating the account. When parties are agreed to present a special case to the Court, and ask for their opinion and judgment upon any questions arising out of it, then they are bound by the judicial contract between them; all the statements of facts, or statements of mixed law and fact, which the special case contains are conclusive and binding, and not only so, but are exhaustive of all the facts which are necessary to enable the Court to give judgment upon the questions arising. Now, that being so, I take it that the parties are agreed that in consequence of the existence of this debit balance there was no sum available for division among the shareholders by way of dividend. If that mode of dealing with the account were right, then of course there was no profit which could be allocated to the preference shareholders; if it were wrong, then it follows equally of course that the dividend which ought to have been paid to the preference shareholders was wrongly applied in wiping out the debit upon the account. Therefore it appears to me that when the second party in this case claims to have a dividend which might have been payable to him in that year made good out of the larger profits of the subsequent year, he is merely in a position to maintain that he is entitled to recover from the company —that is, from the other shareholders—moneys which have been improperly applied. That is the meaning—and the only meaning—which can be put upon the argument which was addressed to us in support of the special case. If the thing was rightly done, there was no dividend; if it was wrongly done, then money was improperly applied which ought to have gone to preference shareholders; and when the question is put in that way, it becomes quite obvious that the second party cannot maintain that position, because it is a statement of fact upon which he has agreed, and which is binding upon him and upon the other party, that there was no money available for division in the year in which this sum of £6909, 8s. 7d. was applied to wipe out the debit balance. Therefore it appears to me to be quite clear upon the statements in the case that there was a deficiency of dividend in the sense of the memorandum of association in that year which he is not entitled to have made good out of the profits of the present year.

The LORD PRESIDENT was absent.

THE COURT answered the first branch of the question in the negative and the second in the affirmative.

DRUMMOND & REID, S.S.C.—STUART & STUART, W.S—Agents.

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ANGUS MACLEOD, Pursuer (Reclaimer).—*Asher—Johnston.*
THOMAS A. MARSHALL, Defender (Respondent).—*Murray—M'Clure.*
JOHN S. WYLIE AND OTHERS, Defenders (Respondents).—*D.-F. Balfour—Dickson.*

Reparation—Slander—Issue—Justification.—In an action of damages for slander in respect that the defender had, as was alleged, called the pursuer "a

* Decided Feb. 27, 1891.

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swindler and a thief," "a questionable character," and a person whose "presence was an offence to all honourable men," the defender admitted having said that the pursuer's conduct "was little removed from thieving," but stated in justification that the pursuer and other persons had purchased certain concessions entitling them to work copper mines at Val d'Elsa, Italy, and that the pursuer though knowing that the prospects of return therefrom were extremely discouraging, had "made false and fraudulent representations to the defender regarding a proposed joint stock company to be formed to take over certain mineral concessions in the Val d'Elsa, Italy, by representing the mines to be of great value, which, in point of fact, he knew they were not, and thus induced the defender to contribute to the capital of the Val d'Elsa Copper Company, in the promotion of which the pursuer was pecuniarily interested as vendor"; that the pursuer further stated that the run by the public upon the shares had been so great that it would be necessary for the defender to take more shares in order to make sure of an allotment, and in reliance upon the truthfulness and accuracy of this, along with the other representations of the pursuer, the defender was induced to take additional shares, while the fact was that only about 25,000 of the 60,000 shares offered to the public were applied for; that the pursuer as vendor was dependent for the carrying out of the sale on a sufficient number of shares being applied for.

The Court (*diss.* Lord Young) allowed the defender issues in justification.

2D DIVISION. Ld. Kyllachy. M.

ANGUS MACLEOD, merchant, Glasgow, and residing at Dullatur, near Glasgow, raised an action of damages for alleged slander against Thomas A. Marshall, John S. Wylie, John Wylie, and James A. Wylie, all residing at Dullatur.

The pursuer averred that when he was in the grounds of the Dullatur Tennis Club on 17th May 1890 the defender Marshall who, as well as the other defenders, had for many months cherished feelings of the deepest enmity towards him, and had conspired with them to blacken his character, asked him if he was a member of the club, adding "This is no place for questionable characters as you"; further, that on the same day and at the same place the defender Marshall called him a "swindler," "liar," a "thief," and other calumnious names; further, that the whole of the defenders, as part of a concerted effort to hold the pursuer up to obloquy and to ruin his character, had concocted a joint letter, dated 20th May 1890, to the secretary of the Dullatur Tennis Club, to this effect,—"Dear Sir,—You are aware that for good reasons Mr Angus Macleod's presence at any general gathering of the inhabitants of Dullatur must be irksome to many of those present. We would therefore request that you, as secretary of the Dullatur Tennis Club, will take such measures as will prevent his being a second time introduced to the courts. . . . Your personal opinion, frequently strongly expressed, of Mr Macleod's doings and character, will, we feel sure, make you desirous to do what is necessary to secure all the members of the club in the enjoyment of their rights, without their being subjected to Mr Macleod's presence in the courts."

The defender Marshall admitted that he had endeavoured to induce the pursuer to leave the tennis ground on 17th May, "because the pursuer was, and knew himself to be, personally objectionable to the defender and other members of the club. The pursuer, however, did not withdraw, and defender then stated as the ground of his request that the pursuer had taken advantage of his former intimacy with the defender to feather his own nest at defender's expense; that he had made false statements to the defender with regard to the Val D'Elsa Copper Company (in which pursuer was interested as a promoter and vendor), to induce the defender to subscribe to the capital of said company; that his conduct was little removed from thieving; and that in the circumstances his intrusion into said tennis club grounds was cowardly. Explained and averred that the

remarks of the defender were made to, and in the hearing of, the pursuer alone." No. 152.

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The defender Marshall further stated;—(Stat. 1) "About the beginning of the year 1886, the pursuer, along with" certain other persons, "purchased certain concessions entitling them to work some copper deposits in the Elsa Valley in Italy. The vendor was an Italian named Salvatori Tedeschi, who had worked the said deposits prior to the year 1884 without success, and the price he received for his rights was £500, paid immediately, with a further contingent payment of £1500. The contingency upon which the latter sum was payable was that the pursuer and the" said other persons "should be successful in promoting a company to take over the concessions from them." (Stat. 2) "After the date of said purchase, the pursuer and the" said other persons "took steps with the object of floating a company to take over said concessions, and as preliminary thereto, they initiated certain works of exploration upon a limited scale, at the mines, and sought the opinion of mining experts as to the value of the property. The returns of copper, however, obtained from the mines were extremely discouraging, and with the exception of the report of Mr Robert Strathern, there was none of the reports that suggested confidence in the concern as a possible commercial success. But, further, the said report of Strathern, which was subsequently quoted in the prospectus of the Val D'Elsa Copper Company, was an exaggerated, incorrect, and entirely misleading report, and was known to the pursuer at the time to be so; the report of Captain . . . also quoted in the prospectus, was exaggerated and untrue, and was concocted by the said Captain . . . with the active assistance of the pursuer; while prior to the visit of Messrs Taylor's representative to the mines, instructions were given, with the pursuer's authority, that copper should be left in the mine in places easily accessible, with the object that a fictitious appearance of value might be given to a worthless property, and a more favourable report obtained. Prior to the issue of the said prospectus, and to the pursuer's false statements to the defender after mentioned, the pursuer had no reason to believe, and did not in fact believe, that the subjects of the said concessions formed a valuable mineral property." (Stat. 3) "During the summer of 1887 the pursuer, who had been acquainted with the defender for about two years, and travelled almost daily with him from Dullatur to Glasgow, had frequent conversations with the defender as to the exceptionally favourable opportunities for investment afforded by copper mine securities, and he informed the defender that he possessed very special advantages in respect of information with reference to such securities, owing to his having friends in the London market. About the month of October following, the pursuer approached the defender with the information, which he professed to give to the defender confidentially, and from motives of friendship, that a company was going to be formed to work certain Italian copper lodes of a most valuable character in the Val d'Elsa, that only the earliest applicants would have a chance of allotment, and that the shares on allotment would be at 20s. premium. The pursuer did not then tell the defender, nor was the defender aware, that the pursuer was interested in the Val d'Elsa mines, and in reliance upon the business knowledge, friendly professions, and the truthfulness of the pursuer's statements of the value of said copper, the defender was induced to give him the sum of £50 to secure on his behalf an interest in the concern, although the prospectus was not yet issued." (Stat. 4) "After some delay, in the month of January 1888 the pursuer shewed the defender a prospectus of the Val d'Elsa Copper Company, which he said was the company he had referred to in the previous October. In said prospectus (which is referred to, and which is founded upon the

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reports of Strathern, Vivian, and Taylor & Sons foresaid), the Val d'Elsa mines were represented as a most valuable property, and the pursuer at that meeting assured the defender that not only had the promoters taken care not to exaggerate the value of the claim in said prospectus, but that he could vouch from personal inspection to its great value. These statements with reference to the value of said mines, as well as those to the same effect made in October preceding, were to the knowledge of the pursuer false. The pursuer and the" said other persons " were, as vendors of the concessions to the Val d'Elsa Company, to receive from the company the sum of £35,000, and the object of the pursuer, it is believed and averred, in making the false statements set forth, was that said company should be successfully floated, and he subsequently should become entitled to his share of said £35,000." (Stat. 5) "On 31st January 1888, the pursuer further stated that the run by the public upon the shares had been so great that it would be necessary for the defender to take more shares in order to make sure of an allotment, and in reliance upon the truthfulness and accuracy of this, along with the other representations of the pursuer, the defender was induced to give a further sum of £6, 5s. to the pursuer in consideration of the deposit upon 25 additional shares of said company. So far from the allegation of the pursuer as to the number of applications being true, it is the fact that only about 25,000 of the 60,000 shares offered to the public were applied for, and the pursuer and other promoters, that is to say, the vendors, consequently applied for 15,000 additional shares in order that the company might proceed to an allotment, when they would become entitled to said sum of £35,000." (Stat. 6) " In consideration of said £35,000 in money and shares, the shareholders obtained a right to the concessions mentioned in said prospectus. The said concessions were known to the pursuer to be at the time of no commercial value, and that there was nothing in the actual condition of the mine which could warrant the description given of it in said prospectus. The representations of the pursuer to the defender inducing his contribution to said company were false; and further, they were made with the fraudulent purpose of securing personal pecuniary gain to the pursuer at the expense of the defender, who, but for said false statements, would not have subscribed to said company. The pursuer made a large sum out of the promotion of said company, while the defender lost the amount of his subscription as above set forth; the mine having turned out to be of no value, and in the circumstances, the defender was justified in making to the pursuer the statements he made."

The pursuer explained that the directors had proceeded on the reports of competent engineers employed by themselves, and *quoad ultra* denied the defenders' averments.

The pursuer pleaded, *inter alia*;—(1) The defenders having engaged in a concerted assault upon the pursuer's character, and having falsely, calumniously, and maliciously slandered the pursuer, as libelled, are jointly and severally liable to the pursuer in damages as concluded for.

The defender Marshall pleaded, *inter alia*;—(1) The defender not having slandered the pursuer should be assoilzied. (2) The statements made by the defender to the pursuer as set forth in the defender's answers are in substance true, and in the circumstances were justified.

The defenders John S. Wylie and others pleaded;—(3) These defenders not having slandered the pursuer as alleged, they should be assoilzied.

The Lord Ordinary (Kyllachy), on 6th January 1891, approved of issues for the pursuer, and of a counter issue for the defender Marshall.

The pursuer reclaimed. After argument the defender Marshall proposed the following amended counter issues:—(1) Whether the pursuer, in or about October 1887 and January 1888, made false and fraudulent repre-

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sentations to the defender regarding a proposed joint stock company to be formed to take over certain mineral concessions in the Val d'Elsa, Italy, by representing the mines to be of great value, which, in point of fact, he knew they were not, and thus induced the defender to contribute to the capital of the Val d'Elsa Copper Company, in the promotion of which the pursuer was pecuniarily interested as vendor? (2) Whether the pursuer, in or about January 1888, falsely and fraudulently represented to the defender that the applications for shares in the said proposed company were so numerous that, in order to be sure of an allotment, it would be necessary for the defender to apply for a greater number of shares, the fact being, as the pursuer well knew, that the shares had not been applied for to nearly the full extent; and whether the pursuer thereby induced the defender to make an additional application for shares in the said company, the pursuer, as vendor, being dependent for the carrying out of the sale on sufficient shares being applied for to allow the company to proceed to allotment?"

At advising,—

LORD JUSTICE-CLERK.—The question before us in this case is, whether two counter issues, which have been lodged by the defender Marshall, are to be allowed or not. The case relates to alleged slanders uttered by the defender against the pursuer, in which he was called a number of very strong names, and point was given to these epithets which were used against him by allegations in reference to his conduct regarding a company which he was promoting, and which, it is alleged, that he, knowing it to be not in a good condition, represented to the defender Marshall to be a company in which it was advisable he should take shares, and represented to him that unless he made application for a very large quantity of shares he would not get an allotment, because the run upon them was so great. Now, it is quite plain that such allegations as form the basis of these counter issues may, in certain circumstances, amount to nothing more than a statement, that the pursuer having something in which he was interested, and which it was his desire to puff and make the most of, spoke in very high terms of it, just as in trade a tea-merchant maintains that his is the best tea, or in amusements a theatre manager announces the enormous success of his pantomime, and so on. But, looking to the averments upon this record, I have come to the conclusion that we must allow the counter issues. However, I think in this case it is a question for the jury whether the representations made, upon which the defender Marshall founds as justifying the alleged slanders, were made, as he alleges, falsely and fraudulently for a personal purpose, to gain advantage to the pursuer, he well knowing the real facts to be to the contrary of what he was stating to this defender, and therefore falsely and fraudulently making a representation, and inducing this defender to act on that representation. I understand that those words, "as the pursuer well knew," have been put into the second issue. That was agreed to at the bar, and it must be done. I think it is a question for the jury in this case, whether that representation so made was a false and fraudulent representation made for the purpose alleged, viz., of benefiting the pursuer, his interest being to secure that a certain number of shares should be applied for, otherwise certain advantages which would accrue to him in the formation of this company would not accrue. Upon the whole matter, I have come to the conclusion that the case must be sent to a jury.

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LORD YOUNG.—I understand that all of your Lordships are of the opinion which has now been expressed. I am of a different opinion, but as the case must go to trial in consequence of the finding of the majority of the Court, I think, perhaps, the less I say the better. My own opinion is, that there are no averments upon this record to justify the slander which is the ground of the action, and that therefore they will not support an issue of *veritas*—I mean, support an issue of justification. I am very far from saying that the averments respecting the pursuer's conduct are irrelevant. I think they may go to mitigate any offence which he may have committed, and the facts established within these averments at the trial may be such as to induce and warrant the jury to return a verdict for a merely nominal sum of damages. We are certainly all familiar with the fact that where a slander is mitigated down to that point a jury not unfrequently find a verdict for the defender, and that there is no slander at all. Unfortunately, the matter of pleading—I mean of records in actions of damages for libel and slander—has always in my time been in a very unsatisfactory, because unsettled, condition; and the law at this moment is not very distinct as to what may or may not be averred in defence, with or without counter issues, in such a case. But I think the law is, and it has ever been my opinion, upon the best consideration of the matter in principle and upon the authorities, that to justify a libel or slander there must be a distinct substantive averment of a fact or facts which, if proved, will justify it, not in the opinion of the jury, but in the opinion of a Court of law. Now, I find no such distinct substantive averment of a matter of fact to be proved upon this record which will justify the slander which is alleged. Upon that ground, my opinion is against allowing a counter issue. I think the slander alleged is not upon the record justified by the averment of any fact which we can put in issue. I am therefore individually against the view in which your Lordship, and I understand the others of my brethren, are for allowing an issue in justification here.

LORD RUTHERFURD CLARK.—I agree with your Lordship in the chair.

LORD TRAYNER.—I think the defender Marshall has made averments relevant, and if proved, sufficient, to justify the slander of which the pursuer complains. He has given the pursuer not only fair, but, as it seems to me, sufficiently specific notice of what he intends to prove. I therefore agree in the view that the counter issues proposed by the defender should be allowed.

LORD JUSTICE-CLERK.—I should like to add that I entirely concur in Lord Young's view, that it is for the Court to judge whether the words will justify the slander alleged. What I meant by referring to the jury was, that the words while justifying the slander, if said in a certain sense, may be held by the jury not to have been said in that sense at all. The Judge sitting at the trial would not allow the case to go to the jury unless the words would justify the slander, if the jury took the view that they were expressed in that certain sense. I quite agree in the view that it is for the Court to judge whether they will justify or not.

THE COURT approved of the pursuer's issues and of the amended counter issues.

SMITH & MASON, S.S.C.—J. & J. ROSS, W.S.—Agents.

MARY ROONEY OR M'GENNIS, Pursuer.—*A. S. D. Thomson.*
JAMES ROONEY AND ANOTHER, Defenders.—*Sym.*

No. 153.
Mar. 20, 1891.
M'Gennis v. Rooney.

Jurisdiction—Trust—Forum non conveniens.—In an action by a legatee against two trustees who had taken out confirmation in Scotland under a Scotch trust-deed, the trustees pleaded no jurisdiction in respect that they were not resident in Scotland, and that the whole estate had been distributed twelve years before.

The Lord Ordinary (Kyllachy) *repelled* the plea, holding that the jurisdiction once constituted against them by their obtaining confirmation, and acting as trustees under a Scottish trust, remained unaffected.

OUTER-HOUSE Ld. Kyllachy.

MARY ROONEY OR M'GENNIS, residing in Ireland, raised an action against Patrick Rooney designed as "now believed to be resident in Nebraska, or elsewhere furth of Scotland," and James Rooney, farmer in County Down, as sole accepting trustees and executors of William Rooney, merchant, Stranraer, for count and reckoning of their intromissions with his estate, and for payment of £600, as the balance said to be due to her as one of the residuary legatees under his settlement.

The defenders pleaded, *inter alia*;—(1) No jurisdiction; (2) *forum non conveniens.*

It was admitted that William Rooney died on 21st August 1878, and that he left a settlement, dated 8th August 1878, by which he appointed the defenders and the Rev. John Canning, Stranraer, to be his trustees and executors.

The pursuer averred that the defenders alone accepted and acted. The defenders stated that Mr Canning, who left Stranraer and went to America in 1878, had also accepted office.

By his settlement the testator disposed specially of certain real property in Ireland, and conveyed his whole means and estate to his trustees for payment of certain legacies, and for division of the residue equally among his brothers and sisters, including the pursuer.

The pursuer averred that in addition to the moveable estate of which the trustees gave up an inventory, the deceased had deposit-receipts to a large amount, which immediately prior to his death he had endorsed and delivered to one of the defenders, James Rooney, explaining to him that this was done only for the purpose of evading Government duty, and that the money was to be divided among the testator's brothers and sisters as directed in the settlement; that the money had been uplifted and not accounted for; and that the share of residue still due to her amounted to £600. "The pursuer has been advised by Irish counsel, and she avers, that by the law of Ireland this action would not lie against the defender James Rooney, as trustee and executor foresaid, in the Irish Courts, it being a Scotch trust and executry. From the fact of the other trustee being domiciled in America, the pursuer has had no alternative but to sue the trustees in the Scotch Court."

The defenders stated that the purposes of the settlement with regard to the estate other than the real property in Ireland were "to pay certain legacies to the testator's brothers and nephews, all of whom resided in Ireland, or in America, and to divide the residue among his said brothers and his sister, Mrs M'Ranor, who resided in Massachussets, and the pursuer, who resides in County Down, Ireland. For these purposes the trustees and executors were to sell and realise his estates as soon as convenient, within twelve months after the testator's death, and to pay the legacies at the first term of Whitsunday or Martinmas thereafter. The trustees, in obedience to these directions, shortly after the testator's death in 1878, realised the estate and removed the funds out of this country

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and divided them among the beneficiaries. There are no funds of the estate in Scotland, and neither of the defenders called is subject to the jurisdiction of the Courts of Scotland. They had no connection with Scotland, except that twelve years ago they wound up and distributed the estate of their said brother, who died in Scotland."

The argument appears from the opinion of the Lord Ordinary.

The defenders cited the authorities noted below.[1]

The Lord Ordinary (Kyllachy), on 20th March 1891, repelled the defenders' pleas against the jurisdiction of the Court, and allowed a proof.*

WM. OFFICER, S.S.C.—P. ADAIR, S.S.C.—Agents.

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[1] Ferguson v. Douglas, Heron, & Co., Nov. 11, 1796, 3 Pat. Ap. 503; Gillon & Co. v. Dunlop & Collett, Feb. 27, 1864, 2 Macph. 776, 36 Scot. Jur. 388. Kennedy v. Kennedy's Trustees, Dec. 9, 1884, 12 R. 275; Halliday's Executor v. Halliday's Executors, Dec. 17, 1886, 14 R. 251; Orr Ewing's Trustees v. Orr Ewing, July 24, 1885, 13 R. (H. L.) 1; Robertson's Trustees v. Nicholson, July 13, 1888, 15 R. 914; Neilson v. Wilson, March 12, 1890, 17 R. 608.

* "OPINION.—In this case the pursuer is a beneficiary under the trust-disposition and settlement of the late William Rooney, merchant in Stranraer, who died in the year 1878, possessed of considerable heritable property in Stranraer, and also of a considerable moveable estate. The defenders are the trustees of the deceased, one of them residing in Ireland and the other in Nebraska, in the United States of America; and the action is one of count and reckoning, brought on the allegation that the trustees failed to recover and distribute among the beneficiaries certain sums of money belonging to the deceased, and deposited in bank at Stranraer, but transferred to the name of one of the trustees a few days before the truster's death.

"The defenders in the first place plead no jurisdiction, and they point out that they are both resident furth of Scotland, that they have now no connection with Scotland, and that it is not alleged that the trust-estate or any part of it is now situated within Scotland.

"It may be explained that both the defenders are designed in the trust-deed as residing in places furth of Scotland. A third trustee, the Rev. John Canning, is designed as residing in Stranraer, but the pursuer alleges that he did not accept the trust, and at all events it appears that he went to America shortly after the trust was constituted. The trustees appear to have made up a title to the heritable property, and to have sold it and divided the proceeds. With regard to the moveable estate they gave up an inventory in 1882, and an additional inventory in 1885, containing the deposit-receipts now in question. The trust-settlement and the two inventories have been produced. The beneficiaries under the trust appear to be all resident either in Ireland or America.

"The question of jurisdiction thus arises in a form in which, so far I can discover, it has not hitherto arisen. In all the previous cases where the Court has sustained its jurisdiction in similar circumstances some one at least of the trustees has been resident in Scotland, and there has also, I think, always been trust-estate extant in Scotland. Here there was a trust-estate in Scotland, and according to the defenders (who are borne out by the terms of the first inventory) there was at one time a trustee resident in Scotland, but now, as I have already said, the pursuer does not allege that there is any trust-estate remaining in Scotland, nor that any of the trustees are domiciled or reside there.

"I have, in these circumstances, felt some difficulty, the more especially as it is somewhat difficult to discover from the authorities how far the rules on the subject depend on consideration of principle, and how far on considerations of convenience. On the whole, however, I have come to the conclusion that there is enough to support the jurisdiction of the Scotch Courts.

"It is certain that the truster was domiciled in Scotland, that the trust was constituted in Scotland, and that the trustees obtained a title to Scotch moveables and Scotch heritage for the purpose of executing the trust. Moreover, the trust fell to be executed in Scotland, at least in this sense, that the duty of

SUMMER SESSION.

No. 154.

May 13, 1891.

Bracken v. Blasquez.

ELIZABETH BRACKEN, Pursuer (Respondent).—*Gunn.*
RAYMOND BLASQUEZ, Defender (Appellant).—*John Wilson.*

Process—Sisting of Mandatary—Foreign—Defender.—The defender in an action for payment of the aliment of an illegitimate child of which he was alleged to be the father went to Spain, and the Sheriff thereupon ordered him to sist a mandatary. The case having been appealed to the Court of Session, the defender returned to this country and undertook to remain in Scotland until the issue of the action. The Court thereupon recalled the order to sist a mandatary.

Prescription—Triennial Limitation—Claim for aliment of illegitimate child.—A person who was entrusted with the charge of an illegitimate child by the alleged father, sued him for payment of an account for aliment extending over six years—averring a verbal undertaking by him to repay whatever sums might be expended on the aliment and maintenance of the child. It was not alleged that the terms of payment or the amount of the aliment had been fixed, but the account produced charged £4 for each quarter's aliment. *Held* that as there was no averment of an agreement to make termly payments of aliment the account was to be regarded as a continuous account, and that as three years had not elapsed since the date of the last item, the triennial prescription did not apply.

1st Division. Sheriff of Midlothian. C.

MARGARET ANN BRACKEN gave birth to an illegitimate child in June 1883, of which Raymond Blasquez, designed as living at 3 Frederick Street, Edinburgh, was alleged to be the father.

Elizabeth Bracken, Margaret Ann Bracken's aunt, brought an action in the Sheriff Court of Midlothian against Blasquez for payment of an account for the aliment and maintenance of the child.

She averred:—(Cond. 10) "In or about the month of October 1884 the defender, through the said Margaret Ann Bracken, agreed with the pursuer that she should take charge of the said child, and undertook to repay her whatever sums she might expend on his aliment and maintenance. With the exception of about a month in the spring of 1885, when the child was taken away by the said Margaret Ann Bracken, and lived with her and the defender, the said child has been maintained by the pursuer ever since. The pursuer produces herewith, and specially refers to an account shewing the details of the expenditure made by her for said child, and

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realisation fell to be performed in Scotland, as did also the duty of distribution, unless the trustees took the unusual course of carrying away the funds, and personally distributing them among the beneficiaries. In these circumstances, the trustees were certainly at one time subject to the jurisdiction of the Scotch Courts. That is to say, if the present action had been brought while the estate or part of it was still unrealised, I do not suppose there could have been any doubt as to the jurisdiction. But if the defenders, though foreigners, were originally responsible to the Scotch Courts for the performance of the trust, it is somewhat difficult to see why they should be able to shake off that responsibility by carrying away the trust-funds and appropriating a part thereof to themselves, which is in substance the charge here made by the pursuer. I am of opinion on the whole that the jurisdiction being once constituted remains, and I think this case illustrates well the hardship and inconvenience of any other rule. If the defenders cannot be sued here, they cannot be sued together, so far as I see, anywhere. One is in Ireland, another in Nebraska, and yet their liability to account is a joint and indivisible liability, and to sue them separately would be therefore impossible.

"I propose therefore to sustain the jurisdiction, and to allow a proof."

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amounting with interest, as at 1st April 1890, to the sum of £104, 13s." (Cond. 11) "The pursuer has repeatedly requested payment from the defender of the sums expended by her in alimenting and maintaining said child, but he refuses or delays to make payment, and also to make any arrangement for repaying the sums to be expended by the pursuer for the future maintenance of said child."

The account as rendered amounted to £104, 13s., being £92 of principal and £12, 13s. of interest, and was apportioned into sums of £4 for each quarter's aliment, from October 1884 to April 1890.

The defender pleaded, *inter alia*;—(3) Prescription. Pursuer's claim is prescribed, so far as regards the items on and prior to 1st April 1887.

On 19th December 1890 the Sheriff-substitute (Hamilton) in view of the fact that the defender had left this country and was resident in Spain, ordained him to sist a mandatary.

On 30th January following the Sheriff-substitute, in respect of the defender's failure to obtemper the order contained in the previous interlocutor, gave decree against him.

The defender appealed to the Court of Session, and his counsel stated that he had now returned to Edinburgh, and would remain in this country until the issue of the action.

Argued for the defender;—(1) Looking to the undertaking he was now willing to give, the Sheriff-substitute's order upon him to sist a mandatary ought to be recalled. (2) The triennial prescription applied to such quarterly payments of aliment as were alleged to be due prior to April 1, 1887, three years before the account was rendered.[1]

The respondent argued that the circumstances were not such as to warrant the Court in recalling the Sheriff-substitute's order upon the defender to sist a mandatary, and the decree ought therefore to stand.

The Court did not call upon the respondent to argue the question relating to prescription.

LORD PRESIDENT.—I think we are in a position to dispose of this appeal. As regards the order of the Sheriff-substitute ordaining the defender to sist a mandatary, that is obviated by the return of the defender to this country, and by his expressed intention to remain here until this action is disposed of.

The only other question which has been argued to this Court has reference to the plea of prescription which has been stated on record. It is a question of some importance, whether that plea is applicable to such a contract as is averred in the 10th article of the condescendence. It is there stated that (cond. 10) "In or about the month of October 1884 the defender, through the said Margaret Ann Bracken, agreed with the pursuer that she should take charge of the said child, and undertook to repay her whatever sums she might expend on his aliment and maintenance." No rate of aliment is mentioned, and no statements are made or figures given from which the rate can be implied. The article then proceeds,—"With the exception of about a month in the spring of 1885, when the child was taken away by the said Margaret Ann Bracken, and lived with her and the defender, the said child has been maintained by the pursuer ever since. The pursuer produces herewith, and specially refers to, an account shewing the details of the expenditure made by her for said child, and amounting, with interest, as at 1st April 1890, to the sum of £104, 13s." Now, it does not appear to me that the circumstance of the pursuer's putting her claim

[1] Ligertwood v. Brown, June 21, 1872, 10 Macph. 832, 44 Scot. Jur. 472. Taylor v. Allardice, Jan. 16, 1858, 20 D. 401, 30 Scot. Jur. 224.

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for aliment into the form of a detailed account makes any alteration upon the nature of the question which we have to decide. The account merely sets forth the sums that the pursuer alleges she has spent on the child's behalf, and accordingly it carries us no further than article 10 itself does. In article 11 the pursuer states that she has "repeatedly requested payment from the defender of the sums expended by her in alimenting and maintaining said child, but he refuses or delays to make payment." There is no mention of any fixed sum as yearly or quarterly aliment.

I do not think that the defender has been able to quote any authority for the application of the triennial prescription to an account of this description. It is not said that there was any communication between the pursuer and defender as to the amount of expenditure to be allowed on the child's behalf. The statements are of the vaguest kind,—and the only thing said is that there was an agreement that the pursuer should take charge of the child, and that she should be repaid whatever sums she might actually expend. The exact figures can be reached only by evidence,—and that fact is of itself sufficient to exclude the operation of the triennial prescription.

Accordingly, I am for recalling the interlocutors of the Sheriff-substitute as to the sisting of a mandatary, and for sending the case back to be tried by him in the Sheriff Court in common form.

Lord Adam.—There are two questions in the present case. The first relates to the interlocutors of 19th December and 30th January last, ordaining the defender to sist a mandatary, and giving decree against him in respect of his failure to obtemper that order. At that time the defender had left the country, and accordingly these orders were very proper. Since that time he has returned, and I understand he is prepared to put in a minute undertaking to remain here until the present action is over. There is therefore now no case for sisting a mandatary.

The second question has reference to the application of the triennial prescription to such a transaction as that libelled. The account is set forth in an appendix, and is continuous, extending from 1884 to 1890,—coming down in the last item contained in it to within three years of the present time. *Prima facie* accordingly prescription is not applicable. But Mr Wilson says that *de facto* it is a termly account, and that prescription must run from the date at which each payment fell due. If that had been the nature of the account there might have been force in the plea which has been stated. But the averment made upon record as to the contract under which the account was incurred does not set forth that the defender undertook to make termly payments. It merely comes to this, that the defender undertook to repay to the pursuer whatever sums she might expend on the child's aliment and maintenance. The expenditure thus incurred is stated in the account to which I have referred, and the pursuer must prove in the ordinary way that the expenditure in question was made. I am clearly of opinion that the account is a continuous one, and accordingly that the Triennial Prescription Act has no application.

Lord M'Laren.—I concur with your Lordships in the view that there has been such an alteration of circumstances since the date of the Sheriff-substitute's interlocutor that the defender ought not to be bound to sist a mandatary.

On the question of prescription, it is to be kept in view that the Statute of

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1579 enumerates various descriptions of debts, "house-maills, men's ordinaries, servants' fees, merchants' accounts, and others the like debts." It is enacted that these shall prescribe in three years, and that the creditor shall have no action unless he prove his case by the writ or oath of his debtor. I think it is evident that the statute has established a qualified presumption of payment—not an absolute presumption, but one having regard to the fact that people do not always preserve receipts or evidence of payment, and that it would not be fair to a debtor, after the lapse of three years, that he should be exposed to the risk of a dishonest claim being made against him for a debt which he had already discharged. In the interpretation of the statute, one of the important questions has always been to determine whether a series of items shall be massed together and treated as one debt, or shall be treated as separate debts. In the case of a current account, the items are treated as part of one debt, viz., the balance, and prescription runs only from the last date. One reason of this is that in the case of a current account there is no presumption—certainly no strong presumption—of interim payment. The presumption is that payment has been made within three years from the date when the account was rendered. In the alternative case of house rents, or aliment fixed at so much per year or per term, the practice is to make payment at each term, and accordingly each termly payment prescribes after three years from the date when it falls due. A debtor knows what his liability is, and the presumption is that he has settled for each term as it fell due, or at all events within three years after that date.

In considering under which of these two categories this case falls, I observe that some light is thrown upon the question by the citation from Mr Bell's Principles, where it is pointed out (sec. 629) that claims of relief by a party who has paid aliment fall to be treated as current accounts, and that prescription only runs in such cases from the last date of the account. I am not sure that in this passage the author means to enunciate a principle. He is merely stating the result of certain decisions. The presumption seems to rest on this, that there is not the same probability of payment in such cases as in those cases where there are agreements for termly payments, and if that is so, the principle appears to me to apply very strongly in the present case. Here, there is no agreement alleged either as to the amount or the period of payment,—there is only an undertaking to pay whatever might be advanced by the pursuer for the maintenance and aliment of the child. Accordingly, the undertaking appears to me to be of the same nature as these claims of relief, which have always been treated as current accounts. I am, therefore, of opinion that the plea of prescription as stated is not well founded, but applies only to the claim as a whole, the result being that prescription runs from the date of the last item in the account.

Lord Kinnear was absent.

The Court pronounced the following interlocutor:—"Recall the interlocutors of the Sheriff-substitute, dated 19th December 1890 and 30th January 1891: *Quoad ultra* repel the third plea in law for the defender, and remit to the Sheriff to proceed with the proof."

John Scott, Solicitor—A. W. Gordon, Solicitor—Agents.

JOHNSTON'S TRUSTEES, First Parties.—*D.-F. Balfour—Craigie.* No. 155.
JAMES JOHNSTON, Second Party.—*D.-F. Balfour—Craigie.*
WILLIAM LOW JOHNSTON AND HIS TUTOR, Third Parties.—*Jameson—Ure.* May 13, 1891.
Johnston's Trustees v. Johnston.

Succession—Vesting—Revocation of destination over.—A testator directed her trustees to "hold, apply, and dispose of" one-half of the residue of her estate to her nephew, payable on his attaining the age of twenty-five, directing her trustees to hold the capital in trust for him till he reached that age, but empowering them to expend the interest for his behoof, and to advance to him sums out of capital; there was then a destination over to a brother of the testator and his children, in the event of the nephew failing to attain twenty-five. By a codicil the testator recalled all the provisions in her settlement in favour of her brother and his children. *Held* that, the destination over being thus recalled, the nephew's interest vested *a morte testatoris.*

Succession—Revocation.—*Held* that where a testator recalled by a codicil all provisions made in favour of a particular person, and directed her trustees to dispose of the estate so set free among her relatives "according to their legal rights," the person originally favoured was not thereby prevented from taking a share of the latter bequest as one of the heirs *in mobilibus.*

MISS MARGARET JOHNSTON, of Welton, Blairgowrie, died on 14th July 1890, leaving a trust-disposition and settlement, dated 27th January 1887, and a codicil dated 2d July 1889. 2D DIVISION. M.

By the settlement she conveyed her whole estate to trustees and directed them to convert it into money, and to hold, apply, and dispose of the same as follows,—"One half of the free rest and residue of my estate to my nephew, William Low Johnston, payable on his attaining the full and complete age of twenty-five years, but until he attains that age my trustees shall hold the capital in trust, and apply in such sums and in such way as they deem most expedient the annual interest, or a part thereof, for his maintenance and upbringing, but with power to said trustees, if they think proper, to advance to the said William Low Johnston, prior to his attaining said age, a part of the capital, not exceeding one-half, in starting him in business, or otherwise starting him in life, but which discretion will lie wholly with my said trustees, whom I hereby appoint to be tutors and curators to him until he attain said age of twenty-five years complete; but declaring, in the event of the said William Low Johnston dying without leaving lawful issue of his body before attaining the said age, his said share of my estate shall fall to the parties after named, being the children of my brother, James Johnston, and the said James Johnston, and shall be divided among them in the same proportions as their own share is to be divided as hereinafter set forth; and the remaining half of said residue shall be held, applied, and disposed of by my said trustees to and for behoof of the children of my said brother, James Johnston, and to himself, in the proportions following, viz.:—(First) To Agnes Johnston, one-sixth thereof," &c.

She then specified the proportions in which these children and their father, James, were to take.

The codicil ran thus,—"I, the said Miss Margaret Johnston, before designed, being about to depart to Denmark for a time, and not having time to make a new settlement of my affairs before leaving, but being desirous to alter some of the provisions in the foregoing trust-disposition and settlement, hereby cancel and annul the whole provisions therein contained in favour of my brother, James Johnston, and also of his children *nominatim* in the said deed above written, and in lieu thereof I leave to the said James Johnston a sum of £100 sterling, in full of all he can claim, and in the event of his challenging this codicil, this bequest of

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£100 will be held as null and void; and with regard to the residue of my estate, so far as the said James Johnston and his children were interested under the said trust-disposition and settlement, in the event of my death before executing a new settlement, such residue will be disposed of amongst those of my relatives according to their legal rights."

Miss Johnston was survived by her brother James, and his children and by her nephew, William Low Johnston, who was at this time a pupil. James and William, as representing his father, were her heirs *in mobilibus*.

A special case was presented to the Court by (1) the trustees; (2) James; and (3) William, and his mother as his tutor, for the determination of the following questions, viz.:—"(1) Did the half of the residue bequeathed to William Low Johnston by the said trust-disposition and settlement vest in him *a morte testatoris*? (2) Does the other half of the residue fall to be equally divided between James Johnston and William Low Johnston, or does it belong exclusively to James Johnston? or does it belong exclusively to William Low Johnston?"

On the question of vesting no argument was submitted. On the second question the arguments *hinc inde* turned upon the consideration, whether by cancelling the bequest in favour of James and his children, and leaving James £100 "in full of all he can claim," the testator did or did not impliedly exclude him from taking as one of her relatives substituted in room of him and his children by the later clause of the codicil.

LORD JUSTICE-CLERK.—The first question which arises on the terms of these deeds is whether the half of the residue, which undoubtedly goes to William Low Johnston, vests *a morte testatoris*, or does not vest till a later date. It was conceded on his behalf that, if the original will had stood unaltered, the destination over in favour of James and his children would have prevented vesting until he attained the age of twenty-five years. But then the will is altered by the codicil, and the effect of the alteration is to read that clause in favour of James and his children out of the will altogether. The original will therefore now reads simply as a bequest to William, with certain directions to the trustees as to the administration of the bequest during his youth. The other clause being read out of the will, and the destination over having thus disappeared, I have no hesitation in answering the first question in the affirmative.

Then comes the question as to what is to become of the half which was originally left to James Johnston and his children. The bequest in their favour is cancelled. Miss Johnston, meaning to make another will, but not having time to do so, added this clause,—"And with regard to the residue of my estate, so far as the said James Johnston and his children were interested under the said trust-disposition and settlement, in the event of my death before executing a new settlement, such residue will be disposed of amongst those of my relatives according to their legal rights."

That is hardly an intelligible clause in itself, and it seems likely that some word has slipped in different from what was intended. It seems, however, to mean that such residue should be divided among her legal representatives. Whether that was or was not truly her intention, it is what the words express, and it is what she might very well have intended. I cannot see how it can be read as meaning anything else. The result of that will be that the first alternative of the second question must be answered in the affirmative, James Johnston and William Low Johnston taking equally.

It is unnecessary to answer any of the other questions. No. 155.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred. May 13, 1891. Johnston's Trustees v. Johnston.

LORD YOUNG was absent.

THE COURT answered the first question and the first alternative of the second question in the affirmative.

WATT & ANDERSON, S.S.C.—JAMES RUSSELL, S.S.C.—Agents.

JESSIE YOUNG, Pursuer (Appellant).—*M'Kechnie—Guy.* No. 156.
MAGISTRATES AND TOWN-COUNCIL OF GLASGOW, Defenders (Respondents). —*Asher—Ure.*
JAMES M'CORRISTON AND MALCOLM M'PHEE, Defenders (Respondents).—*Asher—Ure.* May 16, 1891. Young v. Magistrates of Glasgow.

Reparation—Wrongous apprehension—Burgh—Police Commissioners—Glasgow Police Act, 1866 (29 *and* 30 *Vict. cap. cclxxiii.*), *secs.* 84-86.—In an action of damages for wrongous apprehension against two police-constables and the Magistrates and Town-Council of Glasgow as Police Commissioners, the Magistrates and Town-Council were assoilzied on the ground that the constables were not their servants, the control and management of the police being vested in another statutory body—a committee of the Police Commissioners—and the Sheriff.

Reparation—Wrongous apprehension—Public officer—Malice.—An action of damages for wrongous apprehension on a charge of importuning under the Glasgow Police Act, 1866, was brought against two constables,—the pursuer alleging that the defenders had at first declined to state any ground for her arrest or to allow her to acquaint her mother, who lived close by; that the apprehension had been made with unnecessary violence; that she had been roughly treated and hustled in presence of a large crowd on the way to the police station; that the charge preferred against her was utterly groundless; and that the defenders had acted maliciously and without probable cause. *Held* that malice and want of probable cause must be put in issue, and that the averments were sufficient to infer malice.

1ST DIVISION. Sheriff of Lanarkshire. C.

ON the night of 5th November 1890, Jessie Young, a dressmaker, residing with her mother in Glasgow, was arrested at the entrance to her mother's house by two constables in plain clothes, M'Corriston and M'Phee, and taken to the police station, where she was charged with importuning, under section 149, subsection 30, of the Glasgow Police Act, 1866.

She subsequently brought an action of damages against M'Corriston and M'Phee, and also against the Magistrates and Town-Council of Glasgow, as the Commissioners of Police under the Glasgow Police Acts, 1866 to 1890, and relative Acts therein referred to, particularly the Commissioners Clauses Act, 1847, and the Order Confirmation (Glasgow) Act, 1877,—alleging that they were responsible, both at common law and under the Order Confirmation Act, for the conduct and efficiency of the other defenders, and had adopted their actings.

The pursuer averred that she was virtuous and industrious, and that ever since her father's death she had been the chief support of her mother's household. (Cond. 4) "On Wednesday night, the 5th day of November last, the pursuer, after her work was done for the day, called at the house of a friend, Mrs Reid, and Miss Reid, daughter of Mrs Reid, offered to accompany pursuer home. On reaching the entrance to pursuer's house the defenders M'Corriston and M'Phee . . . sprang forward and arrested pursuer and Miss Reid. . . . Miss Reid and pursuer inquired what was wrong, but the defenders M'Corriston and M'Phee replied that

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they would know that when they got to the Cranstonhill Police Office, and declined to state any grounds for the arrest. The pursuer desired that she should acquaint her mother before accompanying the policemen, but this they refused. Although they knew that pursuer lived at the place where arrested, and would have been available at any time to answer to any alleged complaint that might be preferred against her, and although pursuer and Miss Reid offered to go quietly, they were roughly treated by the policemen M'Corriston and M'Phee, being dragged along by the arms, and jostled and hustled in presence of a large crowd of persons who had collected, and were taken to the Western Police Station at Cranstonhill." (Cond. 9) "In apprehending the pursuer as aforesaid, the defenders, the said M'Corriston and M'Phee, acted maliciously, oppressively, and illegally, and without any just or probable cause. In executing the arrest they used great harshness, and acted with quite unnecessary force and violence. The pursuer suffered in her person through the roughness of their treatment. The charge preferred against her was utterly groundless, and was also made maliciously and oppressively by the said defenders. The pursuer has since learned that one of them has been for only a short time in the force, and she believes and avers that both were very imperfectly acquainted with their duties as constables, and were not fit and proper persons to be appointed to that office. The pursuer has suffered, and still continues to suffer, severely in her health, feelings, business, and reputation by the said wrongous and unjustifiable arrest, and the disgraceful charge made against her character by the police authorities, and persisted in by them, as well as their persecution and threats after referred to." (Cond. 10) "Ever since said arrest the defenders the said M'Corriston and M'Phee have used every means in their power to molest, persecute, and annoy the pursuer. They have threatened to arrest the pursuer on the first occasion she is seen outside of her own house, and have avowed the intention of ruining her character by any means in their power. They are continually watching her, hanging about the neighbourhood of her home, and make a practice of peeping through the windows back and front of the house, which is situated on the ground floor. In consequence of the threats of these defenders, and the system of espionage to which they have subjected the pursuer, she is living in constant fear of them. She dares hardly venture out of doors, and has been prevented attending to her regular work. Her health has suffered in consequence."

The defenders stated a joint defence, explaining, *inter alia*, that "the defenders M'Corriston and M'Phee are not employed or paid by or under the control of the other defenders the Magistrates and Council, nor are the Magistrates and Council responsible for their acts."

In regard to the action of the constables, it was stated that they had reasonable grounds for making the apprehension, and were only acting in the execution of their duty, and under the powers conferred on them by the Glasgow Police Act, 1866.

The pursuer pleaded, *inter alia*;—(2) The pursuer having been apprehended and charged with an offence by the said police-constables, acting with and under the authority and consent of the other defenders, the said Magistrates and Council, as libelled, wilfully, maliciously, groundlessly, and oppressively, and without just or probable cause, is entitled to reparation therefor, and to decree as craved. (3) The defenders the Magistrates, &c., *qua* Police Commissioners, as aforesaid, or those for whom they are responsible, having adopted the actings of the said M'Corriston and M'Phee, and other officials in their employment, and proceedings against them, and being the *domini litis*, are liable to the pursuer

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in terms of the prayer of the petition, jointly and severally with the other defenders."

The defenders pleaded, *inter alia*;—(2) Privilege. (3) The defenders M'Corriston and M'Phee not being employed or paid by, or under the control of the other defenders, the Magistrates, &c., they are not liable for their acts, and they (the Magistrates, &c.) should therefore be assoilzied with expenses.

On 4th February 1891, the Sheriff-substitute (Erskine Murray) allowed a proof.

The pursuer appealed for jury trial, and lodged the following issues:—"It being admitted that the defenders the Magistrates and Council of the City and Royal Burgh of Glasgow are Commissioners of Police of the said royal burgh, constituted by and acting under the Glasgow Police Acts, 1866 to 1890, and that the other defenders, the said James M'Corriston and Malcolm M'Phee, are constables in the western division of the City of Glasgow, employed and acting under and in virtue of the said Acts, Whether, on or about 5th November 1890, the said James M'Corriston and Malcolm M'Phee wrongfully apprehended the pursuer, or caused her to be apprehended, at or near the house of her mother at 31 Willowbank Crescent in Glasgow, and conveyed her, or caused her to be conveyed, to the Cranstonhill Police Office in Glasgow, to the loss, injury, and damage of the pursuer? Whether, place and date foresaid, the said defenders, in apprehending the pursuer as aforesaid, acted oppressively and with unnecessary force and violence, and dragged her by the arms and jostled and hustled her, whereby she was injured in her person, to the loss, injury, and damage of the pursuer? Whether on or about the date foresaid, at the said Cranstonhill Police Office, the said James M'Corriston and Malcolm M'Phee wrongfully and oppressively charged the pursuer, or caused her to be charged, with the offence of importuning, under section 149, subsection 30, of the Glasgow Police Act, 1866, to the loss, injury, and damage of the pursuer? Damages laid at £500."

Argued for the defenders and respondents;—(1) No issue should be granted against the Magistrates. The only ground on which it could be granted would be that of liability for the wrongful acts of their servants. The constables were not under the control of the Magistrates. The Magistrates provided their pay, but they did not give them their orders. Under the Glasgow Police Act, 1866 (29 and 30 Vict. cap. 273), secs. 84-86, the chief constable regulated the conduct and duties of the constables, and he in turn was responsible to the Magistrates' Committee, who were a statutory body different from the Magistrates. The latter, and not the Magistrates, ought to have been called. (2) In the case of the constables, the words "maliciously and without probable cause" must be inserted, as it was not said that the alleged wrongful acts committed by them had been done outside the scope of their employment. There must also be a full disclosure upon record of facts and circumstances from which it might legitimately be inferred that they had not been acting in the discharge of their duty, but from a malicious motive.[1] Protection was given to public officers and persons in the position of these defenders in order that they might be free to perform their public duties fearlessly. There was no suggestion that in what the constables did they transgressed any statutory provision

[1] Beaton v. Ivory, July 19, 1887, 14 R. 1057; M'Murchy v. Campbell, May 21, 1887, 14 R. 725; Innes v. Adamson, Oct. 25, 1889, 17 R. 11; Macaulay v. North Uist School Board, Nov. 26, 1887, 15 R. 99; Urquhart v. Grigor, Dec. 21, 1864, 3 Macph. 283, 37 Scot. Jur. 134; Limpus v. General Omnibus Co., 1862, 1 H. & C. 526.

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or recklessly disregarded any regulation, in which case a mere general averment of malice might have sufficed.[1] The question was whether they had acted within the scope of their duty in doing what they did, and whether, assuming they had exceeded the scope of their duty, they had acted maliciously or not.

Accordingly, as there were no averments on record to justify an inference of malice, the first and third issues ought to be disallowed, or in any case the words "maliciously and without probable cause" ought to be inserted. Further, there were no averments on record to support the second issue.

Argued for the appellant;—(1) The Magistrates had adopted responsibility for the doings of the constables by making common cause with them in this action, and by defending it along with them. Further, although the chief control was delegated to a committee by the Magistrates, under the local Act of 1866, the latter were not absolved from responsibility.[2] The present case might be assimilated to those where it had been held that a master was responsible for the fraud of his agent, committed by the latter while acting within the scope of his employment.[3] (2) It was admitted that the words "maliciously and without probable cause" must be inserted in the issues directed against the action of the constables. But the general averment of malice was sufficient in this case. It was only in the case of persons holding positions of importance in the public service, or of medical men, as in the authorities cited by the other side, that facts and circumstances from which malice might be inferred required to be set forth. In any view the averments set forth upon record were sufficient to infer malice.

The second issue proposed was withdrawn.

At advising,—

LORD PRESIDENT.—As regards the first question which has been raised upon the proposed issues, I entertain no doubt that the action would not lie against the Magistrates either as such or as Police Commissioners. It appears to me that the pursuer has altogether mistaken the position in which the Magistrates stand. They are bound to maintain a police establishment, and to provide money for the purpose. But the management of the police of the city is in other hands—it is in the hands of the Committee of the Commissioners of Police, who have not been called in the action, and of the Sheriff. Therefore, I come to the conclusion that the constables who are charged with effecting a wrongous apprehension are not in any sense servants of the Magistrates as Commissioners of Police, and the latter cannot be made answerable.

The same observations apply with equal force to the second issue.

There is the further question whether the issues against the two constables must be qualified by the insertion of the words "maliciously and without probable cause." These words have not been inserted in the issues, but I am of opinion that they ought to be. But a further question is how far a bare allegation of malice on record without the averment of any facts and circumstances from which malice may be inferred is sufficient to found an action of this description. I think that where an arrest has been made as it was here, and

[1] Lightbody v. Gordon, June 15, 1882, 9 R. 934.

[2] Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), secs. 88 and 134. *cf.* also Goff v. The Great Northern Railway Co., 1861, 30 L. J., Q. B. 148.

[3] Mackay v. Commercial Bank of New Brunswick, 1874, L. R., 5 P. C. Apps. 394; Houldsworth v. The City of Glasgow Bank, July 4, 1879, 6 R. 1164.

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where it is alleged that it was made with unnecessary violence, or was accompanied by abusive language, or by personal restraint such as would be uncalled for in the circumstances—these are facts and circumstances from which malice may be inferred. Accordingly, I am rather disposed to hold that there are sufficient averments in this record to warrant the insertion of the words maliciously and without probable cause.

LORD ADAM.—I am of the same opinion. I think there is no case whatever against the Magistrates and Town-Council. I think the police-constables are the servants, and act under the authority of the Committee of the Police Commissioners, who are a statutory body different from the Magistrates and Town-Council. Along with the Sheriff, they are the authority who have the charge and control of the police. It is now proposed to make the Magistrates and Town-Council responsible for the conduct of persons with whose appointment they have nothing to do. This would be a complete novelty, and I think we must dismiss the action as against these defenders.

Upon the other questions in the case, I also agree with your Lordship. The circumstances attending the arrest, as set forth upon record, are such as in my view are sufficient to suggest malice without any more specific averment.

LORD M'LAREN.—Concurring as I do with your Lordships, I have only to add that I think the argument which has been addressed to us for the pursuer is founded on a mistaken analogy between cases like the present and cases in which an employer of labour is held responsible for the negligent acts of persons in his employment on the principle *respondeat superior*. The relation between the Magistrates and the police is not a relation of employment, but is an official relation constituted by statute. The police of Glasgow are subject to the joint orders of the Magistrates' Committee and of the Sheriff, just as in the counties of Scotland the county constables are subject to the joint control of the Sheriff and the Police Committee (now the Standing Joint Committee of the County Council, and of the Commissioners of Supply). The Town-Council who are the Police Commissioners of Glasgow have no right to interfere with the police in the execution of their duties in relation to the apprehension and detention of prisoners, and therefore the Town-Council cannot be responsible for the negligent performance of these duties.

I do not say that where the police are acting under the direct orders of the Sheriff or a Magistrate, the official who gives the order may not be made responsible in an action containing proper substantive averments of malice towards the person aggrieved. According to the case of *Beaton* v. *Ivory*, a merely formal averment of malice would not be sufficient to take the case out of the region of the privilege which belongs to the higher executive officers in relation to their public duties.

With regard to the action as directed against the constables, without going so far as to say that a naked averment of malice would be sufficient to displace the officer's privilege, yet as it is here alleged that the arrest was carried out in an offensive and arbitrary manner, this, together with the constables' refusal to accept the pursuer's tender of her address and offer to attend the Police Court, constitute a circumstantial case entitling the pursuer to an issue in the form proposed, with the addition of the words "maliciously and without probable cause."

No. 156. LORD KINNEAR was absent.

May 16, 1891. Young v. Magistrates of Glasgow.

THE COURT recalled the Sheriff-substitute's interlocutor, assoilzied the Magistrates, with £7, 7s. of expenses, and approved of the following issues for the trial of the cause:—"Whether on or about 5th November 1890 the said James M'Corriston and Malcolm M'Phee, maliciously and without probable cause, apprehended the pursuer at or near the house of her mother at 31 Willowbank Crescent in Glasgow, and conveyed her to the Cranstonhill Police Office in Glasgow, to the loss, injury, and damage of the pursuer? Whether on or about the date foresaid, at the said Cranstonhill Police Office, the said James M'Corriston and Malcolm M'Phee, maliciously and without probable cause, charged the pursuer with the offence of importuning, under section 149, subsection 30, of the Glasgow Police Act, 1866, to the loss, injury, and damage of the pursuer? Damages laid at £500."

JAMES DRUMMOND, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 157. RODERICK WILLOUGHBY MACLEOD AND OTHERS (Macleod's Trustees), Pursuers (Respondents).—*D.-F. Balfour—Dundas.*
WILLIAM HUGH ERIC MURRAY, Defender (Reclaimer).—*C. J. Guthrie.*

May 21, 1891. Macleod's Trustees v. Murray.

Title to sue and defend—Jus tertii—Adjudication—Discharge—Statute 1621, *cap.* 6.—The debtor in an obligation for payment of an annuity has no title to plead, in answer to a demand for payment by a person who has adjudged the creditor's right, that the adjudger's right has been extinguished by payment of the debt on which the adjudication proceeded.

2D DIVISION. Ld. Kyllachy. I.

JAMES FRASER, of Pitcalzean, in 1666, as part of an arrangement for the commutation of the multures of his lands, "sold, annailzied, and disponed" to Sir George Mackenzie, of Tarbat, owner of the mill of Morvish, a yearly annuity of forty bolls victual payable furth of his lands of Pitcalzean. Infeftment followed on this disposition.

Sir George Mackenzie sold his right to the annuity to Sir John Urquhart, of Cromarty, and in 1698 Roderick Mackenzie, of Prestonhall, advocate, adjudged the right to the annuity from James Urquhart, of Cromarty connecting himself with Sir John by services and retours as heir. The adjudication proceeded on the narrative of a debt due by Urquhart to Mackenzie under a bond for £590 sterling. No charter followed on the decree of adjudication, and no infeftment was taken till 1869 by the adjudger, or those in his right.

On 9th October 1889 the trustees of Macleod, of Cadboll, who had acquired the rights of Mackenzie, of Prestonhall, raised an action against Mr Murray, of Geanies, who now held the lands of Pitcalzean, for payment of a sum of money equivalent to the value of the forty bolls of victual, or, alternatively, for delivery of the victual.

The pursuers pleaded their title.

The defender pleaded;—(1) No title to sue. (2) The debt for which the pretended adjudication of 1698 was led, having been long ago paid up and extinguished by intromissions and otherwise, the pursuers, at common law, and in terms of the Act, 1621, cap. 6, have no interest to sue.

The pursuers pleaded that the defences were irrelevant.

The following minute was lodged by the parties:—"Dundas, for the pursuers, Guthrie, for the defender, for the purposes of this case, and without prejudice to their respective rights and pleas in any other

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action or proceeding, or otherwise, and under reservation of all the pleas in law competent to them respectively, concurred in stating that the parties craved the Lord Ordinary to decide the case on the footing (1) that the annuity in dispute was in point of fact regularly drawn by the predecessors in title of the pursuers, and paid to them by the proprietors of the estate of Pitcalzean, at all events from the year 1698 down to the year 1888, and (2) that the pursuers' predecessors in title in point of fact uplifted and received subsequent to the date of the adjudication in 1698, out of the " annual payments of the annuity, " sums of money more than sufficient to extinguish and pay off the principal sum contained in the said decree of adjudication, dated 17th February 1698, with interest thereon, and expenses."

On 3d December 1890 Lord Kyllachy (Ordinary) decerned in terms of the conclusions of the summons.*

The defender Murray reclaimed.

Argued for Murray;—The pursuers' title was at an end, and they could not give the defender a good discharge. Their title was merely a security title, and to convert it into a title of property there must either be a declarator of expiry of the legal, which had not taken place here, or a charter of adjudication with prescriptive possession.[1] Here there was no infeftment on the decree of adjudication till 1869, whereas forty years' possession was still required under an adjudication as being a redeemable right.[2] The statutes anent comprysings,† had been held applicable to adjudications.[3] *Rankeillor's* case[3] determined that on payment of the debt the right of the adjudger *ipso*

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* "OPINION.— . . . A more serious question is, however, raised with respect to the subsistence of the adjudication title in the person of the Mackenzies, of Prestonhall, and their assignees. It is admitted that Sir John Urquhart's debt to the Mackenzies, on which the adjudication proceeded, has long been extinguished by the annuities drawn from year to year, and the defender argued that that being so, the annuity is now disburdened of the debt, and that the title to draw it has long ago reverted to the Urquharts of Cromarty. It is not said, it will be observed, that there has been any declarator of expiry of the legal, and there being no infeftment, there has of course, been no room for the positive prescription. On the other hand, it is the fact that the Urquharts, of Cromarty, have brought no declarator of redemption, nor have they taken any step to challenge the pursuer's title, or to interpel the tenants of the lands adjudged, or the defender, as debtor in the annuity adjudged, from continuing to pay to the adjudgers.

"I am of opinion that in the circumstances the defender has no title to plead the alleged discharge of the debt and redemption of the annuity. Such redemption is only competent to the reverser and his heirs, and while they choose to stand aside the adjudger's title in my opinion subsists, and he is entitled to continue in possession. It may be that if heirs of the Urquharts, of Cromarty, still exist, the pursuer is bound to count and reckon with them, but I do not see that he can be asked to count and reckon with the defender, who is undoubtedly due the annual payments, and in a question with whom the redeemable character of the adjudger's title seems unimportant. I do not overlook that the adjudger's title is still personal—no infeftment having followed upon the adjudication prior to the notarial instrument of 1869 which is now challenged. But this circumstance does not appear to me to affect the question of the defender's title to plead the discharge of the debt and the redemption of the annuity. . . ."

[1] Ormiston v. Hill, Feb. 7, 1809, F. C.

[2] Hinton v. Connell's Trustees, July 6, 1883, 10 R. 1110.

† 1621, c. 6, 1672, c. 19.

[3] Stair, iii. 2, 50 and 52; Rankeillor, July 1, 1624, M. 295.

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facto came to an end. [LORD RUTHERFURD CLARK.—But that was a case between the adjudger and reverser.] But the language of the Statute of 1621 was perfectly general, and it was the ground of that judgment. Here there was a judicial admission of the payment of the debt. Would the Court aid the pursuer to get what he himself said he had no right to get? There could never be a declarator of expiry of the legal, for the necessary averment in such an action, viz., that the debt was still unpaid, could not be made. The moment that a representative of the Urquharts, or, failing them, the Crown, came forward to claim the annuity, there could be no defence against their claim by Macleod.

Argued for the pursuers;—The defender was bound to pay to someone, and the pursuers were the only persons holding the title of creditor. He could not call on the pursuers for a count and reckoning any more than a tenant of subjects burdened with a bond and disposition in security could, when called on to pay under an action of maills and duties, raised by the creditor in the bond, who has entered into possession, call on that creditor to count and reckon, with the view of shewing that the bond had been paid. The title was, except in a question with the reverser, an irredeemable title. No one else had a title to redeem. As regarded the minute, that was before answer, and under reservation of all pleas. The fact might be as stated there, but the question for the Court was whether the defenders could refer to that fact.

At advising,—

LORD TRAYNER.—In this action the pursuers conclude against the defender for payment of a certain sum of money as the equivalent for forty bolls of victual, or otherwise for delivery of the victual itself. Several defences are stated by the defender on record,—all of which have been repelled by the Lord Ordinary,—but the only defences maintained before us were those set forth in the defender's first and second pleas in law. The first plea depends upon the second. It is unnecessary to go into any detail regarding the pursuers' title, because that has been very fully done by the Lord Ordinary; but the state of the pursuers' title to the victual in question, or its equivalent in money, may be stated shortly as follows. In 1666 the lands of Pitcalzean (of which the defender is now proprietor), were validly burdened and charged with payment of a yearly annuity of forty bolls of victual, and the right to exact this annuity stood vested in 1673 in Sir John Urquhart, of Cromarty. This right was adjudged in 1698 by Mackenzie, of Prestonhall, in respect of a debt of £590 then due to him by Sir John Urquhart, and the pursuers are now in right of the decree of adjudication. It is maintained by the defender that the pursuers have no title to sue this action, because the debt for which the adjudication was led has been paid. This fact is not established, but a minute of admissions has been lodged, by which the pursuers admit that, for the purposes of this case, it may be so held, and the case decided upon that footing. I am of opinion that even upon such an admission the defence now urged cannot be sustained. Whether that debt has been paid or not is a matter with which the defender has no concern. His obligation to pay the forty bolls of victual is an existing obligation which he must discharge, and there must be some creditor in that obligation. *Ex facie* of their titles the pursuers are the creditors entitled to enforce and to discharge that obligation. So far as the defender is concerned, the pursuers' right to enforce payment of the victual payable out of the defender's lands, stands upon an absolute title, although in a question with the representatives of Urquhart of Cromarty that title is redeemable. The defender has no right to state or main-

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tain pleas which are personal to Urquhart's representative, and the pursuers are entitled to decline discussing any such pleas with him. For this reason, in my opinion, the pursuers while admitting for the purposes of this case (in order to save time and expense in investigating that matter) that the debt for which the adjudication was led has been paid, have admitted nothing from which the defender can take any benefit. The pursuers on their present title are the creditors, and only creditors, in the defender's obligation, and to their demand for payment it seems to me the defender has no answer. I am therefore of opinion that the judgment of the Lord Ordinary should be affirmed. In form, however, the Lord Ordinary's interlocutor will require to be recalled, as he has deemed "conform to the conclusions of the summons," omitting to notice that these conclusions are alternative, and decree should now be pronounced in terms of the first conclusion of the summons.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and pronounced decree in terms of the first alternative conclusion of the summons.

MACKENZIE & BLACK, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

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Guthrie's Trustees v. Ireland.

NORMAN M'GREGOR AND ANOTHER (Guthrie's Trustees) Complainers (Reclaimers).—*Asher—Watt.*
ALEXANDER IRELAND, Respondent.—*D.-F. Balfour—Maclennan.*

Public-house—Hotel—Tippling Act (24 *Geo. II. c.* 40), *sec.* 12.—*Opinions* that the 12th section of the Tippling Act does not apply to the case of a guest resident in a hotel who during his stay is supplied from time to time with small quantities of spirituous liquors for his own use and that of friends.

2D DIVISION. Ld. Wellwood. M.

CHARLES SETON GUTHRIE, of Scotscalder, in the county of Caithness, brought a note of suspension against Alexander Ireland, an innkeeper at Georgemas, to suspend a charge upon a bill for £50 granted by him to Ireland.

Guthrie had lived in the respondent's inn from 5th October to 27th December 1887. He granted the bill in dispute in discharge of the account incurred by him for board and lodging, occasional carriage hires, the keep of a horse and dog, and other small expenses during that period.

The ground of suspension was the provisions of the Tippling Act.* The complainer averred that the bill had been granted, in part at least, for glasses of spirits and beer supplied to him, his servant, and persons in his company during his stay in the house.

The Lord Ordinary allowed a proof. A detailed account made up shortly before the proof by the respondent, shewing the details of the complainer's liability, was produced. The two concluding items of that account were, three gallons of brandy, £6, 15s., and two barrels of beer, £3, 10s. The total amount of the account was £73, 8s. 9d.

It was proved that the complainer during his stay in the house had frequently given drink to friends in the bar, but there was also evidence

* 24 Geo. II. c. 40, sec. 12,—"No person shall recover any sum of money, debt, or demand on account of any spirituous liquors, unless it shall, *bona fide*, have been contracted at one time to the amount of 20s. or upwards."

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to shew that a case of brandy had been put aside for him in a corner of the bar-parlour.

The Lord Ordinary (Wellwood), on 4th February 1891, repelled the reasons of suspension, and refused the note.*

Certain trustees, appointed by Guthrie for behoof of his creditors, sisted themselves as parties to the action, and reclaimed, founding on the case of *Maitland* v. *Rattray*,[1] and arguing that, even if Lord Abinger's opinion were sound and Lord Denman's doubts unfounded, the fact that the drink here was taken in the bar and not in the guest's private room distinguished the present case from the case with which Lord Abinger was dealing.

The respondent was not called on.

LORD JUSTICE-CLERK.—The Lord Ordinary has disposed of this case on the ground that the account incurred by Mr Guthrie, of Scotscalder, when examined, shews that there is a sufficient amount due by him to this innkeeper, apart from charges for liquor altogether, to cover the amount of the bill which Guthrie has granted.

That is sufficient for the decision of the case,—for I agree with the Lord Ordinary in that view,—but it seems desirable, since we have had a full argument from the reclaimer on the question raised under the Tippling Act, that I should express my opinion on that matter also.

The object of the Tippling Act is plain enough. It is to prevent persons who have no ready cash from going to bars and drinking small quantities of liquor from time to time by getting credit. Such a practice tends to throw these persons into the power of the publican, and gives him an inducement to

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* The Lord Ordinary having explained in his note that he proceeded on the ground "that when the bill was granted there were legal charges to the amount of £50 due by the complainer, irrespective of the charges for spirits objected to," proceeded thus:—"This being so, I see no reason why the respondent, simply because he was willing to accept less than his full account for the sake of a settlement, should not now, when payment is refused, attribute the whole sum in the bill to his charges other than those for spirituous liquors.

"In this view, it is not necessary for me to decide a somewhat difficult question under the Tippling Act, viz., Whether the Act applies to the case of a person lodging in the house who has a running account for his board and lodgings? If the Act applies, then a lodger might refuse payment for every glass of spirits which he or his guests drank during his stay in the hotel or lodgings, unless he bought a pound's worth at a time. In the case of *Proctor* v. *Nicolson*, 7 C. and P. 67, 24th June 1835, Lord Abinger held that the Act did not apply to such a case. He said,—'I think that that enactment does not apply to cases where spirits are supplied to guests who are lodging in the house, as it could never be intended by the Legislature that an innkeeper should not be entitled to be paid for spirits supplied to such guests who had taken up their abode in his inn.' On the other hand, in *Hughes* v. *Done*, 1841, 1 Q. B. (Adol. and Ellis), 294, Lord Denman expressed doubts of the decision in the case of *Proctor* v. *Nicolson*, and refers to cases, one of which is *Burnyeat* v. *Hutchinson*, 5 B. and A. 241, to the opposite effect. In Wharton on the Law applicable to Innkeepers (1876), p. 144, the author, on the authority of the case of *Proctor* v. *Nicolson*, states that the Act does not apply to such a case.

"If the Act does not apply to spirits furnished to a lodger in his own room, it is hard to distinguish between such charges and those for spirits supplied to him at the bar or in the public rooms. But, as I have said, I do not feel called upon to pronounce a positive opinion upon the question, and I prefer to decide in favour of the respondent on the ground first considered."

[1] Maitland v. Rattray, Nov. 14, 1848, 11 D. 71.

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encourage drinking, and thus to bring poor people under oppressive debt, while injuring them morally. The Act is directed to the prevention of this public mischief.

But here the customer is a guest in the house, and he orders the liquor for himself and his friends; but it is all supplied to him, on his order and credit, as a resident in the house. Does the Tippling Act apply to that case? I think it does not. I think that Lord Abinger's opinion in the case of *Proctor*, referred to by the Lord Ordinary, is quite sound. Lord Denman, in the case in which he expressed some doubt as to that opinion, seems to have mixed up two things, viz., the case where liquor is supplied in a place for passing entertainment,—a public-house or tavern,—and the case of a hotel with guests living in it, it may be for considerable periods. It would be a very strange thing if the Tippling Act must be read so as to require a hotelkeeper to demand payment from a person living in his house for every glass of liquor as he orders it. It would lead to a total subversion of hotel practice, and if it were the law, it would be very surprising that in the case of an Act passed so long ago it should only come to be held now that it applied to guests living in a hotel. I am of opinion that it does not apply.

I entirely concur with the decision of Lord Abinger in the case of *Proctor*, and I am confirmed in my view by finding that Lord Abinger's opinion is accepted as authoritative and as the recognised law, Mr Wharton in his treatise in 1876 stating the law in accordance with that case.

Mr Watt has, however, insisted upon the particular circumstances of this case. He maintains that this case is taken out of the rule approved by Lord Abinger, because Mr Guthrie got his liquor or gave his friends their liquor in the bar. But I am not dealing with any particular case. The enactment being statutory and prohibitory it must be strictly interpreted, and my reading of the Act is that it is intended to cover the case of liquor served out to persons coming to a licensed house for temporary refreshment, but not to cover the case of the guests living in a hotel.

I think, therefore, that the judgment of the Lord Ordinary must be affirmed, both upon the ground on which he has put his judgment and on the ground taken by Lord Abinger.

LORD RUTHERFURD CLARK.—I am satisfied with the Lord Ordinary's interlocutor, and I concur with him on the ground on which he has placed his judgment. I do not feel called on to pronounce any opinion on the question raised under the Tippling Act, but I may say that my opinion leans strongly in the direction of Lord Abinger's opinion in the case cited by the Lord Ordinary.

LORD TRAYNER.—I agree with Lord Rutherfurd Clark, and, like his Lordship, without pronouncing any positive opinion on the scope of the Tippling Act, I am very strongly inclined to agree with Lord Abinger's opinion.

LORD YOUNG was absent.

THE COURT adhered.

THOMAS DALGLEISH, S.S.C.—PHILIP, LAING, & Co., S.S.C.—Agents.

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Aitken v. North British Railway Co.

MRS MARY AITKEN AND HUSBAND, Pursuers.—*M'Kechnie—Graham Stewart.*
NORTH BRITISH RAILWAY COMPANY, Defenders.—*Asher—Ure.*

Reparation—Contributory negligence—Railway—Invitation to passenger to alight.—In an action of damages against a railway company raised by a passenger for injuries received in alighting at night from a train at a railway station—not a terminus—it was proved that the train was of an unusual length, that the last carriage, in which the pursuer was travelling, was stopped opposite the end of the platform which sloped down to the level of the rails; that the pursuer had failed to observe this when she stepped out of the carriage. The guard deponed that he had shouted to the passengers to keep their seats before the pursuer left the carriage, but in this he was contradicted. The jury found for the pursuer.

In a motion for a new trial, on the ground that the verdict was against evidence, *held* (1) that in the circumstances it was the duty of the defenders to have given warning to the passengers to keep their seats; and (2) that the question whether they gave such warning or not was one for the jury.

1ST DIVISION Ld. Kyllachy. C.

THIS action of damages was brought against the North British Railway Company by Mrs Mary Aitken, with consent of her husband, James Aitken, for injuries received by her on 15th September 1890, in alighting from an Edinburgh to North Leith train at Great Junction Street Station, Leith.

The day on which the accident happened was the Edinburgh autumn holiday, on which a large number of people were travelling, and the trains were consequently longer than usual. The Great Junction Street Station was below the level of the street, being bounded on the north by a high bank, and having only one platform, on the south side. The two pursuers occupied the rear carriage of the train, there being only the guard's van behind, and when the train stopped at the station, the two last carriages being at that time short of the level part of the platform, and opposite the slope in which the platform terminated, the female pursuer opened the door of her carriage, and stepping out, fell on the railway and was severely injured. This happened about nine o'clock in the evening.

The pursuers averred;—(Cond. 5) "Said accident was entirely owing to the defenders having failed to draw the rear carriage of said train up to and alongside the platform, or to warn the passengers not to alight, and also through their failure to light the said platform in proper and sufficient places during the hours of darkness."

The defenders denied that averment, and pleaded contributory negligence on the part of the pursuer in stepping out of the train regardless of a warning which it was alleged the guard gave the passengers not to alight until the train was drawn forward.

At the trial Aitken deponed that the train had stopped before his wife left the carriage, thinking it was at the platform, that it was too dark to see the platform, and that he heard no warning "keep your seats," or anything of that sort, until after his wife fell out. This evidence was corroborated by other passengers. Both pursuers knew the station well.

For the defenders the guard of the train deponed that it had barely stopped when he jumped out, and that he shouted "keep your seats" before the accident happened.

The evidence as to the lighting of the station, including the part where the accident occurred, was contradictory. The floor of the carriage was about 4 feet 9 inches from the level of the sleepers.

The jury found for the pursuers, damages £120.

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The defenders obtained a rule upon the pursuers to shew cause why the verdict should not be set aside as contrary to evidence.

Argued for the pursuers;—It was proved that the platform was too short, and that it was not sufficiently lighted. The evidence shewed that the guard's warning not to leave the train, which it was his duty to give if the passengers were not to alight, had not been given in time. If that was so, the female pursuer had only taken the right course in alighting when she did, because the stopping of the train was equivalent to an invitation to her to do so. In any case the question whether the female pursuer had left the carriage too precipitately was for the jury, and the Court would not lightly interfere with their verdict.

Argued for the defenders;—There was no evidence of fault on their part. Accepting the law as laid down in the cases cited on the other side, the present case fell very far short of what had happened there. It could not be said to amount to a fault that the train was too long for the platform, and on the other hand it was not proved that it had been stopped for a sufficiently long time to amount to an invitation to the passengers to alight. If there was not sufficient light there that ought to have shewn the passengers that it was not intended that they should leave the carriages. The evidence was that the guard gave a warning not to alight, but if he did not do so until the pursuer had left the carriage, in so leaving she had been too precipitate and reckless, and there was thus contributory negligence on her part. The verdict was against the weight of evidence.

At advising,—

LORD KYLLACHY.—The pursuer in this case claims damages from the North British Railway Company in respect of personal injuries received by her on a night in September last in alighting from a train on the defenders' railway, at one of their stations between Edinburgh and Leith. The accident happened in this way—The carriage in which the pursuer travelled was the last in the train, and was drawn up opposite the sloping end of the station platform; and the pursuer stepped down upon this slope, which, being dimly lighted, she failed to distinguish from the level part of the platform. In making the descent she fell and sprained her ankle, and the jury have found by their verdict that in the circumstances the railway company were responsible for the accident.

I am not able to say that I think this verdict is contrary to the evidence.

The important facts seem to be these: The station was, as I have said, not a terminal but a wayside station; and the train, when the pursuer alighted, had drawn up within the station in the usual manner, and, so far as appeared, at the usual place. In point of fact the van and the last carriage projected beyond the platform and were opposite to the slope before referred to, but this part of the station was dimly lighted, and the pursuer, as I have said, failed to observe the difference of level. So far as appeared, moreover, the train had come to a final stop; for although, after an interval, it again moved forward and again stopped, there was nothing to indicate to passengers that such second stop was intended. It was not here the practice to call out the name of the station or to give passengers otherwise any express invitation to alight. In fact, at this station

[1] Potter v. North British Railway Co., June 7, 1873, 11 Macph. 664, 45 Scot. Jur. 413; Cockle v. London and South-Eastern Railway Co., 1872, L. R., 7 C. P. 321; Bridges v. North London Railway Co., 1874, L. R., 7 Eng. and Ir. Apps. 213; Rose v. North-Eastern Railway Co., 1876, L. R., 2 Exch. Div. 248.

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the stoppage of the train was the only invitation to alight which passengers received. Further, the projection of the train beyond the platform was not an ordinary occurrence. The pursuer was in the way of travelling on the railway, and it had not previously happened in her experience.

In these circumstances I cannot say that I think it was too much to expect that the defenders, if they found it necessary on the night in question to run a train which was too long for their platform, and thus to expose their passengers to a new and somewhat exceptional risk—it was not, I think, too much to expect that they should give some warning or make some provision against such accidents as that which happened. And indeed the defenders seem to have so far accepted this view of their duty; for they averred on record, and sought to prove at the trial, that before the accident—that is to say, before the train quite stopped—the guard jumped down from his van and called on the passengers to keep their seats. That being so, it became in my opinion a question for the jury whether the warning thus alleged was proved to have been given,—in other words, whether the jury were to believe the guard (whose evidence I think implied that the pursuer left the train before it stopped) or were to believe the pursuer and her husband, whose evidence was distinct to the contrary.

Now, the jury, rightly or wrongly, preferred the evidence of the pursuer and her husband, and in doing so they were within their province, and I do not, for my part, see how upon such a question we can disturb their verdict.

It would no doubt be a different matter if we were prepared to affirm that, notwithstanding the exceptional situation, the railway company were under no obligation to give any special warning or take any special precaution, but were entitled to rely on the passengers appreciating the situation and looking out for themselves. Similarly, it might be different if we were prepared to affirm that the company were entitled to rely on the passengers keeping their seats for some period of time after the train drew up within the station and came to a standstill. But it does not seem to me to be possible to affirm either of these propositions generally or apart from circumstances. Neither am I able upon the evidence to say that the jury here were bound to find contributory negligence. What degree of vigilance shall be required of a railway passenger, how far such passenger is bound to be on the outlook against exceptional risks, or how far, on the other hand, it is reasonable for him to assume, in the absence of notice, that things continue to be as usual,—these are questions which, it rather appears to me, are and must be jury questions, and with respect to which no general rule can be safely or properly laid down. I adopt on this subject, and refer to, the opinion of your Lordship in the chair in the case of *Potter*, 11 Macph. 664, a case which in its main features seems somewhat similar to the present.

I have only to add that I say nothing to countenance the suggestion that this station as a whole was not sufficiently lighted; or that the defenders were in fault in running on the night in question a train too long for their platform. In my view, the fault which the jury were justified upon the evidence in affirming lay in the defenders' omission to give what they tried to prove they did give, viz., timeous notice to the passengers to keep their seats.

LORD ADAM.—The pursuer in this case met with an accident at the Junction Road station of the Leith branch of the North British Railway on 15th September 1890. The day was a trades' holiday, and consequently the railway

company had expected that more passengers than usual would be travelling. Accordingly the train was a long one, the two last carriages, when it came to a stand at the station, projecting beyond the level part of the platform to that part of it which sloped down towards the rails, and which perhaps was imperfectly lighted. So far, however, I cannot see that there was any fault on the part of the railway company. A railway company is not bound, in my opinion, to have their platforms of any special length to meet the wants of their trains on all occasions. So far, accordingly, I do not think that any blame attaches to the railway company.

On the other hand, I think that a passenger is not expected to alight from a train until it comes to the platform, although it may have been brought to a standstill sooner. At the same time, as was laid down by your Lordship in the chair in the case of *Potter*, I do not think that a passenger is bound to remain in the carriage for an indefinite length of time, with the risk of being carried on to the next station. It seems to me that if a railway company draws up a train at or near a station, thereby inducing the passengers to think that the time has come for them to get out, the company is bound, if it is intended that they shall not get out there, to give what Lord Kyllachy has called "timeous notice" to them to keep their seats until the train is moved forward.

The question in this case is whether the railway company did or did not give "timeous notice" to the occupants of the hindmost carriages of the train. That is a question of fact in the first instance, and unless there is no evidence to support the view adopted by the jury or the weight of evidence is against it, the question is one, I think, for the jury alone to decide. If I had been a juryman in the case I should probably not have concurred in the verdict, and should have come to the conclusion that the pursuer had left the train so precipitately that the railway company had no time to give her any notice. But the question of neglect to give notice is, as I have said, a question of fact for the jury, and the Court cannot disturb the verdict they have reached unless it can be affirmed that there was no evidence to go to the jury on the point. The Lord Ordinary who tried the case, and, I understand, your Lordship, are both of opinion that there was such evidence, and on that ground I agree with Lord Kyllachy that we ought to refuse the rule.

LORD M'LAREN.—There seems to be no doubt as to what are the obligations of a railway company in regard to the safety of passengers alighting from a train. There is certainly no obligation upon them to provide a platform of equal length to any train which may stop at the station. I would go further and say that a railway company is not bound to provide platforms at all,—there is no statutory obligation upon them to do so,—although platforms are in practice universally provided for the convenience of the travelling public. Now, if any part of a train projects beyond the end of the platform, after the train has been brought to rest, there is always a risk that the passengers who are not aware that they have not reached the platform may come to grief in alighting from the train. It has been decided that the risk thereby created imposes on the company the duty of giving warning to the passengers either to keep their seats until the train moves on to the platform, or to exercise care in alighting where they are.

In the present case it is admitted that the train had been stopped for the purpose of discharging passengers before the pursuer got out of the carriage, and

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there is no question here, such as sometimes arises, as to whether an invitation to alight had been given. Such a question can only arise in ambiguous circumstances, such as do not here exist. Accordingly it was the duty of the company to warn the passengers in the carriages which were outside the limits of the platform to keep their seats, but I cannot say that in order to discharge that duty the guard was at the risk of his life to leave his van while the train was travelling at a considerable speed as it approached the station. It must be remembered that with the present automatic brakes a train is able to run at a high speed almost to the point where it is brought to rest by the application of the brake, and I do not think that under these circumstances the guard can be expected to leave his van until the train has ceased to move. The passengers must allow him a reasonable time to leave his van and give the warning.

In such cases it may be a question of evidence whether the guard's warning was given in time, but I rather agree with Lord Adam that in the present case the pursuer has put herself out of Court, because upon her own evidence and that of her husband she only remained in the carriage a second after the train had stopped. Accordingly, there is no conflict between the parties and the railway guard on the question whether the pursuer waited to hear the guard's warning before getting out of the train.

If I had been considering this question as a juror, I should not have agreed with the result at which the jury arrived, but all such cases involve questions of credibility, and, especially where the presiding Judge has told us that he did not dissent from the verdict, I do not think it would be in accordance with our practice to disturb it. As there may be cases of a similar description, I only desire to say that I do not decide the case on any personal opinion that there was a failure of duty on the part of the railway guard.

Lord President.—In this case the verdict was a unanimous one, and it is approved by the presiding Judge. The question to be determined was a pure question of fact, and that being so, I think it would be contrary to all our practice to disturb it. When I say that the question was one purely of fact, I mean that it depended upon evidence which was to a certain extent not reconcileable, and was indeed conflicting. The female pursuer and her husband are distinct in saying that no warning was given until the former had left the carriage, and that the train was then at a standstill. On the other hand, the guard says that he stepped out when the train had barely stopped and called to the passengers to keep their seats. The carriage in which the pursuers were travelling immediately adjoined the guard's van, and accordingly it might very well be contended that if the evidence of the guard was to be relied upon the pursuers must have heard his warning before the female pursuer descended from the train. This raises a question of credibility, as there is thus a conflict of evidence. In these circumstances, I agree with Lord Kyllachy that this is not a case in which we ought to disturb the verdict.

Lord Kinnear was absent.

The Court discharged the rule.

Andrew Wallace, S.S.C.—Millar, Robson, & Innes, S.S.C.—Agents.

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Wright's Trustees v. M'Laren.

JOHN BROWN ÆMILIUS WRIGHT AND OTHERS (Wright's Trustees), Pursuers (Respondents).—*Rhind—Hay.*
ROBERT M'LAREN, Defender (Reclaimer).—*C. J. Guthrie—Guy.*

Right in security—Transmission of personal obligation against singular successor—Conveyancing Act, 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 47.—The 47th section of the Conveyancing Act of 1874 provides that "an heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty, contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his ancestor or author, without the necessity of a bond of corroboration, or other deed or procedure."

A disposition of heritage, which was burdened under a bond and disposition in security, contained a clause exempting the bond from the warrandice, and also this clause,—Which sum of £800 it has been agreed is to remain on the security of the said subjects and others as aforesaid, and the said disponee is to take upon himself the obligation to repay the same; and it is further agreed that the disponee, by acceptance hereof, declares and agrees that the personal obligation to pay principal and interest and penalty contained in said bond and disposition in security shall be a burden upon his title in the same manner as it was on that of the disponer, without the necessity of a bond of corroboration or other deed or procedure, and the personal obligation may be enforced against the disponee by summary diligence and otherwise, in the same manner as against the disponer. The disposition was recorded on behalf of the disponee.

Held (1) that this was an agreement in the sense of the 47th section of the statute; and (2) that it was not necessary to its validity that the creditor in the bond should be a party to it.

Carrick, &c. v. *Rodger, Watt, & Paul*, Dec. 3, 1881, 9 R. 243, *distinguished* and *questioned.*

2D DIVISION. Ld. Kyllachy. J.

WILLIAM M'LAREN, heritable proprietor of certain subjects in the Cowgate of Edinburgh, granted a bond and disposition in security over them for £800 in favour of the North British Property Investment Company.

Wright's trustees acquired the creditor's right in the bond, and William M'Laren sold the subjects to Robert M'Laren.

His disposition contained *in gremio* a clause excepting from the warrandice the bond and disposition in security for £800, and a statement that it had been acquired by Wright's trustees. The disposition proceeded,—"Which sum of £800 it has been agreed is to remain on the security of the said subjects and others as aforesaid, and the said Robert M'Laren is to take upon himself the obligation to repay the same; and it is further agreed, as the said Robert M'Laren by acceptance hereof declares and agrees, that the personal obligation to pay principal and interest and penalty contained in said bond and disposition in security shall be a burden upon his title in the same manner as it was on that of me, without the necessity of a bond of corroboration or other deed or procedure, and the personal obligation may be enforced against him by summary diligence or otherwise, in the same manner as against me." The said disposition was recorded on behalf of Robert M'Laren.

The creditors found it necessary to raise an action of maills and duties, in which they called the tenants and Robert M'Laren, concluding against the former for their rents, and against the latter for expenses.

The pursuers pleaded;—(1) The pursuers, as trustees aforesaid, in respect of the aforesaid bond and disposition in security duly recorded, whereof they are now in right, are entitled to decree of maills and duties as con-

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cluded for, with expenses. (2) The defender, Robert M'Laren, having rendered himself personally liable for the sums contained in and due by the said bond and disposition in security, and being the feudal proprietor of the heritable subjects over which the said bond and disposition was granted, the pursuers are entitled to decree against him as concluded for, with expenses.

M'Laren alone lodged defences, but offered to let decree go out unopposed, provided he were not found personally liable in expenses.

He pleaded;—(4) The defender, the said Robert M'Laren, not having rendered himself personally liable for the sums contained in and due by the said bond and disposition in security, and he not being liable therefor, decree of absolvitor should be granted in his favour, with expenses.

The Lord Ordinary (Kyllachy) decerned against M'Laren in terms of the conclusion of the summons.

The defender, M'Laren, reclaimed, and argued;—(First) The import of the obligation undertaken was an obligation to relieve, and hence could not found a direct action. It fell under the principle of *Carrick's* case.[1] (Second) The intervention of the creditor was necessary to a good transmission of the personal obligation. Under the old law he had to accept the bond of corroboration, and the object of the new law was to obviate the multiplication of deeds, not to introduce new principles.[2]

Argued for the pursuers;—(First) If this clause did not constitute an agreement under the statute, could human ingenuity devise one? (Second) The intervention of the creditor was not required in cases of "succession, gift, or bequest." Why require it in the case of a singular successor? It was all the less necessary that the original debtor was not liberated by the introduction of the new obligant.[3]

At advising, the opinion of the Court (LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD TRAYNER), was delivered by

LORD RUTHERFURD CLARK.—The question is whether the defender is personally liable to the pursuers for the sum contained in the heritable security. The answer depends first on the construction which is to be put on the 47th section of the Act of 1874, and secondly, on the terms of the disposition which the defender has obtained to the subjects over which the security has been created.

On the first point, the contention of the defender is that there can be no transmission of the personal obligation to a disponee unless the heritable creditor is a party to the agreement by which the disponee undertakes to become personally liable for the debt. Before considering the statute, I may observe that under the former law the personal obligation would not transmit against the disponee by the mere force of the disposition. If it was intended that he should become liable for the debt, the proper form was that he should grant a bond of corroboration. The effect of such a bond was not to discharge the original debtor, but to give the creditor in the security the further obligation of the granter of the bond. The creditor did not intervene. He merely accepted the bond of corroboration, if he desired to be vested in the obligation of the granter.

The purpose of the statute was to provide a less cumbrous form for the transmission of the personal obligation. It deals with two cases—the disposition of the lands charged with the debt—first, on a lucrative title, succession, gift, or bequest, and second, on an onerous title.

[1] Carrick, &c. v. Rodger, Watt, & Paul, &c., Dec. 3, 1881, 9 R. 243.
[2] See Lord Young's opinion on p. 246 of Carrick's case.
[3] University of Glasgow v. Yuill's Trustees, Feb. 10, 1882, 9 R. 643.

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In the first case, it is declared that the heritable security, together with the personal obligation, shall transmit against the disponee without the necessity of any bond of corroboration or other procedure. It is obvious that in this case the intervention of the creditor is not required. He becomes the creditor of the disponee by the mere force of the statute. There seems no reason why a different rule should prevail when the title is onerous, though a mere disposition may not in that case be sufficient to transmit the obligation.

In the case of a disposition on an onerous title, the personal obligation does not transmit, unless "an agreement to that effect appears *in gremio* of the conveyance." It is maintained that this means an agreement between the heritable creditor and the disponee. But while it is difficult to see why the creditor must intervene in the one case and not in the other, the necessity for the agreement is obvious.

When the disposition proceeds as on a lucrative title, the disponee takes the subject *cum onere*. There is no need for any declaration on his part that he is willing to become personally liable for the debt. His assent is implied as the legal inference from such a title. Consequently the statute declares that the personal obligation shall transmit against him. In the case of an onerous title, there is no room for any such implication. It is necessary that the disponee shall agree to be bound, or in other words, that he shall signify his assent to that effect. Without such assent, it would be manifestly unjust to bind him to pay the debt of the disponer. But when it is given, the two cases become identical.

I am therefore of opinion that it is not necessary that the creditor shall be a party to this agreement.

It was further contended that the defender did not undertake to pay the debt, but that he merely became liable in an obligation of relief. I am of opinion that this contention is not well founded. The disposition bears that the defender "is to take on himself the obligation to repay" the debt charged on the lands, and that "the personal obligation shall be enforced against him by summary diligence." These words can have but one construction. They signify in the plainest terms the agreement or assent of the defender to be bound in the personal obligation, and he is consequently by force of the statute in the same position as if he had granted a bond of corroboration.

The case of *Carrick* was cited to us. In that case there was a great difference of judicial opinion. But in forming the opinion that our judgment should be in favour of the pursuers, I do not think that I am doing violence to it. In that case the obligation undertaken by the disponee was one of relief only, and consequently it was said that there was no assent on his part to come under a direct obligation to the creditor in the security. For the obligation of relief is an obligation to the debtor, and not to the creditor. At the same time, I think it right to say that, in my opinion, the case deserves to be reconsidered.

THE COURT adhered.

JOHN CLARK JUNNER, W.S.—REID & GUILD, W.S.—Agents.

No. 161.

May 26, 1891. International Exhibition, 1890, v. Bapty.

INTERNATIONAL EXHIBITION ASSOCIATION OF ELECTRICAL ENGINEERING AND INVENTION, 1890, AND LIQUIDATOR THEREOF, Pursuers (Respondents).—*Murray—A. S. D. Thomson.*

SAMUEL LEE BAPTY, Defender (Reclaimer).—*Strachan—Hay.*

Jurisdiction—Citation—Meditatio Fugæ.—A domiciled Englishman resided in Scotland for six months for the purpose of managing an Exhibition for an

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association in Scotland. He became bound by a guarantee to contribute, if called upon, a certain sum to the funds of the exhibition, when it should come to be wound up at its close. After it had closed, and the association had gone into liquidation, and when he was about to return to England, he was apprehended as *in meditatione fugæ* at the instance of the liquidator as creditor under the guarantee, but was liberated on finding caution to answer any action to be brought against him for payment of the guarantee within a certain period, on being cited at the Sheriff-clerk's office, Edinburgh.

In an action for payment of the guarantee, which was served at the house at which he had resided during his residence in Scotland within forty days of his leaving it, and also at the place of citation assigned, under the bond of caution granted by him, he pleaded no jurisdiction, and stated that he was proceeding to reduce the *meditatione fugæ* proceedings as illegal.

Held that the action being one to enforce a ground of action arising in Scotland, and the defender having (whether the *meditatione fugæ* proceedings were regular or not) undertaken to answer the action in the Scottish Court, on being cited at the place fixed in the bond, and the defender having been so cited, the plea must be *repelled*.

Question, whether jurisdiction, which has been acquired over a foreigner by forty days' residence in Scotland, endures for forty days after he has left Scotland.

2D DIVISION. Ld. Stormonth Darling. M.

THE INTERNATIONAL EXHIBITION ASSOCIATION OF ELECTRICAL ENGINEERING AND INVENTION was incorporated under the Companies Acts 1862 to 1886 for the purpose, *inter alia*, of carrying on an exhibition near Edinburgh in the summer of 1890.

The Exhibition was carried on from May to the end of October, and was closed on 1st November 1890.

The association went into liquidation on 5th November 1890, and on 21st November the liquidator raised an action against Samuel Lee Bapty designed as "lately general manager of the said association, residing at the said association's buildings, and whose domicile of citation is the Sheriff-clerk's office, George IV. Bridge, Edinburgh," for payment of £500 as the amount which the defender had subscribed to the guarantee fund of the association.

The summons was served both at the Sheriff-clerk's office and at the house the defender had occupied at the Exhibition buildings.

The pursuers stated;—(Cond. 8) "The defender was apprehended on a *fugæ* warrant, obtained on petition of the pursuers, . . . and having been taken before the Sheriff-substitute he was liberated on a bond being granted by the defender and Alexander Mackenzie Ross, . . . dated 8th November 1890. By this bond the said Alexander Mackenzie Ross judicially enacted, bound, and obliged himself, his heirs, executors, and successors, as cautioner and surety, acted in the Sheriff Court Books of Edinburghshire for the said defender, *de judicio sisti* in any action for payment of the debt now sued for to be brought against him at the pursuers' instance in any competent Court, within three months from the date of said bond. And further, by the said bond the said Alexander Mackenzie Ross and the defender assigned the Sheriff-clerk's office, Edinburgh, as a domicile, at which any citation or intimation might be left in connection with the said bond. With reference to the statement of facts for defender, it is averred that the defender had a domicile in Scotland, and resided during the six months which the Exhibition lasted within the association's buildings, near Edinburgh. The summons was served upon him both at the Sheriff-clerk's office and at his said residence at the Exhibition, and that within forty days of his leaving Scotland."

The defender stated;—(Stat. 1) "The defender is domiciled in England, and in the beginning of 1890 he was employed by the said association to

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act as their general manager. He merely came to Scotland for the purpose of performing the duties of that office, and his avowed intention was to leave Scotland when the said association was closed. Accordingly, when the Exhibition was closed on 1st November 1890, he proceeded to make arrangements to leave Scotland, and he did so upon 8th November 1890. The defender had no domicile in Scotland. He, while acting as said general manager, resided within the buildings of the said association." (Stat. 2) "The defender was, upon 8th November 1890, illegally and unwarrantably apprehended as *in meditatione fugæ*, and, without an opportunity of obtaining legal assistance, he entered into the bond referred to. The said bond is null and void, as the said apprehension was illegal. The defender is presently in communication with the pursuers as to the effect of the warrant for his apprehension, and he is in course of taking proceedings to have the said warrant set aside as being illegal. The summons in the present action has been served upon the defender at the Sheriff-clerk's office, Edinburgh, being the place of citation assigned in the said bond. Further, it has been served at the Exhibition premises, but such attempted service is illegal and inept in respect that the said premises were in the possession of the pursuers, and that the defender, after leaving them, had no domicile there."

The defender pleaded, *inter alia*;—(1) No jurisdiction.

On 7th February 1891 the Lord Ordinary (Stormonth Darling) repelled the defender's first plea in law.*

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* "OPINION.—It is admitted that the defender, who is an Englishman, resided for six months or thereby within the Exhibition buildings in Edinburgh, that he left Edinburgh on 8th November 1890, and that the summons in the present action was served upon him at his residence in the Exhibition on the 21st day of the same month. In these circumstances he pleads no jurisdiction. I am of opinion that the plea is bad.

"It was not disputed by the defender's counsel that residence in Scotland for forty days is sufficient to found jurisdiction, but he contended vigorously that there is no warrant for holding that the jurisdiction so constituted endures for forty days after the actual termination of the residence. Mr Mackay, in his book on Practice, states the rule thus:—'The Court has also jurisdiction over persons who have resided in Scotland for forty days prior to the action, or who, having resided during that period, have not since been absent for forty days.' He cites as his authority for this statement the case of *Calder* v. *Wood*, 1798, M. 2250, which does not, according to the defender's counsel, bear out the latter part of the statement. What the case of *Calder* decided was that the Court had jurisdiction over a man who had resided for the requisite time in Glasgow, and on whom service had been made by leaving a citation at his lodging there two or three days after he had quitted it, and was on his way to England. This at all events recognises that the jurisdiction survives the actual termination of the residence. But the rule does not rest merely on the authority of *Calder's* case. I should be slow to believe that on an important point of practice the principal writers on the subject had concurred in misstating the law, for Mr Dove Wilson (Sheriff Court Practice, pp. 72-3), and Professor Rankine (in his edition of Erskine's Principles, 1, 2, 9), stated the law exactly as Mr Mackay does. This rule is customary, and for customary rules it is sometimes difficult to cite decisions. There is, however, a very distinct recognition of it in the opinion of the Lord President (then L. J.-C.) in the case of *Joel* v. *Gill*, 21 D., at p. 939 of the report.

"The Judicature Act (6 Geo. IV. c. 120, sec. 53), provides that 'where a person not having a dwelling-house in Scotland occupied by his family or servants shall have left his usual place of residence, and have been therefrom absent during the space of forty days without having left notice where he is to be found within Scotland, he shall be held to be absent from Scotland, and be charged or cited according to the forms herein prescribed accordingly,' *i.e.*, by

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By interlocutor of 18th March 1891 his Lordship also repelled the defender's remaining pleas in law, and decerned against him in terms of the conclusions of the summons.

The defender reclaimed, and argued;—The jurisdiction founded on the temporary residence of a domiciled foreigner terminated with the cessation of that residence. The Lord Ordinary thought that it survived it, and referred to *Calder* v. *Wood*.[1] But the fuller report in the Faculty Collection[2] did not bear out that view of the case. The citation was good, but that did not give jurisdiction.[3] In *Joel* v. *Gill*[4] there was no question as to citation, and the opinion of the Lord Justice-Clerk (Inglis) was not directed to the founding of jurisdiction. What the case settled was, that if an Englishman came to Scotland and resided for forty days he was subject to the jurisdiction so long as he remained in Scotland thereafter. The arrestment under the *fugæ* warrant was illegal,[5] and therefore the agreement obtained under it was not valid.

The pursuers' counsel were not called on.

LORD YOUNG.—I do not think it necessary to call for any answer here. I am myself of opinion that the ground of action in the case arose in Scotland. It is a letter of guarantee by the manager of an exhibition established in Scotland granted with a view to its existence, and to its being carried on for a considerable period, against any loss consequent upon it. The obligant, the defender in the action, was appointed manager with an agreed-on remuneration, and he granted this obligation. The Exhibition did not result in profit, but in loss, and accordingly the guarantors were called upon under their obligations of guarantee to make it good. This action is therefore to enforce a ground of action arising in Scotland, and I think the Scottish Court had jurisdiction against the obligant in the obligation, provided he was well cited to appear before the Scottish Court. Now, it appears on the face of the record that after the Exhibition was closed the defender proceeded to depart, and in such a way as to induce—I do not say whether they ought to have been induced or not—those having claims upon him, including the present pursuers, to seize hold of him as in the act of flight

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edictal citation. This provision does not directly enact how such a person is to be cited during the interval of forty days, but it very plainly implies that he is not to be held to have left Scotland till the end of that period, and consequently that citation at his former residence would be good. A direct enactment to that effect is to be found in the A. S., 14th December 1805 (quoted in Lord Ivory's note to Ersk. Inst. i, 2, 16). There is some doubt whether that Act did not expire with the statute to which it related, but Lord Ivory quotes (apparently with approval) Mr More's opinion to the effect that it might be considered as a declaration of the common law upon the subject. When read along with the Judicature Act it seems to put the matter on the intelligible footing that for a certain short time after the termination of actual residence of the required duration, a man shall be presumed to be still within Scotland, and if so, he is still in the eye of the law just as liable to the jurisdiction of the Scottish Court as when he was physically within the kingdom. It may be said that the rule is arbitrary, but so are all fixed periods and presumptions, and in such matters it is better that the law should be arbitrary than that it should be uncertain. At all events, I think the rule is well established by custom."

[1] M. 2250.

[2] Jan. 19, 1798, F. C.

[3] Johnston v. Strachan (Lord Kinloch's opinion), March 19, 1861, 23 D. 758, 33 Scot. Jur. 387; Brown v. Blaikie, Feb. 1, 1849, 11 D. 474, 21 Scot. Jur. 135.

[4] Joel v. Gill, June 10, 1859, 21 D. 929, 31 Scot. Jur. 511.

[5] Hart v. Anderson's Trustees, Nov. 28, 1890, 18 R. 169.

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We are told that there are objections to their proceedings in seizing him and apprehending him as in the act of flight or meditating flight, but of course I do not enter upon that matter at all, but only refer to the fact that he was seized upon the allegation that he was meditating flight from the country. Of course the object of such apprehension is only that he may answer for his liabilities in the Courts of the country from which he is meditating flight. And when he is so seized, regularly or irregularly, he enters into a covenant with his adversary who seized him, and says,—"Let me go, and I will find caution to answer in a Scottish Court to any action which may be brought against me, and a summons may be served in the Sheriff-clerk's office, which I fix upon as my domicile of citation." Upon that condition he is let go, and this action, the summons of which is served at the domicile of citation then agreed upon, is the condition of his being left at liberty to depart. Now, joining these two things together, I think the defender was here well cited in the action raised upon a Scotch ground of action,—that is, a ground of action arising in Scotland,—and that he must answer accordingly, and I do not think his liability to answer in a Scotch Court depends at all upon the result of any proceedings by him to recover damages in respect of any irregularity in his apprehension.

If he had been apprehended here, however irregularly and so as to render the party liable in damages, and if a summons in an action upon a Scotch ground of action arising in Scotland had been then put into his hands, I do not think he would have been permitted just to throw it away, and say,—"You ought not to have stopped me on the street so as to put that into my hands." I think he is in the position of having the summons in an action upon a ground arising in Scotland put into his hands, and that his liability to answer for it will not depend upon whether he was regularly or irregularly stopped on the streets and ordered to take it. And so in respect of the jurisdiction of the Court in such an action, I do not think he can object to it upon the ground that he may be possibly successful in shewing that there were irregularities in connection with his apprehension upon which he granted the bond. I think that is sufficient for the judgment, and I would rather abstain from expressing any definite opinion upon the ground upon which the Lord Ordinary has proceeded, although it is not to be understood that I dissent from it or express any opinion adverse to it. It is this, that the only jurisdiction here is that which is acquired by forty days' residence in the country, and that a jurisdiction acquired over any person resident for forty days in a country endures for forty days after he has left it. There are certain authorities, or at least dicta, upon that question. I do not say they are all on one side, but I should rather abstain from putting my judgment in this case upon an opinion on that question, in respect there exists another ground which to my mind is satisfactory. I would refuse the reclaiming note and adhere to the interlocutor of the Lord Ordinary, but, so far as my opinion goes, upon the ground I have expressed, and without entering upon or expressing any opinion for or against the ground upon which the Lord Ordinary has proceeded.

LORD TRAYNER and LORD LOW concurred.

THE COURT pronounced this interlocutor:—"Having heard counsel for the defender in his reclaiming note against Lord Stormonth Darling's interlocutor of 18th March 1891, refuse the reclaiming note and adhere to the interlocutor reclaimed against," &c.

DAVIDSON & SYME, W.S.—WM. OFFICER, S.S.C.—Agents.

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May 27, 1891.
Trotter v. Torrance.

HENRY TROTTER, Pursuer (Respondent).—*D.-F. Balfour—C. K. Mackenzie.*
ARCHIBALD PETER TORRANCE, Defender (Reclaimer).—*Asher—Dundas.*

Lease—Power of resumption—Construction—Land and buildings.—In 1867 a landlord let to a tenant for nineteen years the farm of G., "with the cothouses and smithy at B." A small portion of the farm, including B., lay to the east of a certain public road. The lease reserved power to the landlord "to resume and take off such parts of the lands hereby let on the east side of" the road as he should think proper, on giving to the tenant certain notice, and allowing him "for the ground so taken off a deduction from the rent at the rate of £6 per acre, besides the value of the unexhausted manure on such land." Upon this detached portion of the farm there were at the date of the lease certain cothouses and a smithy, and soon thereafter the tenant, with the landlord's consent, converted the smithy into a byre, and the landlord built another byre beside the cothouse. Thereafter the tenant sublet the buildings for a dairy. In 1884 the parties agreed to continue the lease, which was about to expire in 1886, upon substantially the same terms. The landlord in 1889 gave notice that he intended to resume the fields to the east of the road in terms of the clause of resumption, and the tenant, while willing to remove from the fields, declined to remove from the buildings. *Held* that the tenant was bound to remove both from the fields and from the buildings.

2D DIVISION. Lord Kincairney. M.

IN October 1890 Colonel Trotter, of Mortonhall, proprietor of the farm of Greenbank, raised this action against Archibald Peter Torrance, the tenant, for declarator that the defender was bound to remove at Martinmas 1890 from a certain portion of the farm, and from the "whole buildings and erections" thereon.

The following narrative is taken from the Lord Ordinary's opinion:—"By lease, dated in 1866, the late Richard Trotter, of Mortonhall, let to the defender the farm of Greenbank, 'with the houses thereupon and pertinents thereof, together with two cothouses and smithy at Braidburn, as these were then possessed by the defender, who had succeeded his father in a prior lease. The rent was £491,—£91 above the previous rent,—and apparently was at the rate of from £3 to £3, 10s. per acre. The term of entry was in 1867, and the lease would in ordinary course expire in 1886. The farm lies at a very short distance from the municipal boundary of the city of Edinburgh.

"The lease contained a clause of resumption as follows:—'Reserving full power to the said Richard Trotter and his successors, at any term of Martinmas during this lease, to resume and take off such parts of the lands hereby let on the east side of the road leading from Edinburgh to Linton as they shall think proper, on giving to the said Archibald Peter Torrance and his foresaids twelve months' previous notice of their intention to do so, and allowing them for the ground so taken off a deduction from the rent at the rate of £6 per acre, besides the value of the unexhausted manure on such land, as the same shall be fixed by arbitration as after mentioned.'

"The farm-steading and much the greater part of the farm lie on the west side of the road to Linton. A comparatively small portion, extending to nearly 30 acres, lies on the east side, and consists chiefly of a narrow stripe between two public roads, as shewn on the plan No. 6 of process. The 'two cothouses and smithy at Braidburn' are on this portion of the farm which the landlord takes power to resume.

"There is another clause in the lease empowering the landlord to resume 4 acres of land from any part of the farm, for planting or any other purpose, allowing an abatement from the rent of £4, 10s. per acre.

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"The lease contains stipulations of some importance with regard to the buildings on the farm. It bears that the landlord agrees to expend a sum not exceeding £350 for 'the purpose of erecting three new cattle-sheds, turnip-house, implement-house, smith-shop, and byre,' and of improving existing buildings. The tenant binds himself to keep up the whole of the buildings in good repair, and leave them so at the end of the lease, except two thatched cottages, which he was not to be bound to rebuild. The lease contains a provision for the insurance of the buildings by the tenant.

"These are all the clauses of the lease which appear material to the present question.

"There was no dairy on the farm when the lease was executed, and it contains no allusion to a dairy. The tenant has deponed that he had the dairy in contemplation when he offered an increase of £91 on the rent. But he does not say that he communicated this idea to the landlord. He depones that immediately after the execution of the lease he set on foot a dairy at Braidburn, and in a year or two afterwards a second dairy at his farm-steading.

"From a letter dated 26th February 1867 it appears that about that date, and therefore before the commencement of his lease, the defender, with the landlord's sanction, converted the smithy at Braidburn into a byre. About the same time, or shortly afterwards, the landlord built a second byre alongside of the cothouses. The defender depones that this was the byre mentioned in the lease as one of the buildings on which the landlord was to expend £350. There is only the tenant's word for that, and no documentary evidence, but there is no contrary evidence. Farther, in or about 1871 the tenant erected a third byre alongside of the second byre, with the sanction of the landlord, and on the understanding that he should have liberty to remove it at the close of the lease, or that the landlord should then take it off his hands at a valuation.

"The dairy buildings now at Braidburn consist of these three byres and the two cothouses. . . .

"The defender considers that he derives a great advantage in the working of his farm from the close proximity of these two dairies. They are sublet, and ever since they were established the dairymen have bought the defender's turnips and fodder, and have sold him the manure made on the dairies. He, besides, receives a considerable rent for the buildings.

"The pursuer succeeded to the estate in 1874. In 1884, two years before the expiry of the lease, proposals for a new lease were interchanged between the defender and Mr Mackenzie, then the pursuer's land-steward, now his factor, and on 3d May 1884 the defender offered a rise of £30 on the former rent; and by a letter dated 3d July 1884 Mr Mackenzie, with the pursuer's authority and on his behalf, accepted the offer 'for the farm of Greenbank, as presently possessed by you, and that for nineteen years from Martinmas 1884'; and in a letter dated 8th September Mr Mackenzie, after referring to various details, writes,—'As the new lease is on the terms of the old or current lease, except in so far as altered in writing, the position as to the engine and boiler remains unchanged.'

"Various letters followed, in which there are references to the clause of resumption, but they relate only to the rate per acre, and throw no light on this question.

"Various matters remained unadjusted,—it does not appear clearly why,—and the new lease has never been executed; indeed, it seems never to have been drafted, but the defender continued to possess and cultivate the farm."

In 1889 Colonel Trotter, the pursuer, entered into an agreement to sell

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two small fields to the east of the road to Linton, and gave notice to the defender that he intended to resume them at Martinmas 1890.

The defender had no objection to cede possession of the fields, upon one of which the dairy called Braidburn Dairy stood, or the garden behind the dairy, but he declined to remove from buildings thereon, being the byre which he had erected in place of the smithy, the cothouse, and the byre which had been erected with part of the money provided by the landlord.

The pursuer pleaded;—(2) The pursuer being entitled, under the terms of the contract between him and the defender, to resume the two fields referred to, is entitled also and at same time to resume the buildings which are situated on part of one of these fields.

The defender pleaded;—(4) In respect that the landlord's right under the lease to resume is limited to the resumption of lands only, the pursuers are not entitled to decree in terms of the conclusions of the summons, so far as they conclude for removal from the buildings in question. (5) In respect that the buildings which the pursuer now seeks to resume are necessary for the proper cultivation and management of the farm, the pursuers are not entitled to decree in terms of the conclusions of the summons.

A proof was led. The defender led evidence to shew that owing to the nature of the farm and its situation the dairies thereon were of great value to him.

On 4th February the Lord Ordinary (Kincairney) found the pursuer entitled to resume the fields, "including those portions thereof on which the buildings known as Braidburn Dairy were built, and that on the terms and conditions specified in the clause of resumption" in the lease, and decerned in terms of the conclusions of the summons, "reserving to the defender his right of compensation in terms of said clause, and also all claims competent to him for payment of the value of the byre erected by him at Braidburn Dairy."*

* "OPINION.— . . . (After the narrative of the facts)—I take it to be clear that the pursuer cannot succeed in this action except in virtue of a power of resumption which he is *in titulo* to plead. But there is no existing clause of resumption except that in the old lease of 1866, and therefore this action must be rested on a concession of the defender's right to possess the farm, either by tacit relocation under the conditions of the lease of 1866, or by virtue of a new agreement constituted by the correspondence and the defender's consequent possession. The defender maintains that he is possessing under a new lease for nineteen years, binding on both parties. But in either view the present question must depend in the first instance on the true construction and effect of the clause of resumption in the former lease.

"Now it appears to me that if one seeks to construe the clause of resumption by itself, it will bear either of the meanings put on it by the parties. The pursuer maintains that the word land may include buildings, and certainly may include land covered with buildings, and that it must be read as including such land, because it is not excepted. The defender maintains that the word land, especially when used in connection with the word ground, primarily means land only and excludes buildings; and that it is reasonable to expect that buildings would have been specially mentioned if it had been intended to include them. It is difficult to choose, as a bare question of construction, between these two perfectly legitimate constructions. It is therefore important to consider the subject to which the clause relates, and the object of the clause. And, in the first place, it is to be observed that the power to resume is unusually great in a lease. It is a power to resume nearly 30 acres out of a total under 150 acres; and it is a power to resume the whole of a distinct section of the farm, separated from the rest of it by a public road. Having in view the proximity of the farm

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The defender reclaimed, and argued;—Clauses as to resumption were always read favourably to the tenant. Lands on which buildings were

to Edinburgh, the extent, compactness, and situation of the land to be resumed, I find it impossible to doubt that one of the objects which the landlord had in view was the feuing of this portion of the farm. Perhaps that was not the only thing which he had in view. But it must have been one object. He could not have contemplated resumption of the land under conditions which would negative feuing. No other reason for the reservation of this unusually extensive power to resume has been suggested. It has not been suggested that the landlord had any wish to add this section of the farm to any other farm. Now, certainly, if this section of the farm were to be given off in feus, the very first thing to be done would be to clear away the cothouses. I have been unable to imagine any purpose to which the landlord could put this section of his farm after resuming it, consistently with leaving the tenants in possession of the cothouses. Hence it appears to me that he must have understood that the power to resume the land included power to take the land on which the cothouses stood. And for similar reasons it appears to me that the tenant must have understood the clause of resumption in the same sense. He could not but have recognised that the landlord could not resume this considerable portion of the farm to any useful purpose, if he should leave it encumbered with the cothouses in the tenant's possession. These considerations lead to the conclusion that the clause of resumption ought to be read as including the buildings, in accordance with the pursuer's contention. I speak only of the intention and meaning of the parties when they executed the lease, and not of the pursuer's purpose in now resuming a part of the resumable land. That has not been disclosed, and is not of importance.

"The defender disputed this conclusion on various grounds, some of which seem of considerable weight. He contended that the clause could not apply to the cothouses and smithy, because they were let as a separate and distinct subject; and on the assumption that they were, he referred to the case of the *Caledonian Railway Company* v. *Smith and Nimmo*, 5th June 1877, 14 S. L. R., 510. That case seems to me to be quite special and inapplicable. I am unable to hold that the cothouses and smithy are treated in the lease as subjects separate from the rest of the farm. I think they are included in it, and are expressed as forming part of it, especially seeing that they were a part of the subjects of which the defender had been in possession under the previous lease. . . .

"Farther, it was maintained that the houses were necessary for the due working of the farm in the ordinary course. I think it impossible to maintain this, looking to the extent to which the farm buildings at the steading are at present sublet, and to what I think is the fact, that these cothouses were never really used by the defender at all in the management of his farm. It is not proved that these cothouses would have been of any use in the ordinary occupation of the farm had no dairies been established, a circumstance which may account for the fact that no special mention is made of them in the clause of resumption.

"It occurred to me in the course of the argument that a point might be made for the defender on the clause by which the landlord agreed to expend £350 on certain buildings, and in particular on a byre. If it could have been shewn that the landlord contracted to build this byre at Braidburn, as the defender says he did build it, there would be a difficulty in holding that he meant to reserve power to remove it at his pleasure. I do not, however, think it proved that the landlord did so contract, and in any case I do not think that this difficulty would outweigh the reasons which induce me to hold that the parties intended that the clause of resumption should include the buildings.

"It was argued that the circumstance that the landlord built the one byre at Braidburn and sanctioned the defender's construction of the other shewed that it was not intended that the buildings at Braidburn should be subject to the landlord's power of resumption, and also imposed a personal bar on the landlord using his power in order to remove these buildings. I think, however, that

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erected were appropriated to a special purpose. The clause of resumption in the lease was not applicable to land on which there were buildings, as the words at the end of the clause, "besides the value of the unexhausted manure on such land," shewed that it referred only to agricultural land. Where the clause said "lands," "buildings" should not be read.[1] The dairy was most important to the working of the farm. For twenty years the tenant had worked and spent money on it with the knowledge and consent of the landlord. The landlord himself had built a byre on the lands with part of the £350 he agreed in the lease to expend. That being so, he had waived his right to resume the buildings, if such right ever existed. The clause of resumption in the old lease must be read as modified by the state of the buildings at the renewal of the lease in 1884.

Argued for the pursuer;—If the clause of resumption was read in accordance with the fair rules of construction, it entitled the landlord to resume the buildings.[2] A lease must be construed according to the plain object of the words. There was no other reasonable purpose for which the clause was inserted in the lease, except to provide for feuing. This case was distinguished from *Caledonian Railway Co.* v. *Smith & Nimmo*. In that case the lime-works were the subject of the lease, and the resumption would have stopped the works. In the present case the subject of the lease was a farm, to be occupied as an ordinary arable farm; a dairy business had never been contemplated in the lease, and the land to be resumed was separated from the greater portion of the farm. The landlord had never waived his right to resume. Any privileges he had granted to the tenant were gratuitous, and the latter during the nineteen years of the lease had been fully recouped for any expenditure he had laid out on the farm.

At advising,—

LORD YOUNG.—In this case I cannot say that my views have not fluctuated. I do not think the case is unattended with difficulty. I have given to the argument on both sides the most careful attention, especially with the view of avoiding doing anything harsh to the tenant. He has been tenant in this farm for over twenty years, and seems to have conducted himself to the landlord's satisfaction. The landlord also would appear, as I gather from the correspondence, to have behaved throughout with great consideration and even generosity towards the tenant.

But what we have to determine is the true meaning and operation in the circumstances of the case of a clause in the contract of lease. This clause

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these acts of the landlord shew little more than that he was willing that the tenant should make the most beneficial use of the whole of his farm so long as he possessed it, and they cannot be held to import on the part of the landlord either an admission that his power of resumption did not extend to buildings, or an obligation not to exercise it. Whether the landlord is bound to pay for the byre at Braidburn put up by the tenant is a question which does not seem to arise in the present action. The defender has worked his farm so long in conjunction with this dairy that I do not wonder at his reluctance to give it up, and if I could have found any sound ground on which his defence could be maintained, I should readily have given effect to it. The case seems a somewhat hard one in this sense, that the compensation contracted for will, I think, leave him a loser. At the same time, if the view which I have taken be correct, he will only lose an advantage for which he never bargained."

[1] Caledonian Railway Co. v. Smith & Nimmo, June 5, 1877, 14 S. L. R. 510.

[2] Hunter's Landlord and Tenant, ii. 215 (4th edn.); Stewart v. Lead, March 25, 1825, 1 W. and S. 68.

relates to a power reserved by the landlord to himself and his successors "at any term of Martinmas during this lease to resume and take off such parts of the lands hereby let on the east side of the road leading from Edinburgh to Linton as they shall think proper, on giving to the said Archibald Peter Torrance and his foresaids twelve months' previous notice of their intention to do so, and allowing them for the ground so taken off a deduction from the rent at the rate of £6 per acre, besides the value of the unexhausted manure on such land, as the same shall be fixed by arbitration as after mentioned."

This clause is contained in a formal lease. It terminated in 1886. The parties, however, are agreed that it has been renewed since its expiration by arrangement standing on a correspondence, and the parties still continue landlord and tenant on terms which have never been finally adjusted, but which are substantially the same as those contained in the lease, a clause from which I have just read.

That clause, which applies to the existing contract under which the tenant is now in possession, relates to an outlying field at the extremity of the farm and adjoining the burgh of Edinburgh as now extended. It is plain on the face of the correspondence and the whole matter that the purpose of the insertion of this clause in the lease was that the landlord contemplated (and of course the tenant did so also) the possibility and probability of this part of the land being feued, or sold for other than agricultural purposes. The land upon the east side of the public road amounted to about thirty acres, and of this land the landlord in the lease reserved power to take off such part as he thought proper upon the terms specified.

Now, that was in 1867, when the lease was executed. At that time there were some buildings in the field in question, but I may make the observation in passing that these are not of a character to hinder the Court from reading the clause as applicable to the whole of these fields. These buildings were not costly, rather they were trifling and not of considerable value.

But we are told that a portion of a certain sum which the landlord bound himself in the lease to expend on buildings was expended on the erection of a dairy building on these lands. No one can tell exactly what the value of it was. We have only the tenant's statement, and there is no contradictory evidence. It was also pointed out to us that the tenant was allowed to put up a byre on condition that he should have liberty to remove it at the end of his lease, or that the landlord should then take it off his hands at a valuation. He was allowed to put it on the field to which the clause of reservation applies. There is a great deal to be said for the view that the tenant took the risk of the landlord's resuming this part of the farm under the clause of reservation. And any anxiety about hardship being occasioned to the tenant by such a course is out of the question in the present case, because the tenant has for twenty years had possession and use of the byre which he erected. It appears that he used these buildings for the purpose of subletting a part of the farm to a dairyman at a rent of £25, although I must regard the lease on which he holds these lands as containing a prohibition against subletting. This no doubt was a consideration with the tenant, Mr Torrance, in continuing tenant of the farm. Matters went on in this manner till 1888, the tenant always having the dairyman as subtenant in these lands and in possession of the dairy.

In 1889 the landlord gave notice that he desired to exercise his power of resumption in regard to the field in which the dairy stood. Therefore, for a

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period of twenty years, from 1871 till now, the tenant has had possession of these dairy buildings. Further, if the lease were at an end the tenant would be now entitled to remove the byre erected by him or get it taken off his hands at a valuation. He objects to the landlord exercising his reserved power to resume that part of the field which is occupied with the dairy buildings of the nature to which I have alluded.

Now, in my opinion, the clause of resumption, and any clause in similar terms, is subject to construction, and considerations of good sense and equity are serviceable and to be resorted to in making such construction. I also pointed out more than once during the debate that I should not be indisposed to construe a clause of this sort by reference to the conduct of parties. One can easily figure a case in which a power reserved to the landlord to resume land upon condition of making an abatement of the rent, otherwise at a certain rate per acre, would not be held applicable according to the true intent and meaning of the contract as gathered from the nature of the contract and the actings of landlord and tenant towards each other in regard to buildings of a certain class. Thus, for example, suppose a landlord reserved power to resume ten acres of an arable farm, to be chosen by him from any part thereof, upon condition of abating the rent of the remainder at so much per acre, I would be slow to read that, in accordance with the rules of good sense and equity, and having regard to the intention of the parties, as applicable to the dwelling-house or the premises about the farm steading. These buildings might fall under the term of "land" and be part of the farm, but still I would be disposed to answer in the negative the question, Does such land fall under the reserved power of resumption? rather than answer that question in the affirmative and imply an obligation not expressed in the lease to erect other farm premises of a similar kind elsewhere.

But in the present case there is no occasion to encounter any consideration of this sort. The field is outlying and at the extremity of the farm, and the power to resume is applied to it by expressing the limits of it, its very boundaries and extent. I do not think that the power to resume this field can be met by the consideration that the cowhouses are there. Mr Asher indeed contended that the reserved power to resume would have been inapplicable to ground occupied by a pigstye or a dovecot. Such a contention is in my opinion unsound. I think that in the present circumstances the clause of resumption is applicable to the whole field, and that the landlord is entitled to exercise his power to resume on condition of abating the rent as provided in the lease.

With every anxiety to do justice to the tenant, I am of opinion on the whole matter that the judgment of the Lord Ordinary should be affirmed, with expenses.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I am of the same opinion. The right of the pursuer to resume is bounded only by the conditions in the clause of resumption, and I think that the reading of that clause upon which the pursuer has relied is unfair and indeed the only permissible one.

The LORD JUSTICE-CLERK concurred.

THE COURT adhered.

ROMANES & SIMSON, W.S.—GEORGE F. SCOTT, S.S.C.—Agents.

ABERDEEN JOINT PASSENGER STATION COMMITTEE AND THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY, Pursuers (Reclaimers).—*Murray—Ferguson.*

NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—*D.-F. Balfour—Dickson.*

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Aberdeen Station Committee v. North British Railway Co.

Railway—Running powers—Use of joint station—Statute—Construction—Act, 29 *and* 30 *Vict. cap. cccxi.*—In 1864 the Scottish North-Eastern and the Great North of Scotland Railway Companies built a joint station at Aberdeen, which was by statute declared to be their joint property. It was provided that the control and management of it should be in a joint committee of the two companies. The Scottish North-Eastern Company, with "all the rights, interests, and estate" which it possessed, was afterwards transferred by the Act 29 and 30 Vict. cap. cccxi. to the Caledonian Railway Company. The 99th section of the Act, after reciting that the railways of the North British Company formed, with other railways, lines of communication between London and Scotland, &c., and that it was expedient that free and expeditious transit of traffic over the said lines of communication should be secured, enacted that the expression "Scottish East Coast traffic," as used in the Act, should mean traffic of every description on the Scottish North-Eastern line from or to any place on or beyond and *via* the North British lines. And by the 106th section of the same statute it was provided that "the North British Railway Company may, for the purpose of conveying Scottish East Coast traffic, run over and use with their engines, trucks, and carriages of every description, the Scottish North-Eastern lines, or any part thereof, and the stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines." Further, the North British Railway were to be entitled to "the joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, wharfs, stopping, loading, and unloading places, sidings, and junctions of the Scottish North-Eastern lines, including, in so far as the company lawfully may, the station at Aberdeen, and all conveniences therewith connected. . . ."

After the North British Railway had been for some years admitted to the station, and had enjoyed its conveniences for their traffic, an action was brought by the Joint Committee and the Great North of Scotland Company for declarator that the North British Company had no right, without the consent of the Great North of Scotland Company, to use the station, and for interdict.

Held that, the object of the Legislature having been to give every possible facility for the passage of Scottish East Coast traffic upon the lines in question, the North British Company were entitled not only to running powers through the station at Aberdeen, but also to the use of the station itself, and all the conveniences and privileges connected therewith, in so far as these were enjoyed by the Caledonian Company.

1ST DIVISION. Lord Kinnear. B.

(THIS was the sequel to the case reported *ante,* June 19, 1890, vol. xvii. 975.)

Under the Denburn Valley Railway Act, 1864 (27 and 28 Vict. c. cxi.), a joint passenger station was built at Aberdeen, and lines of railway constructed through it, at the joint expense of the Scottish North-Eastern and Great North of Scotland Railway Companies, at a cost of £90,000. The works authorised by the Act were "a joint passenger station" and certain lines of railway intended to connect the systems of the Scottish North-Eastern and Great North of Scotland Companies.

By the 20th section of that Act it was provided,—"The joint passenger station shall be jointly and equally the property of the company (*i.e.*, the Scottish North-Eastern) and of the Great North Company. . . : The joint passenger station, when made, shall be under the control and management of the joint committee. Each of the said companies shall be entitled to the free use of the joint passenger station for through and local

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passenger traffic, and, in proportion to their traffic, to an equal amount of accommodation therein. . . . The expression 'joint passenger station' or 'station' in this enactment means the joint passenger station, the railway through the same, and the sidings, accesses, and works extending for two hundred yards on each side of the passenger shed of the joint passenger station." The joint committee was to consist of three directors of each of the two companies, there being provision for referring to arbitration any questions upon which they should be equally divided.

There were in the statute provisions binding the companies to give mutual facilities for the transmission of traffic.

In 1866, by the Act 29 and 30 Vict. c. cccxi., the North-Eastern Railway Company was amalgamated with the Caledonian Company.* In this statute the North British Company got running powers over the line from Montrose to Aberdeen, which were thus expressed (sec. 106):—"The North British Railway Company may, for the purpose of conveying Scottish East Coast traffic, run over and use with their engines, trucks, and carriages of every description, the Scottish North-Eastern lines or any part thereof, and the stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines; and the North British Railway Company shall be entitled to the conveniences and privileges, and be subject to the regulations and obligations, hereinafter mentioned" (that is to say) ". . . (4) The joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, wharfs, stopping, loading, and unloading places, sidings, and junctions of the Scottish North-Eastern lines, including, in so far as the" [Caledonian] "Company lawfully may, the station at Aberdeen, and all conveniences therewith connected; the extent of such use, and the nature of the arrangements for working the traffic at the respective places, to be determined by agreement or by arbitration, and the payment to the company for the same to be the terminals as respects goods, mineral, and

* The 99th section of that Act provided,—"And whereas the railways of the North British Railway Company *via* Berwick, in connection with the North-Eastern and Great Northern Railways, form a line of communication between the Metropolis and Scotland, and the railways of the North British Railway Company *via* Hawick and Carlisle form, in connection with the railways of the Midland Railway Company and of the London and North-Western Railway Company, other lines of communication between the Metropolis and Scotland: And whereas the lines of the North British Railway Company, in connection with the Scottish North-Eastern lines, with or without other railways, form competing lines of communication with the railways of the company between Dundee, Aberdeen, and other places in the north of Scotland, on the one hand, and Edinburgh and Glasgow, and other places in the south, east, and west of Scotland, on the other, and it is expedient that the free and expeditious transit of traffic of every description should be secured and maintained over the said several lines of communication, and that nothing should be done to impede or obstruct, but that every reasonable facility should be afforded for promoting the free passage and transmission of such traffic: Be it enacted as follows:—The expression 'Scottish East Coast traffic,' where used in this Act, shall mean traffic of every description passing or destined or directed to pass to or from any place on or beyond the railways which, previously to the commencement of this Act, formed the undertaking of the Scottish North-Eastern Railway Company, and all extensions and branches of such railways which now belong to or are leased or worked by the company, except the Montrose and Bervie Railway, or which hereafter may belong to or be leased or worked by the company, and every or any part thereof (in this Act subsequently called the Scottish North-Eastern lines), from or to any place on or beyond and *via* the railways forming the undertaking of the North British Railway Company, and every or any part thereof"

live stock traffic, and as respects passenger traffic, to be such special payment, if any, as may be determined by agreement or by arbitration; and further, if at the request of the North British Railway Company the arbitrator shall order any enlargement or alteration of any of the said stations or places, such enlargement or alteration shall be made by the company, and the annual payment therefor, if any, shall be settled by agreement or by arbitration."

From June 1878 the North British Company used these running powers, and were accommodated with a booking-office, &c., in the station at Aberdeen.

In November 1888 the Joint Committee, suing, as by statute they were empowered to do, in name of their clerk, and the Great North Company raised an action against the North British Company for declarator that the defenders were not entitled, without the consent of the Great North Company, to use the station, or any part thereof, or the conveniences connected therewith, for the purposes of their traffic, or to run over or use with their engines, trucks, or carriages of any description, the said station or the railway through the same, or the sidings, accesses, or works, extending for 200 yards on each side of the passenger shed of the said passenger station, or any part of the same; and that the said Joint Committee were not bound to admit the traffic of the defenders, or their engines, trucks, or carriages of any description, into or within the said station, as defined by sec. 20 of the said Act, or the conveniences connected therewith, or upon or over the railway running through the same, or the sidings, accesses, or works aforesaid, and for interdict conform to these conclusions.

The pursuers stated;—(Cond. 7) "The defenders are entitled to use the joint passenger station at Aberdeen and conveniences connected therewith only in so far as the Caledonian Company may lawfully empower them to do so. The Caledonian Company cannot lawfully empower them to do so, if the consent of the pursuers be withheld, as is the case. The defenders, in these circumstances, have no right or title to run their trains into the joint station, or to use it for the purposes of their traffic. . . . The pursuers have since 1878 allowed the defenders to run their trains into certain parts of the said station. This they have, however, hitherto done under protest, out of regard to the public convenience, and without prejudice to their rights, and in the hope that an arrangement might be made regarding the conditions on which the use of the station by the defenders might be permitted. The defenders have, however, failed to come to any arrangement with the pursuers, and they now claim the right to use the station without their consent, and usurp without payment the services of the pursuers' signalmen, porters, and other servants, to attend to the defenders' trains and passengers." (Cond. 8) "The accommodation of the said joint station is not more than sufficient for the traffic of the Caledonian and Great North of Scotland Companies, and the introduction of the defenders' traffic is causing serious inconvenience to the pursuers, especially with regard to the traffic of the Deeside Railway."

The pursuers pleaded;—(1) On a sound construction of the Acts of Parliament condescended on, the pursuers are entitled to decree of declarator as concluded for. (2) The use of the joint passenger station at Aberdeen being restricted to the through and local passenger traffic mentioned in sec. 20 of the said Act of 1864, the defenders have no right to use the same. (4) The Great North of Scotland Railway Company being joint proprietors of the said station, the defenders are not entitled to use the said station without their consent.

The defenders stated;—(Stat. 3) "The defenders have, since June 1878, taken advantage of the powers conferred upon them by the Amalgamation

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Act of 1866, and have exercised, and still are exercising, the running powers conferred upon them by said statute, *inter alia*, by running their passenger and goods trains over a portion of the Scottish North-Eastern lines from Kinnaber Junction, near Montrose, to Aberdeen. In connection with their passenger traffic they are provided with accommodation in the joint station at Aberdeen, which has been constructed under the powers of 'the Denburn Valley Railway Act, 1864.' The accommodation provided consists of an office or box in the booking-hall for the use of their booking-clerk, and the use of a parcels-office, as well as a portion of the platform and rails for their trains. The defenders, however, only use the lines of railway forming the southern part of the station, which are part of the undertaking of the Scottish North-Eastern Railway. The defenders are now, and have for years past been, in the enjoyment and possession of the station, and the pursuers are now seeking to eject them therefrom."

In answer to this averment, the pursuers stated;—"Admitted, under reference to article 7 of the condescendence, that the defenders were, subsequent to 1870, allowed certain accommodation at the joint station, and have since 1878 (with the exception of the period from 27th December 1879 to 1st May 1883) been permitted to run their trains into the said station. . . . It is only for the limited purpose of collecting and allocating tolls, rates, and charges that the southern portion of the railway through the same, measuring from the centre of the joint passenger station, is under the said Act deemed part of the Scottish North-Eastern Railway."

The defenders pleaded;—2. The defenders should be assoilzied, or otherwise the action should be dismissed in respect, . . . (3) the defenders are authorised by the Caledonian Railway Company, and for many years have been with the consent of the pursuers in possession and enjoyment of the use now had by them of the station.

A preliminary plea by the defenders that the pursuers had no title to sue, and that they must call the Caledonian Company as defenders, having been repelled on a reclaiming note by the First Division (*ante*, vol. xvii. p. 975), the Lord Ordinary (Kinnear) thereafter, on 24th October 1890, dismissed the action.*

The pursuers reclaimed, and argued;—It was to be kept in view in this case that the Legislature never took away private rights, without making provision for compensation.[1] The principle of that case applied to our-

* "NOTE.— . . . The joint station at Aberdeen appears to me to be a station connected with the Scottish North-Eastern line, both physically and by reason of the legal right which the company possessed in that station, and which is now transferred to the Caledonian Company. It is admitted that if the running powers given to the North British did not extend to the Aberdeen station, they would be useless for the purpose for which the statute declares that they are given, namely, for the free transit of Scottish East Coast traffic between Aberdeen on the one hand, and Glasgow and Edinburgh on the other. I find no sufficient reason for so restricting the construction of the words in question as absolutely to exclude the North British Railway from the Aberdeen station, with the result of defeating the avowed purpose of the statute.

"It does not follow that the defenders are entitled, without the pursuers' consent, to all the uses of the station which they now enjoy. But the pursuers' counsel have admitted that they are not in a position to obtain a judgment in this action by which the extent of the defenders' right shall be defined, on the assumption that they are not to be absolutely excluded. The proper course, therefore, appears to be to dismiss the action. A judgment of absolvitor might prejudice questions which are not at present before the Court."

[1] Wells v. London, Tilbury, and Southend Railway Co., 1876, L. R., 5 Chanc. Div. 126.

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porations as well as to individuals. There was therefore a strong presumption against the Legislature having assigned away the rights of the Great North of Scotland Railway Company and of the Joint Committee. The subsections of the 106th section of the Act, which particularised "the conveniences and privileges" to which the North British Company was to be entitled under the Act, could not be extended beyond their strict letter. The right to run over and use the line was confined to "the Scottish North-Eastern lines." There was a parliamentary surrender of the Scottish North-Eastern system to the North British in so far as they got running powers over it, which was the consideration they got in respect of the amalgamation of that system with the Caledonian. The language of the 4th subsection of the 106th section giving them the use of the station at Aberdeen "in so far as the company lawfully may" did not lead to the result arrived at by the Lord Ordinary. The station was the joint property of the Caledonian and the Great North. What Parliament meant was that the consent of one of the two joint owners, *i.e.*, of the Caledonian, might be forced, if the other joint owner consented. But Parliament could not be held to have bound the Great North to submit to a partition of the station in an Act by which they got nothing themselves. The North British were in no sense assignees of the Great North, and the other joint proprietor could not assign a portion of his share and introduce a third party, irrespective of the consent of the two joint proprietors. Interdict had been frequently granted in similar circumstances.[1] The conveniences "connected with" the Scottish North-Eastern lines were such as were physically and practically connected, and not legally as the Lord Ordinary construed it. The question was not one of the convenience of the public. The pursuers would be quite willing to admit the defenders to the use of the station, if they paid for the privilege to be granted to them. The toll clauses did not apply to stations; accordingly, although the North British Railway had paid the Caledonian for the use of their rails, including the 200 yards up to the platform, they had never paid anything for the use of the station either to the Caledonian or to the Joint Station Committee.

Argued for the respondents;—The true construction of the Act of 1866 was that which had been adopted by the Lord Ordinary. Otherwise the expressed object of the Legislature would be totally defeated; for there could be no doubt that the clauses in the Act of 1866 had been imposed upon the Caledonian Company much more in the interests of the public than in any other view, one object of Parliament being—looking to the terms of the 4th subsection of section 106—to keep up a competition. For the purposes of the toll clauses and the adjustment of rates and charges the travelling lines met in the middle of the station, the Joint Committee's property being entirely confined to the station. The object of giving the North British "the joint or separate use of the stations, &c., of the Scottish North-Eastern lines, including, in so far as the company lawfully may, the station at Aberdeen" was to make the right of the North British to the station perfectly clear, and as contrasted with the usual terms in which ordinary running-power rights were conceived.

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[1] North British Railway Co. v. Edinburgh and Glasgow Railway Co. and Caledonian Railway Co., Dec. 20, 1853, 16 D. 250, 26 Scot. Jur. 99; London, Brighton, and South Coast Railway v. London and South-Western, 1859, 4 De Jex and Jones, 362; Portpatrick Railway Co. v. Girvan and Portpatrick Junction Railway Co., Feb. 3, 1882, 9 R. 510; *cf.* also Caledonian Railway Co. v. North British Railway Co., July 16, 1880, 7 R. 1147.

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LORD PRESIDENT.—When formerly reviewing the interlocutor of Lord Kinnear, we had occasion to become familiar with the history of the Scottish North-Eastern Railway and its amalgamation with the Caledonian Company, and it is unnecessary for the purpose of the present judgment to go back upon any of these details. It is sufficient to say that by the Act of 1866, which we are now to deal with, the Scottish North-Eastern Company was dissolved and the Caledonian Company came into its place as part of the line connecting the north and south of Scotland. The Act of 1866, in so far as it records and gives effect to an agreement between the Scottish North-Eastern and the Caledonian Company, may be passed over in the meantime, because what we have to determine in the present case is how far the North British Company have acquired any rights under that statute.

Now, it is necessary in the first place carefully to consider the 99th section of the Act of 1866, which proceeds upon a recital that the railways of the North British Railway Company *via* Berwick in connection with the North-Eastern and Great Northern Railways form a line of communication between the Metropolis and Scotland, and the railways of the North British Railway Company *via* Carlisle and Hawick form in connection with the railways of the Midland Railway Company and of the London and North-Western Railway Company other lines of communication between the Metropolis and Scotland, and "whereas the lines of the North British Railway Company in connection with the Scottish North-Eastern lines with or without other railways form competing lines of communication with the railways of the Caledonian Company between Dundee, Aberdeen, and other places in the north of Scotland on the one hand, and Edinburgh and Glasgow and other places in the south, east, and west of Scotland on the other, and it is expedient that the free and expeditious transit of traffic of every description should be secured and maintained over the said several lines of communication, and that nothing should be done to impede or obstruct, but that every reasonable facility should be afforded for promoting the free passage and transmission of such traffic: Be it enacted as follows:—the expression 'Scottish East Coast Traffic,' where used in this Act, shall mean traffic of every description passing or destined or directed to pass to or from any place on or beyond the railways which previously to the commencement of this Act formed the undertaking of the Scottish North-Eastern Railway Company, and all extensions and branches of such railways which now belong to or are leased or worked by the company, except the Montrose and Bervie Railway, or which hereafter may belong to or be leased or worked by the company and every or any part thereof (in this Act subsequently called the Scottish North-Eastern lines) from or to any place on or beyond and *via* the railways forming the undertaking of the North British Railway Company, and every or any part thereof." Now, one cannot help seeing upon the reading of this section of the statute that Parliament attached great importance to the definition of Scottish East Coast traffic, shewing that by the statute it was intended to give particular facilities for the transmission of that traffic upon the lines with which this Act is dealing. And the 106th section of the statute makes this provision, that "the North British Railway Company may for the purpose of conveying Scottish East Coast traffic run over and use with their engines, trucks, and carriages of every description the Scottish North-Eastern lines or any part thereof, and the

stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines." The section thus gives the North British Railway Company running powers, and it proceeds thus:—"And the North British Railway Company shall be entitled to the conveniences and privileges, and be subject to the regulations and obligations hereinafter mentioned." And then, under the 4th subdivision of the section there occurs this provision,—"The joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, wharfs, stopping, loading, and unloading places, sidings, and junctions of the Scottish North-Eastern lines, including, in so far as the company lawfully may, the station at Aberdeen, and all conveniences therewith connected; the extent of such use, and the nature of the arrangements for working the traffic at the respective places, to be determined by agreement or by arbitration, and the payment to the company for the same to be the terminals as respects goods, mineral, and live stock traffic, and as respects passenger traffic to be such special payment, if any, as may be determined by agreement or by arbitration: And further, if at the request of the North British Railway Company the arbitrator shall order any enlargement or alteration of any of the said stations or places, such enlargement or alteration shall be made by the company, and the annual payment therefor, if any, shall be settled by agreement or by arbitration."

Now, I think it is very plain that the object of the Legislature was to give every possible facility for the passage of the Scottish East Coast traffic upon the lines to which this station applies, and that for that purpose they were to be entitled not only to have running powers through the station at Aberdeen, but that they were entitled under subsection 4, which I have just read, to the use of the station itself, and all the conveniences and privileges connected with that station. No doubt this provision is limited apparently and in words by the insertion of this clause "including, in so far as the Company lawfully may, the station at Aberdeen," and so forth.

Now, it has been said that that is a limitation of the accommodation and privileges conferred upon the North British Railway Company. I think it is necessary for the opponents of the North British Railway Company—the joint committee for managing the station—to shew in what respect anything has been given to the North British Railway Company which the Caledonian Railway might not lawfully give, and they have not pointed out any such privilege or accommodation communicated to the North British Railway Company which the Caledonian Company might not lawfully give; and therefore I confess I attach very little importance to these words in construing the 106th section of the statute. I think the true meaning was that the Scottish East Coast traffic was to enjoy all the privileges enjoyed by the Caledonian Company, not only in using the Scottish North-Eastern line, but in passing through and using the station at Aberdeen, and the Lord Ordinary in his interlocutor has suggested a conclusive reason for so construing the statute, because if that advantage is not given to the North British Railway Company, the object of the statute in providing facilities for the passage of the Scottish East Coast traffic would fail altogether. The object of the statute would be defeated by reading these words in such a way as to imply that there is some limitation in the amount of privilege or accommodation which the Caledonian Railway Company lawfully may give to the North British Railway Company.

It is upon that, I think, very simple ground that I come to the same conclu-

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sion with the Lord Ordinary, and hold that the North British Railway Company, with their running powers, and with the privileges and advantages bestowed by the 4th subsection of section 106, are just in as good a position as the Caledonian Railway Company, and as the Great North of Scotland Railway Company, in regard to the uses of the joint station at Aberdeen. I am therefore for adhering.

LORD ADAM.—It is desirable to see what the extent of the claim and the contention of the Great North of Scotland Railway Company is in this case. The leading conclusion of their action is to have it found "that the defenders" (that is, the North British Railway Company) "are not entitled, without the consent of the Great North of Scotland Railway Company, part owners thereof, to use the joint passenger station at Aberdeen, or any part thereof, or the conveniences connected therewith, for the purposes of their traffic, or to run over or use with their engines, trucks, or carriages of any description, the said station or the railway through the same, or the sidings, accesses, or works, extending for 200 yards on each side of the passenger shed of the said joint passenger station"; and there are subsidiary conclusions following, so that the claim on behalf of the Great North of Scotland Railway Company is this, that they have the power of keeping the North British Railway Company's carriages, engines, and trains at a distance of 200 yards from the joint passenger station at Aberdeen. If we are to give effect to that contention, it comes to this, that no North British train, using the running powers conferred by this Act, can approach the station at Aberdeen without the consent of the Great North of Scotland Railway Company, nearer than 200 yards, and if so, it cannot enjoy the benefit and use of the station.

Now, I think with your Lordship that that depends upon the construction of two clauses, the 99th and the 106th, of the Act of 1866. Now, the 99th clause is important, because it defines what the intention of the Legislature was as to the running powers with reference to the Scottish East Coast traffic. It is a clause which defines what Scottish East Coast traffic is, and it provides,—"And whereas the lines of the North British Railway in connection with the Scottish North-Eastern lines, with or without other railways, form competing lines of communication with the railways of the company between Dundee, Aberdeen, and other places in the North of Scotland, on the one hand, and Edinburgh and Glasgow, and other places in the south, east, and west of Scotland, on the other"—it is dealing with the traffic between Aberdeen and other places in the south; and then it goes on,—"And it is expedient that the free and expeditious transit of traffic of every description should be secured and maintained over the said several lines of communication, and that nothing should be done to impede or obstruct, but that every reasonable facility should be afforded for promoting the free passage and transmission of such traffic." Everything is to be done to promote the free passage and transmission of, *inter alia*, the traffic between Aberdeen and the south.

That is, if I may so call it, the preamble to this part of the Act which sets forth the reason for granting the running powers and facilities mentioned. It is to promote the free transmission of the traffic between Aberdeen and the south, and the claim on the part of the Great North of Scotland Railway Company is this, that notwithstanding that that is the avowed object and intention of the statute, they are entitled of their own *ipse dixit* to say, "We shall not allow that portion of the traffic between Aberdeen and the south carried by the North British Railway Company to come within 200 yards of the joint station."

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That is the contention. Now, that may be a construction of the Act, but it does not appear to me *a priori* to be a probable construction, for the result is that the Great North of Scotland Railway Company are to do the very opposite of what the Act says is its intention should be done.

Now, when we come to the general powers given in section 106 we find that they are these—"The North British Railway Company may for the purpose of conveying Scottish East Coast traffic"—which in the Act itself includes traffic between Aberdeen and the south—"run over and use with their engines, trucks, and carriages of every description the Scottish North-Eastern lines, or any part thereof": Then we come to the use of the station, which is the great question here—"and the stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines." Now, this particular station is not a station, I think, upon the North-Eastern line proper. But I am perfectly clear that the Lord Ordinary's view in his note is right, that it is beyond doubt a station connected with the Scottish North-Eastern Railway, and in that respect I am clear that it falls within the general powers. If the Act had contained no further provisions on the subject, I should upon the construction of this clause have held that the North British Railway Company were entitled to the use of the station, just as they were entitled to the use of stations which were wholly the property of the North-Eastern, now of the Caledonian Railway Company.

But then there is a specialty connected with this particular station, that it was a joint station, and not the entire property of the Caledonian Railway Company; and therefore the Legislature has thought it right that it should be specially dealt with, and it has inserted a clause for the purpose. Accordingly the 106th section goes on to say that "the North British Railway Company shall be entitled to the conveniences and privileges, and be subject to the regulations and obligations hereinafter mentioned," and the "hereinafter mentioned" refers to the 4th subsection, which provides that they are to be entitled to "the joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, &c. of the Scottish North-Eastern lines,"—that is, the stations, and so on, which are the exclusive property now of the Caledonian Railway Company, and then of the Scottish North-Eastern Railway Company. And then it says, "including, in so far as the Company lawfully may, the station at Aberdeen, and all conveniences therewith connected."

Now, what is the meaning of the words "in so far as the Caledonian Company lawfully may"? It is an elliptical form of expression, but I think the meaning is that they are to be entitled to the use of the joint station so far as the Caledonian Railway Company may themselves lawfully use it. That is to say, that the North British Railway Company were to have exactly the same privileges and uses as the Caledonian Railway Company, and the reason of that is this. The station is a joint station, it was constructed under the Denburn Valley Act of 1864, the 20th section of which provides for the powers of the joint owners —"Each of the said companies shall be entitled to the free use of the joint passenger station for through and local passenger traffic, and in proportion to their traffic, to an equal amount of accommodation therein." That is to say, that the Companies who built this station and whose joint property it was, were to have it appropriated for their accommodation,—in other words, part of it, in proportion to their traffic, is to be set aside for the particular use of the Great North of Scotland Railway Company, and part of it is to be set aside for the use of the Caledonian Railway Company. Accordingly I think that the Cale-

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donian Railway Company could not lawfully use the accommodation appropriated and set aside for the Great North of Scotland Railway Company in a common station. And so under the 4th subsection I do not think the North British Railway Company could, any more than the Caledonian Railway Company, insist on using that portion of the joint station set aside for the accommodation of the Great North of Scotland Railway Company. I think that was the meaning of the words "so far as they lawfully may"; or, in other words, that the North British Railway Company were to have all the powers and privileges which the Caledonian Railway Company could exercise or have in the joint station; but they were not to have the power, any more than the Caledonian Railway Company, of interfering, or insisting on any further rights or powers than the Caledonian Railway Company have in a question with the Great North of Scotland Railway Company.

Accordingly, my construction of these words is that the North British Railway Company have every privilege and every use which the Caledonian Railway Company may lawfully have of that joint station, but in exercising that use they are not entitled, any more than the Caledonian Railway Company would be entitled, to interfere with any parts or portions of that joint station which had been under their joint Act appropriated for the use of the Great North of Scotland Railway Company. That is my construction of this clause, and one sees that if that is the right construction, it is no hardship whatever upon the Great North of Scotland Railway Company, because the traffic with which the Act is dealing is traffic which was formerly brought into that station by the Scottish North-Eastern Railway Company alone. The same amount of traffic and the same character of traffic—the traffic from the south by all converging lines,—was brought in by the North-Eastern Railway Company, and was all accommodated in that portion of the joint station which by the Act of 1866 was appropriated to the Caledonian Railway Company. The difference was this, that that traffic which was formerly brought in by the Scottish North-Eastern line was in future to be partially brought in by the Caledonian and partially by the North British Railway Company under their running powers, and I can see no hardship inflicted on the Great North of Scotland Railway Company when they are called on to admit that traffic. I cannot agree to the contention that in spite of the preamble of the Act, which says that such traffic is to be facilitated in every way possible, the Great North of Scotland Railway Company are to have the power to put a stop to this traffic, and to say that all the traffic which the North British Railway Company brings is to be stopped 200 yards from the station. That, in my opinion, is quite an inadmissible construction.

That is my view of this clause, and it comes to this, as the Lord Ordinary says, that it must lead to the dismissal of this action, because it is impossible under this action to define the extent of use which the North British Railway Company are entitled to have. If any question of that sort is raised, it must be by a different action. But my construction necessarily leads to the conclusion that this action must be decided against the Great North of Scotland Railway Company. I therefore concur with your Lordship.

Lord M'Laren.—I am of opinion that this action was rightly decided by the Lord Ordinary, and I concur in his Lordship's view as reported, and with your Lordship's additional observations on the construction of the statute in question. In the arguments addressed to us at the bar, I think the Lord

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Ordinary's views were really not seriously controverted, but an attempt was made to displace the result at which his Lordship arrived by a very ingenious construction which was attempted to be put on these words, "in so far as the Company lawfully may." The argument was that the effect of these words was to make the right of the North British Railway Company entirely dependent on the power of the Caledonian Railway Company to communicate a right to the use of the station; and then it was said that inasmuch as the Caledonian has only a joint interest in the station along with the Great North of Scotland Railway Company, that Company has no power to communicate anything. And so the North British Railway Company, it was said, could take nothing under that clause.

I think there are two answers to this argument. First, if the meaning suggested was the meaning intended by the Legislature, then certainly Parliament, or the promoters of the bill, took the strangest mode of giving expression to their views, because the natural way of expressing what the reclaimers say is the meaning would have been to say simply, the North British Railway Company shall have no power to enter or to use the station at Aberdeen except with the joint consent of the Caledonian and the Great North of Scotland Railway Companies. But, secondly, I think the argument fails altogether, because it involves an assumption of fact which I take to be unfounded. It was pointed out by Lord Kinnear, in the course of the argument, that the Caledonian Railway Company were not antecedently to this Act in the position of being joint owners or having a joint interest in the station. They were receiving under this very statute, for the first time, the right to use the Aberdeen Railway Station; and the provision is that the North British Railway Company are to have all the rights which the Caledonian Railway Company have—all that they can lawfully communicate—out of the joint interest which they are now receiving. That does not seem to me to involve any reference to the goodwill either of the Caledonian Railway Company, or of the Great North of Scotland Railway Company. But the proviso is not without meaning. It in the first place makes it clear that the right of the North British Railway Company to the station was to be co-extensive with the right of the Caledonian Railway Company in the matter of the use, although different in its legal character; and secondly, as Lord Adam has pointed out, the proviso would also have the effect of making it clear that the North British Railway Company were not to interfere with the Great North of Scotland Railway Company in those parts of the station which had been specially appropriated to the accommodation of that company. I am therefore of opinion that the interlocutor under review should be affirmed.

LORD KINNEAR.—I remain of the opinion which I expressed in the Outer-House.

I only desire to add that I concur with your Lordships in thinking that the only question which we have to determine is whether the pursuers can stop the North British Railway at a point 200 yards south of the passenger shed at Aberdeen, so as to debar the North British Railway Company from a right of passage for its carriages and engines across that portion of the line into the station. It is now conceded, I think, that the pursuers cannot use the present action for the purpose of regulating the uses of the station to which the North British Railway Company may be entitled, or of fixing in any way the character and extent of the accommodation which may be lawfully given. The pursuers take

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their stand upon their position as joint owners of a part of the Scottish North-Eastern undertaking, and say, "in respect of our right of joint ownership, we peremptorily exclude the North British Railway Company from running its carriages and engines over any part of the line within the conclusions of our summons."

Now that they are not entitled so to exclude the North British Railway Company, I think, with all your Lordships, is very clear. I must confess that irrespective of the running powers given to the North British Railway Company by the Act of 1866, I should myself have some difficulty in seeing how these conclusions of the summons could have been sustained. The pursuers rest their right, as I have said, entirely upon their joint ownership in this station; but then they are joint owners of railway lines and a railway station subject to rights conferred by the Legislature upon all other companies and all other persons. Every company has the right to run over the lines of every other company. Of course we all know that that is not a right of any practical value, because the Legislature has given to other companies than the owning company a right of passage only, and has not added such facilities as are necessary to make the right of passage practically available, or to make it a right that could be safely exercised without the aid and concurrence of the owning company. But then the difficulty of practically working out a right which the Legislature has given does not prevent it being theoretically a perfectly good right; and it does appear to me that if the Caledonian Company had agreed so to work its signals and points as to enable the North British to run with safety beyond the point 200 yards south of the Aberdeen passenger shed, at which the pursuers desire to stop them, it would have been extremely difficult for the pursuers to say, "in respect of our joint right of property merely, we exclude such use." They might very well have made it practically of no avail to the North British Railway Company. That is perfectly possible. But that they may take their stand on their mere legal right, and say, that in respect of that joint right they may debar the North British Company at their pleasure from coming on that portion of their lines, would appear to me to be a proposition which it would be very difficult to maintain; because that is simply denying to the North British Company the right of passage which the Legislature has given to them and others by the Railways Clauses Act.

But it is not necessary to consider that question in determining this action, for the reasons your Lordships have given, because the Legislature has undoubtedly conferred on the North British Railway Company just those practical running powers which are necessary to enable the general right given by the Railways Clauses Act to all companies to be made effectually advantageous. Upon the construction of the clauses of the statute upon which the extent of the running power depends, I have nothing to add. I agree with your Lordship that the action must be dismissed,—the particular accommodations to which the North British Railway Company may be entitled, or to which the Caledonian Railway Company and the North British Railway Company together may be entitled, in the use of this station, being a question which we have no means of dealing with in this action.

THE COURT adhered.

T. J. GORDON & FALCONER, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

JOHN EDWARDS AND SPOUSE, Pursuers (Appellants).—*M'Kechnie—Baxter.*
THE PAROCHIAL BOARD OF KINLOSS AND ANOTHER, Defenders (Respondents).—*Jameson—Salvesen.*

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Reparation—Public official—Statutory protection against claims of damages for irregularities in execution of office—Ultra vires—Public Health (Scotland) Act, 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 118.—Where a local authority had partly demolished an untenanted house within their district on the ground that the state of the roof was dangerous to public safety, *held* that the local authority were not protected by the 118th section of the Public Health Act, 1867,* against a claim for damages by the owner, the demolition of houses on account of their danger to public safety being outwith the powers of local authorities under the Act.

1ST DIVISION. Sheriff of Inverness, Elgin, and Nairn. C.

IN July 1889 John Edwards, carpenter in Govan, and his wife, Charlotte Edwards, raised an action in the Sheriff Court at Elgin against the Parochial Board of Kinloss, as the local authority under the Public Health Act, 1867, and Archibald Keir Leitch, clerk to the Local Authority, for damages for the demolition of certain house property belonging to the pursuers in Findhorn.

The pursuers pleaded, *inter alia*;—(1) The defenders having, through their officer acting in their behalf, wrongously and unwarrantably interfered with and partly demolished the property of the pursuers, are liable in damages therefor.

The defenders pleaded, *inter alia*;—(2) The pursuers are barred by the 118th section of the Public Health (Scotland) Act, 1867, from insisting in the present action, and the same ought to be dismissed, with expenses.*

A proof was allowed. It appeared that the house in question had had the roof removed by order of the defender Leitch in February 1889, in consequence of complaints by neighbours that it was dangerous to public safety through the risk of slates falling off it. It also appeared that it was untenanted, and was in a filthy condition, some persons having been using it as a public convenience. The property was demolished without notice to the pursuers. Leitch deponed that he had been unable at the time to discover who were the owners of the property. In the course of the proof the Parochial Board admitted liability for the proceedings of Leitch in the matter.

On 2d August 1890 the Sheriff-substitute (Rampini) pronounced this interlocutor (after findings in fact):—"Finds that these proceedings by the defender Leitch, acting as aforesaid, did not fall within the scope of the Public Health (Scotland) Act, and were unwarrantable in law: Therefore sustains the pursuers' pleas in law: Finds the defenders liable in damages to the pursuers therefor; assesses the same at the sum of £50 sterling: Decerns," &c.

On appeal, on 23d October 1890, the Sheriff (Ivory) recalled that interlocutor, and after findings in fact, found in law that the action was excluded by the 118th section of the Public Health Act, 1867, and assoilzied the defenders.

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* The Public Health (Scotland) Act, 1867 (30 and 31 Vict. cap. 101), sec. 118, provides,—"The local authority and the board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act or for anything done by themselves in the *bona fide* execution of this Act, and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts in respect of all costs, liabilities, and charges to which he may be subjected, and every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act shall be commenced within two months after the cause of action shall have arisen."

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The pursuers appealed, and argued;—The proceedings of the defender Leitch, for which the other defenders had admitted liability, were wholly outwith the statute. The defenders had not even a colourable warrant for pulling down houses on account of their danger to the public safety. The act complained of, therefore, could not be described as an "irregularity" committed "in the execution of the Act," and thus did not come within the protection of the 118th section.[1]

Argued for the defenders;—The policy of the Legislature was to protect public officials so that they might not be hampered in the execution of their duties by the fear of claims for damages. Hence clauses of protection like the present received a very liberal interpretation,[2] which was wide enough to cover the irregularity here complained of. At anyrate, the buildings in question were a nuisance from their filthy condition, and a local authority had undoubtedly authority to remove nuisances.

LORD PRESIDENT.—With regard to the merits of this case I do not understand your Lordships to entertain any doubt. The Parochial Board of Kinloss, in acting as they have done, profess to have proceeded as the local authority under the Public Health Act of 1867, and Leitch, as their officer, professes to have acted under that statute also. The question therefore comes to be whether in performing the duties imposed by the Public Health Act a local authority is entitled to order the demolition of a house. I confess I am unable to find in the statute any authority at all for such a proceeding. The Public Health Act empowers local authorities to remove nuisances of all kinds which are injurious to sanitation or public health generally, but I cannot find any general warrant authorising a local authority to pull down houses. It is possible that a house may be in such a state that the public health cannot be effectually secured except by the removal of the house altogether. As to whether the removal of the house in such a case would be within the powers of the local authority I say nothing: it is sufficient to say that it is not the case with which we have here to deal. No doubt this house had become a nuisance in consequence of its having been so long unoccupied, because mischievous persons were in the habit of resorting to it, and making use of it as a public convenience, but any nuisance of that sort could easily have been removed without the necessity of pulling the whole house down. Therefore, upon the important general question under the statute I think the Sheriff has gone wrong, and that his interlocutor must be recalled. I am, however, unable to agree with the Sheriff-substitute in assessing the damages at so large a sum as £50, and I propose, if your Lordships should agree with me, that we should reduce the damages to £10.

LORD ADAM.—I agree with your Lordship in thinking that the Sheriff-substitute is right except as regards the amount of damages, which I think with your Lordship ought to be assessed at £10.

The question is whether a local authority, acting under the Public Health Act of 1867, is entitled to pull down a house on the ground that it is dangerous to public safety. Now, in the execution of that Act a local authority has power

[1] Knox v. Macarthur, June 7, 1865, 3 Macph. 890, 37 Scot. Jur. 528.

[2] Ferguson v. M'Ewen, Feb. 7, 1852, 14 D. 457, 24 Scot. Jur. 225; M'Laren v. Steele, Nov. 13, 1857, 20 D. 48, 30 Scot. Jur. 27; Murray v. Allan, Nov. 29, 1872, 11 Macph. 147, 45 Scot. Jur. 88; Ferguson v. M'Nab, June 12, 1885, 12 R. 1083; Hastings v. Henderson, July 15, 1890, 17 R. 1130.

to remove nuisances, but, as far as I can discover, they are no more entitled than any private person to order the removal of a house on the ground that it is not in a safe condition. There are well known means by which houses that are dangerous to the public may be removed, but it is no part of the duties imposed on the local authority to see to the removal of such houses. That being so, this local authority, in ordering the removal of the pursuers' house, were doing what they had no warrant or authority whatever for doing. I cannot see that what they did was done in execution of the Act, or was done *in bona fide*, or that it was done under the Act. The whole defence to the present action is based on the 118th section of the Public Health Act, 1867. I do not think it necessary to examine the terms of that section critically, for I am very clear that the defenders were not acting under the Act, but were acting entirely outwith its provisions, and accordingly that they are not entitled to the protection of the 118th section.

LORD M'LAREN.—It was virtually admitted in the inferior Court, and was not disputed at the bar here, that the Act complained of was altogether outwith the powers of an inspector of poor acting as the sanitary authority. The Public Health Act, 1867, gives extensive powers to local authorities in connection with the removal of nuisances, subject to the approval of the Sheriff, but I agree with your Lordships that this was not a case of nuisance at all. In the present case a double error was committed, first, the error of treating as a nuisance what was not a nuisance, and secondly, that of carrying out the removal of the supposed nuisance in a way not contemplated by the statute. Now, it appears to me that when anyone is sued on account of the illegal actings of his agent, he must make up his mind whether he will adopt these actings or repudiate them. Here the Parochial Board has elected to adopt the act of their inspector, and to plead the benefit of the 118th section of the Public Health Act. I agree with your Lordships that the 118th section, wide as it is, will not exclude action where the thing complained of is something altogether outwith the powers conferred by the statute. It is not enough to entitle a local authority to the benefit of the protective clause that they choose to describe what they have done as something done in the execution of the Act. It must be something which can be represented as a proceeding taken in the execution of the statute, and where, as in the present case, there was no attempt either to carry out the procedure required by the Act or to ascertain whether the thing which it was intended to do was within the powers conferred by the Act, I cannot see that the Parochial Board is in a position to take any benefit from this protective clause. I think that if the Parochial Board had looked at the statute, as they were bound to do, they could not have failed to see that it gave them no authority to demolish houses. The same reasoning applies to the limitation as to the time within which proceedings may be brought, for it is a limitation of actions directed against persons acting under the Act, and consequently has no application where the person has been acting altogether outwith the authority of the Act. I further agree with your Lordships in thinking that the damages should be assessed at £10.

LORD KINNEAR.—I am of the same opinion. I think that the Public Health Act of 1867 gives no power to local authorities to demolish houses on the ground that they are in a state dangerous to public safety. It therefore appears

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to me that there can be no effectual defence here on the ground that the defenders are entitled to the statutory protection against the consequences of irregularities committed in the execution of the Act, for what they have done cannot with propriety be described as an irregularity committed in the execution of the Act; on the contrary, it was something altogether beyond the scope and powers of the Act. Counsel were unable to refer to any provision in the statute which gave even the colour of a warrant for what the defenders have done. I therefore think that the defenders ought to be found liable in damages, which I concur with your Lordship in thinking should be assessed at £10.

THE COURT recalled the interlocutors of the Sheriff-substitute and the Sheriff; found in terms of the findings in fact in the interlocutor of the Sheriff-substitute; found that the proceedings of the defenders did not fall within the scope of the Public Health Act, 1867, and were unwarrantable in law; sustained the first plea in law for the pursuers, repelled the pleas stated for the defenders, and assessed the damage at £10 sterling.

A. J. & J. DICKSON, W.S.—R. STEWART, S.S.C.—Agents.

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Jardine v. Grant.

SIR ROBERT JARDINE, Bart., AND OTHERS, First Parties.—*C. J. Guthrie.* SIR ARTHUR HENRY GRANT, Bart., Second Party.—*Asher—G. R. Gillespie.* CHARLES MICHELL AND OTHERS, Third Parties.—*W. C. Smith—John Wilson.*

Entail—Heir in possession—Provisions to children, authority to charge fee and rents with, by bond and disposition in security—Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 21.—A deed of entail, dated in 1769, conferred power upon heirs of entail to grant provisions to their younger children "to affect the rents of the lands, . . . such provision to be given by each heir of tailzie to his or her children, . . . not exceeding three years' rent of the estate, and which provisions shall only affect the persons of the succeeding heirs of tailzie possessing the estate and the rents thereof, to the extent of one-half of whatever the heir does possess yearly, and any estate, real or personal, belonging to them, other than the said entailed estate or rents thereof, until the provisions given in manner foresaid to the children of the former heirs of entail shall be satisfied and paid, at least shall affect the same no further than to the extent of what shall have been paid, or otherways extinguished, of the provisions given to the children of the former heir, so that the whole provisions shall at no time exceed the sum of three years' rent."

In 1818 A, the heir of entail then in possession, granted a bond of provisions to his younger children to the amount of three years' rents. B, the succeeding heir, possessed from 1820 to 1859 without having paid off any of the bond.

C, the next heir, having in 1889 presented a petition for disentail, the question arose whether the bond was one which could be made to affect the fee of the estate under sec. 21 of the Rutherfurd Act.* C contended that it could not

* The Entail Amendment Act, 1848 (11 and 12 Vict. c. 36), sec. 21, enacts that "in all cases where an heir of entail in possession of an entailed estate in Scotland shall be liable to pay or to provide by assignation of the rents and proceeds of such estate for any sum or sums of money granted by any former heir of entail, by way of provisions to younger children, in terms of the said recited Act passed in the fifth year of the reign of His Majesty King George the Fourth, or in virtue of the powers to that effect contained in any deed of entail under which the heir of entail in possession holds, ... it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate, other than the mansion-house, offices, and policies thereof, or to charge the fee and

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in respect that it was not intended to be a permanent burden, but to be paid off each year by the heir in possession to the amount of one-half of the rents, and that B's representatives were liable for the debt. *Held* that the bond was one which could have been made to affect the fee of the estate under sec. 21 of the Rutherfurd Act, and that it fell to be paid by the disentailer.

2D DIVISION. M.

On 4th January 1889 Sir Arthur Henry Grant, Bart., heir in possession of the entailed estates of Monymusk and others in Aberdeenshire, presented a petition for disentail under the Entail Amendment Act of 1848.

On 5th February the Lord Ordinary (Wellwood) remitted the petition to Mr H. B. Dewar, S.S.C., for inquiry and report.

Mr Dewar reported that, in his opinion, a sum of £10,857 contained in the schedule of debts could not be made to affect the entailed estate.

This sum was contained in a bond of provision granted in 1818 by Sir Archibald Grant, then heir of entail in possession of the estates, as a provision for his younger children in virtue of powers contained in a deed of entail executed on 24th November 1769 by Sir Archibald Grant of Monymusk and his son, Archibald Grant.

This latter deed contained the following clause:—"And excepting also from the said restriction and limitation upon the heirs of entail power to the said heirs of tailzie above specified to give suitable provisions to their children, other than the heir of entail for the time being, to affect the rents of the lands and others contained in this deed of settlement, such provision to be given by each heir of tailzie to his or her children, other than the heir, not exceeding three years' rent of the estate, and which provisions shall only affect the persons of the succeeding heirs of tailzie possessing the estate and the rents thereof to the extent of one-half of whatever the heir does possess yearly, and any estate, real or personal, belonging to them, other than the said entailed estate or rents thereof, until the provisions given in manner foresaid to the children of the former heirs of entail shall be satisfied and paid, at least shall affect the same no further than to the extent of what shall have been paid, or otherways extinguished, of the provisions given to the children of the former heir, so that the whole provisions shall at no time exceed the sum of three years' rent."

Mr Dewar's view as to the sum in question was that it was a debt due by Sir James Grant, who had succeeded to the entailed estate in 1820 after the death of his father, Sir Archibald, the granter of the provision, and who had possessed the estate till 1859. The reporter recommended that the disentailer should grant a bond and disposition in security over the estates in favour of trustees for the £10,857, on condition (1) that in the event of its being judicially found or admitted that the sum could before the disentail have been made to affect the fee of the estates, the trustees should assign the bond to the present holders of the £10,857; (2) that if it were found or admitted that the sum could not have been made to affect the fee of the estates, and that the disentailer could not have been made liable therefor, the trustees should discharge the bond.

The interest upon the sum had been regularly paid by successive heirs of entail in possession down to Whitsunday 1889.

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rents of any portion of such estate, other than as aforesaid, with the amount of such provisions, by granting bond and disposition in security over such estate or such portion thereof, other than as aforesaid, for such amount, with the due and legal interest thereof from the date of such bond and disposition in security, or any subsequent date, till repaid, and with corresponding penalties; and such bond and disposition in security may be in ordinary form, binding the granter and his heirs of entail, in their order successively, to repay the principal sum therein, *with interest* and penalties as aforesaid, . . ."

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Objections were lodged to the report by the creditors, or representatives of creditors, in right of the sum under the bond of provision, and they maintained that the disentailer was not entitled to disentail until he had executed in their favour bonds of corroboration and dispositions in security in common form for the whole sums due to them.

In conformity with the report, the Lord Ordinary (Kyllachy), on 29th October 1889, granted authority to disentail the lands of Monymusk, but superseded extract of the interlocutor until a trust-bond and disposition in security for the £10,857, with interest, in the terms recommended by the reporter, should be executed by the disentailer.

A reclaiming note was presented against this judgment, but was withdrawn on its being arranged that the disentailer should grant the bond in terms of the report.

On 18th December 1889 the bond and disposition in security was granted, and the instrument of disentail was thereupon recorded by authority of the Court.

The free rental of the estate was at this time about £6100, and the £10,857 was the only debt affecting the fee of the estate. The capital value of the estate was about £170,800.

To determine the question raised by Mr Dewar as to who was liable to the creditors in right of the £10,857, a special case was presented to the Court by (first) the creditors or representatives of creditors in right of the £10,857; (second) by the disentailer, Sir Arthur Grant; and (third) by the personal representatives of Sir James Grant, who (as already stated) had succeeded the granter of the provision in 1820.

The first and third parties maintained that the provision affected, or could before the disentail have been made to affect, the fee of the entailed estate, or the heirs of entail in possession of the same.

The second party maintained that the representatives of Sir James Grant were liable to pay off and satisfy the provision.

The questions of law were:—"(1) At the date of the disentail executed by the second party, did the said sum of £10,857 affect, or could it have been made to affect, the fee of the entailed lands of Monymusk, or the heirs of entail possessing the same? (2) If and in so far as the first question is answered in the negative, are the third parties liable in payment of the said sum, or any, and what part thereof?"

Argued for the second party;—The 21st section of the Rutherfurd Act did not contemplate provisions of a qualified nature, but only provisions which in accordance with the terms of the entail formed a continuous or indefinite burden upon the rents and proceeds of the estate. That had been established in *Campbell's*[1] case, where the deed of entail provided that the provisions for younger children should not affect the estate for a longer period than twenty-five years after the granter's death, and in *Baillie's*[2] case, in which there was a provision in the deed for payment of the amount of the provision by instalments. The question then came to be whether the provision in the present deed was of a qualified or terminable nature. It clearly was so. Power was given to affect the rents, and the rents only. Each heir of entail in succession had the power to grant provisions up to three years' rent, and he was liable to pay the bond by instalments of one-half of the yearly rents so as to give the succeeding heirs a chance of exercising the power each in their turn. The creditor's right was limited to a demand against the heir in possession at

[1] Campbell, Jan. 26, 1854, 16 D. 396, per Lord Rutherfurd, 402, 26 Scot. Jur. 188.

[2] Baillie, Feb. 4, 1854, Duncan's Manual on Entail, p. 339.

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the time for one-half of the annual income if there was no other estate, real or personal. The bond, in short, was not to be permanent, but it was contemplated that each provision should be paid off at a certain rate, one set nearly exhausted and another set coming on. [LORD YOUNG.—Supposing the creditor in the bond neglects to exact from the heir in possession at the time the one-half of the annual income to which you say his right under the bond is limited, and the heir dies in default, what is the legal result?] The creditor loses his right so far as the heir in possession is concerned, and his only recourse will be against the personal representatives of the deceased. [LORD YOUNG.—Is that not extravagant?] It is only an implication of what was expressly contained in the deed of entail in *Baillie's* case. The cases of *Seymer*[1] and *Hope Johnstone*[2] were inapplicable. In the former case the Lord Ordinary (Kinloch) was of opinion that it fell to be distinguished from the two cases already cited, inasmuch as the provision was made a general burden on the heir of entail, and was a burden not removable until the provision was fully satisfied. There was, too, no provision for extinction of the burden once created either by mention of a term of years or by payment by instalments. In *Hope Johnstone's* case each succeeding heir was entitled to burden up to three years' rent, under deduction of the interest already paid on previous provisions by previous heirs of entail. In the present case there could only be one bond for three years' rent effectual at the time against the heir in possession. The provisions were then not capable of being made to affect the fee of the estate under the Act, and the third parties were liable to pay them off.

Counsel for the first and third parties were not called upon.

LORD JUSTICE-CLERK.—The deed of entail before us is somewhat obscurely expressed, but presents, in my opinion, little difficulty as regards the point which has been argued by Mr Gillespie. The question is whether the sum of £10,857 which was placed as a burden upon the lands and estate of which the second party is now fee-simple proprietor is to be dealt with as no longer due by him as heir of entail coming into possession of the estate with that burden upon it.

I do not find in the language of the deed which empowered the granting of the provision anything to indicate that if the creditor in the bond failed to exact from the heir of entail in possession during the lifetime of the latter the amount of the debt, the creditor's right was annulled as against the heir.

I do not see any distinction between this case and the case of *Hope Johnstone*. The first question must be answered in the affirmative.

LORD YOUNG.—I am of the same opinion, and I think the matter is very clear. The only argument which has been stated against the validity of the bond of provision as a charge upon the rents of the estate of which the second party is now fee-simple proprietor is based upon the clause in the deed of entail which protects any heir in possession for the time being from being compelled to pay yearly in extinction of the bond of provision more than one-half of the rent of the estate.

In the view which I take of that clause it is simply one for the protection of the heir in possession against the hardship of the creditor in the bond pressing him for payment beyond half of his income from the estate.

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[1] Seymer, Jan. 29, 1859, 21 D. 361.

[2] Hope Johnstone v. Hope Johnstone, Nov. 27, 1880, 8 R. 160.

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We are asked, however, to infer from the clause that if the creditor does not press him and exact payment to that extent of one-half of the yearly rent, then the creditor's right is annulled, so far as the heir of entail at all events is concerned, or that it will only exist against the personal representatives of the deceased heir. In my opinion, that is an erroneous and extravagant inference.

I have already indicated my opinion during the argument that the provision is a perfectly good charge against the entailed estate. It falls, therefore, to be paid by the disentailing heir.

LORD RUTHERFURD CLARK.—I am of the same opinion.

LORD TRAYNER.—I am of the same opinion as Lord Young.

THE COURT answered the first of the questions in the affirmative, and found and declared accordingly.

JOHN CLERK BRODIE & SONS, W.S.—MACKENZIE & KERMACK, W.S.—AULD & MACDONALD, W.S.—Agents.

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une 5, 1891.
Maclean v. Maclean.

ALEXANDER JOHN HEW MACLEAN AND HIS TUTORS, First Parties.—*Ure—Macpherson.*
SELINA PHILIPPA DICKEN OR MACLEAN, Second Party.—*Salvesen—C. K. Mackenzie.*

Succession—Will—Revocation—Whether words revoking "previous testaments" revoked a revocable bond of annuity to take effect at death of granter.—The heir in possession of an entailed estate granted in favour of his wife a bond of annuity under the Aberdeen Act providing her an annuity out of the estate "during all the days of her life after my decease, in case she shall survive me." He reserved power to revoke the bond.

Subsequently he executed a trust-disposition and settlement prepared by a law-agent, whereby he revoked "all previous settlements and all writings of a testamentary nature, with the exception of" the bond of annuity.

By a later holograph will he revoked "all previous wills or testaments." *Held* that the holograph will did not revoke the bond of annuity.

2D DIVISION. M.

ON 16th July 1881, the late Alexander Thomas Maclean, one of the Judges of the High Court, Calcutta, heir of entail in possession of the estate of Ardgour, executed a bond of annuity under the Aberdeen Act over Ardgour in favour of his wife, Mrs Selina Philippa Dicken or Maclean, to the extent of one-third of the free rental "during all the days of her life, in case she shall survive me," as in full satisfaction of her legal rights, but excepting her right to an annuity as his widow from the Indian Civil Service fund. The bond reserved power to the granter "to revoke or alter these presents in whole or in part." Mr Maclean held the estate of Ardgour under an entail which excluded terce, and he had no marriage-contract.

On 19th August 1882, Mr Maclean executed a trust-disposition and settlement, prepared by a law-agent, containing a clause by which he revoked "all previous settlements and all writings of a testamentary nature, with the exception of a bond of annuity in favour of my wife, dated 16th July 1881."

On 29th November 1889, Mr Maclean executed a holograph will dealing with his whole estate, and containing this clause, "I revoke all previous wills or testaments."

By this will he gave his widow the liferent of his whole estate during her widowhood.

Mr Maclean died on 14th December 1890, survived by his widow and

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four children. He was succeeded in the entailed estate by his son, Alexander John Hew Maclean, who was born on 1st December 1880. Mr Maclean's personal estate amounted to about £14,000. The free yearly value of the estate of Ardgour was between £1300 and £1400.

A special case was presented by Alexander John Hew Maclean and his tutors and curators, first parties, and by Mrs Selina Philippa Dicken or Maclean, second party.

The first parties maintained that the bond of annuity was revoked by the holograph will of 29th November 1889, and Mrs Maclean maintained that it was not.

This question of law was stated:—"Does the holograph will, dated 29th November 1889, revoke the bond of annuity dated 16th July 1881?"

Argued for first parties;—The bond of annuity must be treated as testamentary for two reasons,—(first) because it was expressed in testamentary language; and (second) because it was clear that Mr Maclean so considered it. He referred to it as such in his settlement of 1882, when he excepted it from his revocation of "previous writings of a testamentary nature." The expression in the will of 1889 "all previous wills and testaments" must apply to the bond of annuity, for it was plural, and no other writings existed save that bond and the settlement of 1882.

The second party was not called on.

LORD JUSTICE-CLERK.—I doubt if we can legitimately interpret the words of the will of 1889 by the words of the revoked deed of 1882. Taking as they stand the words of the holograph will of 1889, "I revoke all previous wills or testaments," I am of opinion that they cannot be said to revoke the bond of annuity. The revocation is a revocation of testamentary writings, and this bond of annuity, though it may to some extent partake of a testamentary character, is not, as I think, a testamentary writing in the ordinary sense of that term. I therefore think that the question ought to be answered in the negative.

LORD YOUNG.—I am of the same opinion. I do not go into the question whether we ought to interpret the words of the will of 1889 by using as a glossary for that purpose the expression in that of 1882 which has been referred to. I wish to guard myself against being supposed to have any decided opinion upon that question. I see two difficulties in deciding upon it, first, that there is no ambiguity in the language of the will of 1889, and we generally look to extrinsic evidence only where there is such ambiguity. Again, it is doubtful enough whether we ought to refer for interpreting a holograph writing to a formal deed prepared by a professional man.

LORD RUTHERFURD CLARK.—I concur that the question should be answered in the affirmative. I think it quite clear that the bond of annuity was not revoked.

LORD TRAYNER concurred.

THE COURT answered the question in the negative.

TODS, MURRAY, & JAMIESON, W.S., Agents.

No. 167.

June 6, 1891.
Mouat v. Lee.

MISS MARGARET A. C. MOUAT, Pursuer (Respondent).—*Dickson.*
WILLIAM LEE, Defender (Appellant).—*M'Kechnie—M'Lennan.*

Sheriff—Jurisdiction—Citation—Registered letter—Debts Recovery Act, 1867 (30 *and* 31 *Vict. cap.* 26)—*Citation Amendment Act*, 1882 (45 *and* 46 *Vict. cap.* 77), *sec.* 3.—The proprietor of a fishing station brought an action under the Debts Recovery Act, 1867, in the Sheriff Court of the county in which the station was situated, against his tenant, for arrears of rent. At the date of the summons the defender was in possession of the fishing station, and had thereon fish-curing stock and plant, but had ceased to carry on active operations. He was resident in another sheriffdom, and was cited by means of a registered letter sent by the agent of the pursuer. The defender pleaded (1) no jurisdiction, in respect that he had no domicile, and was not carrying on business in the county; and (2) that he had not been properly cited. *Held* (1) that the Sheriff had jurisdiction, and (2) that the citation was valid.

1ST DIVISION. Sheriff of Caithness, Orkney, and Zetland. C.

ON 10th January 1891 Miss Margaret A. C. Mouat, of Bressay, Zetland, brought a summons under the Debts Recovery Act, 1867, in the Sheriff Court at Lerwick, against William Lee, designed in the summons as "fish-curer, Baltasound, Unst, Zetland, residing at Fraserburgh," concluding for payment of £30 as the year's rent of the fishing station at Baltasound due at Martinmas 1889.

The defender pleaded, *inter alia*;—1. No jurisdiction, in respect (1) that the defender has no domicile in Zetland or place of business there; (2) that he has not carried on a trade or business within the said county since the month of August 1889; and (3) that he has not been cited to appear in this action, either personally or at his place of business within said county; (4) citation by law-agent incompetent.

The parties by minute admitted;—"(1) That the defender, who resides in Fraserburgh, holds a lease of the fish-curing station mentioned in the summons, for a term of five years from and after 1st June 1889, at the yearly rent of £30, payable at Martinmas, beginning the first payment at Martinmas 1889; (2) that the defender entered on the possession of the station, as a fish-curer, and cured herrings thereon during the year 1889; (3) that the defender has not been removed from said station, nor renounced his lease; (4) that the sum sued for is the rent due for the first year of the lease; (5) that since then the defender has not carried on active operations on the station, but has been in possession thereof, and has thereon fish-curing stock and plant; (6) that the summons was served by the pursuer's agent by registered letter."

The execution returned by the agent bore that the registered letter had been addressed "Mr William Lee, fish-curer, Baltasound, Unst, Zetland, residing at Fraserburgh."

On 4th February 1891 the Sheriff-substitute (Mackenzie) repelled the defender's first plea, and on 18th February granted decree as concluded for, with expenses.

On 25th February the Sheriff (Thoms) adhered.

The defender appealed, and argued;—The Sheriff had no jurisdiction to entertain the present action. The circumstance that the defender was the tenant of a heritable subject within the sheriffdom was not *per se* sufficient to give the Sheriff jurisdiction.[1] Nor was the case within the 46th section of the Sheriff Court Act, 1876.* For, in the first place, the

[1] M'Bey v. Knight, Nov. 22, 1879, 7 R. 255.

* The Sheriff Courts Act, 1876 (39 and 40 Vict. cap. 70), sec. 46, enacts,—"A person carrying on a trade or business, and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business."

defender, though he might have a place of business within the county, was not at the date of the action carrying on business there; in the second place, he had not been cited personally or at his place of business; and thirdly, it was plain from the 2d and 3d sections of the Act* that the word "action," in section 46, meant action in the Sheriff's ordinary Court, *i.e.*, under his common law jurisdiction, and did not include actions under such statutory jurisdictions as that of the Debts Recovery Court. The citation therefore was bad, as the warrant to cite had proceeded from a Court which had no jurisdiction. But even if the Sheriff had jurisdiction, the citation nevertheless was bad. The Citation Amendment Act, 1882,† introduced a new form of citation—by registered letter—but it had no effect in enlarging the powers of a Court to grant warrant to cite, and a Sheriff had no power at common law to grant warrants to cite persons beyond his territory. The 2d subsection of section 12 of the Sheriff Court Act, 1876,‡ did not apply to the present case, for that section, like section 46 of the same Act, applied only to ordinary Sheriff Court actions, as was plain from the terms of subsection 2, which dealt with the service of "petitions," whereas the writ here was a summons.

Argued for the pursuer;—There was no direct authority for holding that a Sheriff had jurisdiction to entertain an action for the recovery of the rent of heritable subjects within his territory,—probably because the usual course was to sequestrate for the rent,—but the fair result of the authorities was that he had.[1] At all events he had jurisdiction under sec. 46 of the Sheriff Court Act, and any objection to the citation was cured by sec. 12, subsec. 2, of the same Act. Both these sections, whatever might have been the case originally, now applied to actions in the

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* The Sheriff Courts Act, 1876, sec. 2, enacts that, "unless where otherwise expressly provided, this Act shall only apply to civil proceedings in the ordinary Sheriff Court"; and sec. 3 enacts,—"Action includes every civil proceeding competent in the ordinary Sheriff Court."

† The Citation Amendment Act, 1882 (45 and 46 Vict. cap. 77), sec. 3, enacts,—"In any civil action or proceeding in any Court, or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the Court from which such summons, warrant, or judicial intimation was issued, or other officer who according to the present law and practice might lawfully execute the same, or by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, or to the office of the keeper of edictal citations where the summons, warrant, or judicial intimation is required to be sent to that office, a registered letter by post containing the copy of the summons or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation."

‡ The Sheriff Courts Act, 1876, sec. 12, subsec. 2, enacts,—"A party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

[1] Aberdeen Railway Co. v. Ferrier, Jan. 28, 1854, 16 D. 422, 26 Scot. Jur. 198; Young v. Livingstone, March 13, 1860, 22 D. 983, 32 Scot. Jur. 417; Harris v. Gillespie, Cathcart, & Fraser, July 20, 1875, 2 R. 1003.

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Debts Recovery Court. For the Small-Debt Amendment Act, 1889,[1] incorporated these sections expressly, and the Debts Recovery Act, 1867,[2] having incorporated the procedure sections of the Small-Debt Act, 1837, secs. 12 and 46 of the Sheriff Court Act, 1867, were also to be read into the Debts Recovery Act by implication. The requirements of sec. 46 had been fulfilled. Although the defender had not been cited personally or at his residence, he had been cited by registered letter, which must now be held as equivalent to the other modes of citation.

LORD PRESIDENT.—As regards the objection which has here been taken to the jurisdiction of the Sheriff, I have really been unable to understand upon what it is founded. The action is one for the recovery of a year's rent of a fishing station in Shetland, and the sum sued for is £30. The Sheriff undoubtedly in all ordinary cases has jurisdiction to entertain actions for the recovery of the rent of heritable subjects in his county, and I can discover no peculiarity in the present case to take it out of the general rule. The only question of any interest here is as to whether the defender has been properly cited. I am of opinion that the citation is perfectly good. It appears from the minute of admissions that the defender has a place of business in the county—the fish-curing station, the rent of which is sued for; that he entered into possession of that station and cured herrings there in 1889; and that he is still in possession and keeps his fish-curing stock and plant there. It is also admitted that the summons was served upon the defender by means of registered letter, which is now sanctioned by statute as an effectual form of citation. I am therefore for adhering.

LORD ADAM.—I am of the same opinion. The action is just an action for the recovery of the rent of a heritable subject. It is an action for the rent of a fish-curing station, which I suppose means a house and ground adapted for that purpose; and that is exactly the same thing, as far as the question of jurisdiction is concerned, as an action for the rent of a farm, and it is needless to dispute the jurisdiction of the Sheriff to entertain such an action when the farm is within his county. I have therefore no doubt about the jurisdiction of the Sheriff.

The only other question is as to whether the defender has been properly cited. In my opinion the 3d section of the Citation Amendment Act, 1882, applies to the present case. The language of the section is very wide—(His Lordship then quoted the section). The objection to the present citation is that the summons was sent by the pursuer's agent in a registered letter instead of being served by an officer of Court, but that is just what the Act allows. I therefore think that this objection also fails.

LORD KINNEAR.—I am of the same opinion, and I only desire to add that if the question of jurisdiction had depended on the 46th section of the Sheriff Court Act, 1876, I should, for myself, have been of opinion that there was here a sufficient citation of the defender within the meaning of that section, for the defender does not say that he has not received the summons, but only objects to the person by whom the service was made.

THE COURT refused the appeal.

TORRY & SYM, W.S.—J. D. MACAULAY, S.S.C.—Agents.

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[1] 52 and 53 Vict. cap. 26, sec. 5.
[2] 30 and 31 Vict. cap. 96, secs. 3 and 5.

ALEXANDER SUMMERS AND OTHERS (Owners of the "Restless Wave") AND THE NORTH BRITISH FISHING BOAT INSURANCE COMPANY, Complainers (Reclaimers).—*Murray—Salvesen.*
PETER BUCHAN AND OTHERS (Owners of the "Christina"), Respondents.—*Jameson—Shaw.*

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Ship—Salvage—Merchant Shipping Act, 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 460—*Jurisdiction.*—The Merchant Shipping Act, 1854, sec. 460, enacts that "whenever any dispute arises" as to salvage between the owners of the salved ship or boat and the salvors, and the parties cannot agree as to the settlement thereof by arbitration or otherwise—"then, if the sum claimed does not exceed £200, such dispute shall be referred to the arbitration of any two Justices of the Peace resident . . . at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident, by reason whereof the claim to salvage arises."

Held that the words "at or near the place where such ship or boat is lying" mean at or near the place where the ship is brought immediately after the accident, and do not include any place where the ship may afterwards be when a dispute arises.

Opinions that an insurance company, with which a salved vessel is insured, cannot be convened in such proceedings.

2D DIVISION. Lord Low. M.

ON 14th November 1890, Peter Buchan and others, fishermen, resident in Peterhead, the owners and crew of the fishing boat "Christina" of Peterhead, presented a petition in the Sheriff Court of Aberdeenshire, at Peterhead, under the 460th and 501st sections of the Merchant Shipping Act of 1854,* to determine a dispute as to salvage which they claimed from Alexander Summers and others, the owners of the "Restless Wave," another fishing boat belonging to Peterhead, the owners of the "Restless Wave" and the North British Fishing Boat Insurance Company, Peterhead, with which it was insured, being also called as defenders.

It was averred that the "Christina" had on 2d October 1890 rendered salvage services to the "Restless Wave" when about seven miles from Whitby, and had assisted her into Scarborough; that the owners of the "Christina" had requested the owners of the "Restless Wave" and the insurance company to compensate them, but that they had refused to do so, it being disputed that the services rendered were salvage services. The request for compensation was originally made and refused at Scarborough, but was renewed when both boats had returned to Peterhead.

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* 17 and 18 Vict. c. 104, sec. 460,—"Whenever any dispute arises . . . between the owners of any such ship, boat, &c. and the salvors as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof, by arbitration or otherwise, then, if the sum claimed does not exceed £200, such dispute shall be referred to the arbitration of any two Justices of the Peace resident as follows,—(that is to say)

"In case of wreck, resident at or near the place where such wreck is found;

"In case of services rendered to any ship or boat . . . resident at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident by reason whereof the claim to salvage arises."

Sec. 501,—"All matters and things that may, in pursuance of the eighth part (in which section 460 occurs) of this Act, be done by or to any Justice or any two Justices, may in Scotland be done also by or to the Sheriff of the county, including the Sheriff-substitute."

Sec. 461 provides that the Justices may call in a person skilled in maritime affairs to act as assessor, or may appoint an umpire. The Justices are to give their decision within forty-eight hours after the matter is referred to them, and any umpire is to give his forty-eight hours after his appointment.

Sec. 464.—"No appeal shall be allowed unless the sum in dispute exceeds £50."

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When the case was called in the Sheriff Court an agent appeared for the owners of the "Restless Wave" and the company, and objected that there was no jurisdiction against them in respect of the claim made, and that, in any event, the insurance company could not be sued in any such proceedings. The Sheriff-substitute (Grierson) repelled the objections, and ordered proof.

The owners of the "Restless Wave" and the insurance company then raised on 26th December a process of suspension and interdict against the owners of the "Christina" and the Sheriff-substitute to interdict the proceedings in the Sheriff Court. They set forth the circumstances already narrated, and in regard to the position of the insurance company they explained, while admitting that the local agent for the fishermen complainers was secretary of the company, that the respondents on their return to Peterhead called upon this agent and made a claim against the company, and that he made them an offer, which they declined.

The complainers pleaded;—(2) The said Sheriff-substitute having no jurisdiction under said sections of the Merchant Shipping Act to act as arbiter in said dispute, should be interdicted from proceeding therein.

The respondents pleaded;—(3) The proceedings complained of being well founded, both at common law and under the Merchant Shipping Acts, the note falls to be refused.

The Lord Ordinary (Low), on 6th January 1891, upon caution passed the note and granted interim interdict, and on 19th March 1891 repelled the reasons of suspension, recalled the interim interdict, and refused the note.*

* "OPINION.— . . . The complainers' contention was this:—Under the 460th section the claim may be brought before two Justices resident either, first, at or near the place where the boat is lying; or second, at or near the first port or place where the boat is brought after the occurrence of the accident. The complainers maintain that the concluding words 'after the occurrence, &c.' apply to both alternatives, and that the first alternative, the place where the boat is lying, contemplates the boat saved being beached, and not brought into any port.

"I cannot accept this construction of the statute. If the first alternative was inserted to meet the case of the boat being beached, it was unnecessary, because the words of the second alternative, the first place where the boat is brought after the occurrence of the accident, are clearly applicable to such a state of matters; but, further, the claim is to be referred, 'whenever any dispute arises, . . . and the parties cannot agree as to the settlement thereof,' and it is then to be referred to two Justices resident 'at or near the place where the ship or boat is lying.' The time is when the dispute arises, and the place is where the boat is then lying. The dispute in the present case arose when the boat was lying at Peterhead, and, therefore, the claim fell to be referred to two Justices resident at or near Peterhead, or to the Sheriff of the county.

"The complainers further contended that the Legislature could not intend that the salvors should be entitled to bring their claim at any place where the boat saved might happen to be, no matter how far that place might be from the scene of the salvage, and the residence of the witnesses whose evidence might be necessary to the determination of the claim. I do not think that considerations of supposed convenience, even if they were stronger than they are in the present case, could prevail against what, in my judgment, is the plain meaning of the words of the Act; but it is not unimportant to observe that in England it is expressly provided by statute that the claim may be brought at the place where the vessel is when proceedings were instituted. By the Act 25 and 26 Vict. cap. 63, sec. 49, it is made competent for a County Court Judge to exercise the same jurisdiction in salvage cases as is given to two Justices. This provision is analogous to that of the 501st sec. of the Merchant Shipping Act in regard to Sheriffs in Scotland. Then, by Act 31 and 32 Vict. cap. 71, certain provisions are made for the exercise by the County Court of Admiralty jurisdiction, and by the 21st sec. it is enacted that proceedings shall be commenced '(1) in

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The complainers appealed, and argued;—(1) The statute contemplated a speedy and informal award to be made on the spot. The terms of the 461st section, in which it was implied that a decision on any dispute should be given within forty-eight hours of the reference being made, shewed that "lying" in the statute did not mean lying at the time of the dispute, but lying immediately after the occurrence. It was not solely intended to meet the case of a boat being beached, as the Lord Ordinary thought. The case of a ship being damaged and salved while lying in a dock would be a case covered by it. (2) The clause was limited to questions with the owners of vessels. The company were not owners, hence these statutory proceedings could not be taken against them.

The respondents argued;—The object of the statute was to give a speedy and simple remedy. That consideration met both grounds of suspension here, for where could this question be so well and cheaply decided as in Peterhead? What interest had the complainers to press either of their pleas?

At advising,—

LORD TRAYNER.—The facts out of which the present question arises seem to be these. Early in the morning of 2d October last, the "Restless Wave," a fishing-boat belonging to the complainers, was caught in a gale when about eight or nine miles off the Yorkshire coast; her mast gave way and fell over the side, leaving her, as the respondents allege, in a helpless and disabled condition. The respondents in their boat, the "Christina," observing the condition of the "Restless Wave," bore down upon her, and towed her safely into Scarborough harbour in the course of the same day. Immediately after both boats had got into Scarborough the respondents put forward a claim for salvage, but their claim as then made was not admitted. Both boats some short time thereafter proceeded to Peterhead (the port from which they both sail), and then on 14th November last the respondents commenced the proceedings complained of before the Sheriff-substitute in order to have their claim for salvage ascertained, and decree therefor pronounced. The respondents' petition to the Sheriff was

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the County Court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings.'

"The complainers further contended that the note should be sustained, at all events to the extent of holding the proceedings in the Sheriff Court to be incompetent in so far as directed against the North British Fishing Boat Insurance Company, on the ground that it is only the owners of the boat against whom the claim of salvage lies. The boat was insured with the company for the period during which it was engaged in fishing at Scarborough, and it is not disputed that in the event of salvage being found due the company will have to pay at least three-fourths of the amount. Further, complainers' statements shew that the secretary of the company, who is also the other complainers' agent, negotiated with the respondents on the footing that the company was truly the party interested in the matter. In these circumstances, I do not think that it was unreasonable for the respondents to convene before the arbiter the party having the chief interest in securing that the question was properly laid before him. It is true that the application by which the proceedings before the Sheriff were instituted asks him to ordain the complainers, jointly and severally, to pay the salvage to the respondents. I think that probably the respondents are not entitled to decree directly against the company, but that is a matter with which I think that the Sheriff may properly be left to deal. I may add that no separate pleadings have been lodged, nor has any separate appearance been made for the company either here or in the Sheriff Court."

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founded upon the 460th and following sections of the Merchant Shipping Act, 1854. The complainers objected that the Sheriff-substitute had no jurisdiction under the statute libelled, but that objection having been repelled, the complainers brought the present suspension and interdict to have the Sheriff-substitute interdicted from proceeding with the said petition. The Lord Ordinary has repelled the reasons of suspension and dismissed the note, holding that the Sheriff-substitute had and has jurisdiction to deal with the petition presented to him, under the sections of the statute there libelled and founded on. That judgment is now before us for review.

I agree with the Lord Ordinary in thinking that the question presented for decision depends upon the construction of the 460th section of the Merchant Shipping Act, but my agreement with the Lord Ordinary ends there. I cannot adopt the construction which the Lord Ordinary puts upon that section.

By the section in question it is provided that "whenever any dispute arises (with respect to salvage) between the owners of any ship . . . and the salvors, as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof, by arbitration or otherwise, then, if the sum claimed does not exceed £200" (which is the case here), "such dispute shall be referred to the arbitration of any two Justices of the Peace" (or in Scotland under section 501 to the Sheriff or Sheriff-substitute) "resident . . . at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident by reason whereof the claim to salvage arises."

The jurisdiction thus conferred is special and extraordinary. It is extraordinary in the sense that what the statute authorises the Justices or the Sheriff to do could not be done by them in the exercise of their ordinary jurisdiction, and special in regard to the manner and time within which the jurisdiction is to be exercised,—special also in this respect that the judgment of the Justices or Sheriff on the salvor's claim is to be final in all cases where the sum awarded does not exceed £50. In short, what the statute provides for is a Court of arbitration to which the parties must submit, if its authority is invoked either by the salvor or the owner of the property salved, and by which the disputed claim shall be determined (finally as I have said in certain cases) practically at once, and without either the procedure or the necessary delay arising from the procedure of ordinary Courts of law. The respondents might have taken the benefit of this statute's provision, undoubtedly, had they chosen to do so, at Scarborough, immediately after their salvage service had been rendered. But the questions are, can they now, at Peterhead, adopt this statutory mode of having their claim determined, and has the Sheriff-substitute there any jurisdiction under the statute to entertain the respondents' demand? Both of these questions must, in my opinion, be answered in the negative. The jurisdiction conferred by the statute—extraordinary and special as I have pointed it out to be—can only be exercised by the persons, and in the circumstances, specified in the statute. According to my reading of the statute, the persons to exercise the jurisdiction are the Justices or Sheriff resident at or near the place where the salved ship is lying, or at or near the first port or place to which she has been brought after the salving,—that is to say, the Justices or Sheriff resident at or near the first port or place of safety which the salved ship has reached after or by reason of the salving, whether that place be a harbour in which she floats or a beach where she is stranded, or a dock or slip on which she has been placed

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for repair. The Lord Ordinary thinks that this statutory jurisdiction is conferred on the Justices or Sheriff resident at or near the place where the salved ship is lying when the dispute arises as to the amount of the salvors' claim, and holds that these two conditions are satisfied in the present case, because the dispute as to the salvors' claim arose at Peterhead, and the "Restless Wave" was then lying there. But I find nothing in the statute to warrant the view that the time when the dispute arises enters into the matter of conferring the jurisdiction at all. The words upon which the Lord Ordinary bases his view, and it was the view urged upon us in argument by the respondents—are these:—"Whenever any dispute arises," &c. These words, however, do not indicate a point of time; they point to a certain event. They are not equivalent to "at the time when any dispute arises," but "in the event of any dispute arising." If the Lord Ordinary's view was the right one, then the time of the dispute must be combined with the place where the salved ship is lying. You must have the dispute arising at the place where the salved ship is lying at that particular time. This might rarely occur, except in the case which I think the statute alone contemplated and provided for, namely, the salvors' claim advanced and disputed at the first place of safety to which the salved ship had been brought by the salvors. In short, I think the statute provides a special remedy for settling salvage claims, where such claims are made matter of dispute, at the place of safety to which the salved ship has first been brought after the occurrence which gives rise to the claim. If this special remedy is not then and there resorted to, the salvors' claim can only be enforced by an appeal to the ordinary Courts of law. It appears to me that this view of the statute is supported by the consideration that the Justices or Sheriff are required to issue their award within forty-eight hours of the time when the dispute has been referred to them. They are entitled, no doubt, to extend that time by a writing under their hand, but the contemplation of the statute is that the award will be issued within the time there specified. Now, such summary disposal of the dispute is quite intelligible if the dispute is to be taken up at the first place of safety which the salved ship shall reach. The salvors are there; the crew of the salved ship are also there. The salved ship itself is there, open to the inspection of the Justices, or any "person conversant with maritime affairs," whose assistance they are entitled to take. In these circumstances the Justices may quite well issue their award speedily. It is not contemplated, I think, that they shall have pleadings, lead proof, and pronounce judgment thereon as a Court of law. They are to determine as arbiters a question which it is in the interest of all concerned should be determined at once. But it is difficult to conceive how this summary mode of settling the dispute can be applied, if the dispute arises months after the salvage services have been rendered, and many miles away from the place to which the salved ship was first brought.

The Lord Ordinary's judgment proceeds upon the view that the dispute as to the salvage arose at Peterhead. But is it quite clear that that is so? It appears to me, taking the statements on record, that the dispute as to the salvage arose at Scarborough. The respondents aver that immediately after the two boats got safely into Scarborough the demand for salvage was made. The complainers admit this, and say that their answer to the demand was that it was extravagant, and if that statement is accepted then the dispute arose in Scarborough and not at Peterhead. But whether the complainers' statement is accepted as made or not, it is clear on the respondents' averments that they

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made their claim at Scarborough, and that their claim was not then admitted. They had undoubtedly some claim, and therefore the only question was as to its amount. Now, it seems to me that if the amount claimed was not admitted a difference or dispute as to the amount claimed at once arose. And thus the dispute as to the salvage claim arose at Scarborough, where the salved ship was lying, and the Justices at Scarborough alone had the right to determine under the statutory jurisdiction the amount to be awarded to the salvors. It is not necessary, however, to press this view after the opinion I have expressed as to the meaning of the 460th section of the Act.

There is just one other point to be noticed. The respondents directed their petition not only against the owners of the salved ship, but against the company with which the salved ship was insured. I think it quite certain that the statutory jurisdiction does not cover such a claim. The Justices and Sheriff can only pronounce an award against the owners of the salved property, as it is only in disputes between the salvors and such owners that they are authorised to pronounce any award at all. In any view therefore, as regards the insurers, the Sheriff had no jurisdiction. But it is unnecessary to make any special finding with regard to them, for on the whole matter I am of opinion that the reasons of suspension should be sustained and the interdict formerly granted declared perpetual.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the interlocutors of the Lord Ordinary, and suspended, interdicted, prohibited, and discharged in terms of the note of suspension and interdict.

W. CROFT GRAY, B.L.—R. C. GRAY, S.S.C.—Agents.

No. 169.
June 9, 1891.
Davidson v. Davidson.

GEORGE DAVIDSON, Pursuer (Appellant).—*Jameson—Burnet.*
ANN DAVIDSON, Defender.

Sheriff—33 *and* 34 *Vict. cap.* 86, *secs.* 12 *and* 13—*Appeal.*—The Sheriff-substitute of a county divided into two districts by an order of a Secretary of State following on the Statute 33 and 34 Vict. cap. 86, refused a warrant to cite to the Court at the head burgh of the county a defender belonging to another district of the county. *Held* that an appeal against this refusal was incompetent.

2D DIVISION.
Sheriff of Aberdeenshire.
I.

GEORGE DAVIDSON, residing in Aberdeen, raised an action of accounting against Ann Davidson, designed as residing at Gallahill, St Fergus, in the county of Aberdeen.

The Sheriff-substitute (Grierson), on 26th May, pronounced this interlocutor:—"Having heard the pursuer's agent on his motion for a warrant to cite the defender to the Court at Aberdeen in respect of the order of the Secretary of State, of date 10th June 1885, refuses the same."*

* An order by a Secretary of State, on 10th June 1885, bore that the Secretary prescribed "that, from and after the date hereof, the following arrangements shall take effect with respect to the Sheriff Courts in the Peterhead district of the county of Aberdeen:—(1) All cases, civil and criminal, arising in the district of the county of Aberdeen, hitherto known as the Peterhead district, shall be called, tried, and proceeded with within the said district. (2) A Court shall be held at Peterhead once a-week, on a stated day, during three weeks out of every four, according to such regulations as may be prescribed by the Sheriff,

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The pursuer appealed, and argued;—The Sheriff had power to cite all persons within his jurisdiction to his head burgh.[1] This warrant should have been granted, and the defender after being cited could appeal to the discretion of the Sheriff to order the action to proceed elsewhere. The present case must be taken on the same footing as if the action had been dismissed for want of jurisdiction, or for any other cause.[2] [LORD YOUNG.—But this action has not been dismissed. If the Sheriff-substitute had added the words "dismisses the action," you might have had an appeal, for then he would have disposed of the whole merits of the case.] But there was a difficulty in point of process, for an action could not be dismissed till it was in Court, and, without a warrant of citation, the action could not be brought into Court. [LORD RUTHERFURD CLARK.—I do not at present see why you should not get the action dismissed, and then I think we could probably deal with it.] In substance that was what had been done.

LORD JUSTICE-CLERK.—I think we must dismiss the appeal as incompetent.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT dismissed the appeal as incompetent.

HENRY & SCOTT, W.S., Agents.

No. 170.
June 10, 1891.
M'Lean v. M'Lean.

MRS FLORA M'LEAN AND OTHERS, Pursuers (Appellants).—*Mackay—W. Campbell.*
MALCOLM M'LEAN AND ANOTHER, Defenders (Respondents).—*M'Kechnie—Craigie.*

Lease—Crofter—Bequest of holding—Crofters Holdings (Scotland) Act, 1886 (49 *and* 50 *Vict. c.* 29), *sec.* 16.—*Held* (1) that the power conferred on a crofter under section 16* of the Crofters Holdings (Scotland) Act, 1886, of

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for the despatch of all business, civil and criminal, competent in the Sheriff Court."

[1] Tait v. Johnston, Feb. 28, 1891, 18 R. 606.

[2] Whyte v. Gerard, Nov. 30, 1861, 24 D. 102, 34 Scot. Jur. 58.

* The Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. c. 29), sec. 16, enacts,—"A crofter may by will, or other testamentary writing, bequeath his right to his holding to one person, being a member of the same family, that is to say, his wife, or any person who, failing nearer heirs, would succeed to him in case of intestacy (hereinafter called the 'legatee'), subject to the following provisions:—

"(*a*) The legatee shall intimate the testamentary bequest to the landlord . . . within twenty-one days after the death of the crofter. . . .

"(*d*) If the landlord . . . intimates that he objects to receive the legatee as crofter in the holding, the legatee may present a petition to the Sheriff praying for decree declaring that he is the crofter therein as from the date of the death of the deceased crofter, of which petition due notice shall be given to the landlord . . . and if any reasonable ground of objection is established to the satisfaction of the Sheriff he shall declare the bequest to be null and void . . .

"(*g*) If the legatee shall accept the bequest, and the bequest is not declared to be null and void as aforesaid, the legatee shall be entitled to possess the holding on the same terms and conditions as if he had been the nearest heir of the crofter.

"(*h*) If the legatee does not accept the bequest, or if the bequest is declared to be null and void as aforesaid, the right to the holding shall descend to the heir of the crofter in the same manner as if the bequest had not been made."

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bequeathing his holding was validly exercised in favour of a niece, although there were in existence sons and daughters of the crofter.

NEIL M'LEAN, a crofter, Cornaigbeg, Tiree, died, survived by two sons and five daughters, and by nephews and nieces.

He left a deed of settlement, dated 1st October 1890, in which he bequeathed to his niece, Flora M'Lean (a daughter of one of his brothers), his right to his holding under the Crofters Holdings (Scotland) Act, 1886,* as her own absolute property. The bequest was duly intimated to the landlord in terms of the statute, and he expressed his willingness to accept her as tenant.

In December 1890 Flora M'Lean, with the concurrence and consent of her husband and the executors under the will of the deceased, presented a petition of removing from the dwelling-house and lands of the croft of Cornaigbeg, against Malcolm M'Lean, the eldest son of the deceased, and Margaret M'Lean, one of the daughters of the deceased.

The pursuers founded upon the deed of settlement in favour of Flora M'Lean, and pleaded;—The female pursuer having the sole legal right and title to the holding of crofts at Cornaigbeg aforesaid, which belonged to the deceased, is entitled to decree as prayed for.

The defenders pleaded, *inter alia*;—(2) The bequest founded on is null and void, in respect that the female pursuer is not a member of the same family as the deceased Neil M'Lean, and that nearer heirs have not failed. (3) The female pursuer does not possess the qualification of a legatee required by section 16 of the "Crofters Holdings (Scotland) Act, 1886," and the bequest to her is null and void. (4) The defender being the eldest lawful son and nearest lawful heir of the deceased Neil M'Lean, is entitled to retain possession of the said croft.

On 10th March 1891 the Sheriff-substitute (Maclachlan) pronounced this interlocutor:—"Finds that the deceased Neil M'Lean, crofter, Cornaigbeg, Tiree, by his settlement, dated 1st October 1890, bequeathed his right to the holding possessed by him at Cornaigbeg aforesaid to his niece, Mrs Flora M'Lean, the female pursuer: Finds that the said Mrs Flora M'Lean does not possess the qualification of a legatee required by section 16 of the Crofters Holdings (Scotland) Act, 1886, and that said bequest is insufficient to exclude the claim of the defender Malcolm M'Lean, as eldest son and heir to the deceased, to the said holding: Therefore assoilzies the defenders from the conclusions of the action."†

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* Quoted *supra*, p. 885, note.

† "NOTE.—By section 16 of the Crofters Holdings (Scotland) Act, 1886, a crofter is empowered to bequeath his holding to one person being a member of the same family, and the question is whether a niece can be so considered when the deceased has left sons and daughters. The section defines a member of the same family as meaning the wife or any person who, failing nearer heirs, would succeed to the crofter in the case of intestacy. If this were to mean, as the pursuers contend, any who might succeed in the hypothetical case of there being no nearer heirs in existence, it would leave the power of bequest practically unlimited, and the section itself would be meaningless, because any person, however distantly related, might claim to be included in this description. It is not difficult, however, to come to the conclusion that by the above expression is meant those who would succeed in the case of intestacy, nearer heirs having failed—that is to say, the next of kin—and that the nearer heirs must fail before the holding can be bequeathed to more distant relatives. In the present case the deceased's next of kin are his sons and daughters, including the issue of any that may have predeceased him, and it is only when those fail that a niece can be included among the next of kin or have the holding bequeathed to her."

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The pursuers appealed, and argued;—There was no trace in the Act of any intention on the part of the Legislature to restrict the crofter's choice in the bequest of his croft at his death. He might bequeath it to his wife or to any person of the same family. The word "family" included the whole series of persons standing in the order of intestate succession as heirs. The contention that the bequest was limited to the person who happened to be heir-at-law to the crofter at his death was obviously ill-founded when regard was had to the provisions contained in subsections (*g*) and (*h*) of the 16th section. These provisions contemplated that the legatee need not necessarily be the nearest heir-at-law in order to have right to the bequest.

Argued for the defenders;—Upon a sound construction of the 16th section all the nearest heirs must be exhausted before any person other than the wife or eldest son could succeed. In that view the pursuer could not have the croft bequeathed to her until the heir-at-law and those nearer than her in blood to the deceased were dead.

LORD PRESIDENT.—The question which we have to determine is as to the construction of the 16th section of the Crofters Holdings (Scotland) Act, 1886, which provides that "a crofter may, by will or other testamentary writing bequeath his right to his holding to one person, being a member of the same family, that is to say, his wife, or any person who, failing nearer heirs, would succeed to him in case of intestacy (hereinafter called the 'legatee') subject to the following provisions."

Now, the power of bequest is limited thus. It must be exercised in favour of one person—to prevent the subdivision of crofters' holdings—and that one person must be a member of the same family. It may be his wife, but the only other person suggested in the section is a person who, "failing nearer heirs, would succeed to him in case of intestacy."

Now, I do not think that the Act means the existing nearest heir. On the contrary, I think the language is repugnant to such a construction. It says,—"Any person who, failing nearer heirs, would succeed in case of intestacy." Now, a person who would not succeed except in a case of failure of nearer heirs cannot himself be the nearest heir. We must therefore look for some other person, and he is one who is not the nearest heir at present, but who, failing nearer heirs, would be in the legal order of succession *ab intestato*.

I entertain no doubt that that is the true meaning of the clause.

LORD ADAM.—This question depends upon the construction of the 16th section of the Crofters Holdings (Scotland) Act, 1886. I agree with Mr M'Kechnie that the construction is clear, but I do not think that it is clear in the direction which he maintains.

The clause gives power to a crofter to leave his right to his croft to one person of the same family, who may be his wife "or any person who, failing nearer heirs, would succeed to him in case of intestacy," that is to say, any person who, if there were no nearer heirs, would be entitled to serve. There is a limitation to one person, who may be his wife, or some one else who is of the same blood as himself.

But the right is not confined to his wife and the nearest heir only, for there are subsections of the 16th section from which we find that the landlord has the right to object to the person named as legatee. But if the legatee accepts, and no objection is offered by the landlord, then the legatee is to be "entitled

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to possess the holding on the same terms and conditions as if he had been the nearest heir of the crofter." That plainly implies that he need not be the nearest heir, for he is to hold as if "he had been" such nearest heir. Then, again, from subsection (*h*) we find that if the legatee does not accept the bequest, or if the bequest is declared to be null and void, the right to the holding is to descend to the heir-at-law in the same manner as if the bequest had not been made. That, again, plainly implies that the Act contemplates that the legatee may not be the nearest heir.

LORD M'LAREN.—It seems reasonably clear that the Legislature did not intend to confine the crofter's testamentary power within such a narrow range as is implied in the construction which makes the crofter's wife and his heir-at-law the only possible objects of that bequest. If such had been the intention of the Legislature one would have expected to find a clear enactment that the crofter was to be entitled to leave his croft to his wife, and failing her that it was to descend to the heir by operation of law.

But it is plain that some selection other than the wife was intended, and it is also clear that, with the doubtful exception of the son-in-law, the person favoured must be of the blood of the testator.

It does seem strange and somewhat fanciful that the Legislature should have thought of giving the crofter the right to bequeath his croft to a person who should be distantly related to him, while withholding the power to bequeath it to a stranger.

No reason of public policy suggests itself to my mind for such a limitation of the testamentary powers, and I have sympathy with the view expressed by the Sheriff-substitute in his note on this matter. At the same time the Act does not define the class of heirs who may succeed to the bequest, and in the absence of such a definition we cannot make one. I can therefore come to no other conclusion than that anyone who is able to establish a traceable relationship with the testator is a proper object of the power of bequest conferred by the statute.

LORD KINNEAR.—I am of the same opinion. I should have no difficulty in construing the 16th section of the Act as your Lordships have done, even without referring to the subsections.

But if that were doubtful the difficulty would be entirely removed by a consideration of subsections (*g*) and (*h*) to which Lord Adam has referred.

These subsections make it clear that the legatee contemplated by the enactment is not the heir-at-law, but a legatee by whom the heir-at-law will be excluded, because the practical effect of the provision is that if the bequest is declared effectual the legatee is to have the same right to the bequest as if he were heir-at-law. If, on the other hand, the bequest is declared ineffectual, then the heir-at-law is to take the place of the legatee. How then it can be contended that no one but the heir-at-law is to take the bequest I cannot understand.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute: Sustain the plea in law stated for the pursuers, and decern."

LINDSAY, HOWE, & Co., W.S.—J. K. & W. P. LINDSAY, W.S.—Agents.

ROBERT AINSLIE BROWN, Pursuer (Respondent).—*Jameson—Alison.*
EDMUND LAMB BROWN, Defender (Reclaimer).—*Strachan—Craigie.*

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June 11, 1891.
Brown v. Brown.

Prescription, Triennial—Mercantile Agency—Act 1579, *c.* 83.—*Held* that the triennial prescription did not apply to an account for commission charged by a mercantile agent on the purchase of goods wholesale.

1st DIVISION. Ld. Kyllachy. C.

ON 20th August 1890 Robert Ainslie Brown, S.S.C., Edinburgh, raised an action against his brother, Edmund Lamb Brown, Sydney, New South Wales, for payment, *inter alia*, of £217, 5s. as commission at the rate of 2½ per cent upon the execution of orders after mentioned.

The pursuer averred, that between April 1876 and March 1886, the defender "regularly sent for and obtained, through the intervention, agency, and credit of the pursuer, large quantities of goods, amounting, with other consequent and relative disbursements, in the aggregate to £8772, 19s. 6d., conform to account after mentioned. In a letter dated 25th November 1877, with reference to the said order for goods, and a subsequent order, the defender wrote to the pursuer thus:—'I must return many thanks for your kindness in getting Matheson's goods sent off. I hope they will come safe, and trust will be able to send you the money soon, but will pay you at the rate of 6 per cent, and 2½ for your trouble. I have had an invoice from Mr Hardie, and the ship has been out 78 days now. She may be in any day. I have been thinking that you will be able to do what I have to do quite as well as he can, and if it will be the means of putting a few pounds in your way so much the better. I have paid him over £5 for the first transaction, and I may have to pay him ten times that during the year. If you think it worth your while, let me know by return. You would have nothing to do with the paying of the goods further than drawing a bill on me at six months, and, of course, seeing as to insuring and shipping. The Birmingham agents charge 2½ per cent, and I would allow 2 per cent on goods purchased through them, and 2½ on goods purchased by you, such as Matheson's, or any goods you could purchase. You would require to give me all discounts—that is, trade and cash—and then there would be a clear understanding. I hope you will undertake this, and I am quite satisfied it will be of advantage to both. There is every chance my orders will get larger every month.' This letter formed the terms on which the pursuer acted throughout for the defender. . . . The pursuer has charged interest at 5 per cent and commission at 2½ per cent, the original agreed-on rate."

The defender pleaded;—(2) The triennial prescription.

On 20th March 1891 the Lord Ordinary (Kyllachy) repelled the second plea in law stated for the defender, and allowed the parties a proof of their averments, and to the pursuer a conjunct probation.*

* "OPINION.—In this case I am of opinion that the triennial prescription does not apply to the account sued for. In the first place, I incline to think that the action is laid upon a written obligation or written agreement. I do not say that it is an obligation absolutely liquid, or that the effect of the documents founded on may not be displaced by production of the further documents which the defender undertakes to produce, but the action appears to be founded on a written obligation, and I think that is enough to elide the plea of prescription.

"In the next place, the plea of prescription does not, I think, apply to a case of mercantile agency, and as I read this record, the relation of the parties was one of mercantile agency. No doubt if this had been a lawyer's account for legal business, in the course of which were included charges for commission incurred in the course of that legal business, I should have been bound to follow the case of *Scott*,[1] referred to by the defender, and to have held that the whole account must be dealt with as a *unum quid*. But here there is no mixing up

[1] Scott v. Gregory's Trustees, Feb. 24, 1832, 10 S. 375.

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The defender reclaimed, and argued;—(1) This was not a binding written contract or obligation requiring writing for its discharge. It was a mere proposal by the defender that the pursuer should conduct business on certain terms for the defender, and the proposal had never been accepted in writing.[1] It had been held that the statute applied to such a transaction.[2] *Chisholm's* case[3] differed from this. In it there was a concluded contract to hire the sacks on certain specific conditions. Here there was only a proposal to allow commission in certain events. (2) This was not a mercantile transaction, as the Lord Ordinary had also held. It entirely differed from the transaction in *M'Kinlay's* case,[4] where there was a buying and selling by commission-agents for their employers, which obviously did not fall within the statute. The pursuer was not a merchant but a lawyer, and simply interponed his credit for his brother by making cash payments on his behalf. The only commercial element was that the accounts were framed in commercial language. The claim for personal services[5] was analogous to charges of brokerage[6] or commissions on transactions, which had been held to be covered by the Act.

Argued for the pursuer;—The operation of the statute was excluded for three reasons—(1) This was a proper mercantile account for business in connection with a mercantile agency. The statute was only intended to apply to shopkeepers' accounts, or others of that class, which were usually settled without writing or receipts therefor.[7] (2) This was a case of employment of a professional person out of the ordinary line of his business.[8] In *White's* case,[9] on the other hand, the Act was held to apply, because the employment was in the ordinary course of the creditor's professional business. (3) The debt was founded upon "written obligation" in the sense of the statute, being such an obligation as naturally required a written discharge.[10] It was not necessary that there should be a written contract ascertaining the amount of the debt. It was enough if, as here, written obligation was the basis of it. The case of *Chalmers*[11] was dis-

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of commission with legal business. The commission charged is accessory to a proper mercantile account for mercantile business in connection with a mercantile agency, and therefore I think that I must repel the plea of prescription, and allow a proof of the averments of parties, which will, of course, be before answer, keeping everything open."

[1] 1 Bell's Com., 5th ed., p. 332.

[2] Chalmers v. Walker, Nov. 19, 1878, 6 R. 199; Grubb v. Porteous, March 3, 1835, 13 S. 603, 7 Scot. Jur. 293.

[3] Chisholm v. Robertson, March 10, 1883, 10 R. 760.

[4] M'Kinlay v. M'Kinlay, Dec. 11, 1851, 14 D. 162, 24 Scot. Jur. 71.

[5] Grant v. Fleming, Dec. 10, 1881, 9 R. 257, per Lord Young, p. 260.

[6] White v. Caledonian Railway Co., &c., Feb. 15, 1868, 6 Macph. 415, per Lord President, p. 419, 40 Scot. Jur. 198.

[7] 1 Bell's Com., 5th ed., p. 348; Laing and Irvine v. Anderson, &c., Nov. 10, 1871, 10 Macph. 74, per Lord President, pp. 74 and 75, 44 Scot. Jur. 53; M'Kinlay v. M'Kinlay, Dec. 11, 1851, 14 D. 162, per Lord Fullarton, p. 164; Hamilton v. Martin, Jan. 18, 1795, M. 11,120; Anderson and Child v. Wood, Jan. 18, 1809, Hume, 467.

[8] Barr v. Edinburgh and Glasgow Railway Co., June 17, 1864, 2 Macph. 1250. 36 Scot. Jur. 626.

[9] White v. Caledonian Railway Co., &c., Feb. 15, 1868, 6 Macph. 415.

[10] 1 Bell's Com., 5th ed., p. 349; Blackadder v. Milne, March 4, 1851, 13 D. 820, per Lord Justice-Clerk (Hope), p. 835, 23 Scot. Jur. 373; Barr v. Edinburgh and Glasgow Railway Co., *supra*, note 8; White v. Caledonian Railway Co., *supra*, note 9, per Lord President, 6 Macph. 419; Chisholm v. Robertson, *supra*, note 3.

[11] Chalmers v. Walker, Nov. 19, 1878, 6 R. 199, per Lord President, 201, and per Lord Shand, 202.

tinguishable. In it there was no writing signed as here by the alleged debtor. This distinction also applied to the case of *Smith Sligo*.[1] The present case differed from such cases as *Barr*,[2] where the writing referred to an antecedent contract, which was the true ground of action.

LORD PRESIDENT.—The Lord Ordinary has repelled the plea of triennial prescription upon two grounds—(1) he thinks that the action is laid on a written obligation or written agreement. Now, I have some hesitation in affirming that proposition, because the document set out on record does not appear to me to contain terms of obligation at all. Proposals were put forward for certain transactions between the two parties, and the letter set forth on record gives the terms upon which the pursuer acted for the defender; but yet there was no obligation expressly constituted by that letter. I therefore hesitate to affirm that ground of the Lord Ordinary's judgment.

But then as regards his Lordship's second ground of judgment, I entirely concur with him. If, as the Lord Ordinary has said, this had been a lawyer's account for legal business in course of which was included charges for commission, the ground of judgment could not be maintained, but "here there is," as his Lordship says, "no mixing up of commission with legal business. The commission charged is accessory to a proper mercantile account, for mercantile business, in connection with a mercantile agency." On that ground I am quite prepared to concur in the Lord Ordinary's judgment.

LORD ADAM.—I am of the same opinion. I agree with your Lordship that, as the Lord Ordinary says, this is not a merchant's account in the sense of the prescription statute in question. It is an account in connection with a proper mercantile agency to which the statute has no application.

With reference to the other ground upon which the Lord Ordinary has proceeded, I think I should be prepared to agree with him, but it is unnecessary to give an opinion upon it, as we have already a sufficient ground of judgment.

LORD M'LAREN.—It results from the decisions that those contracts of sale which fall under the statute are, generally speaking, sales by the trader to the consumer. The mere extent of the order is immaterial. I imagine that if a contractor undertakes to supply clothes or boots for a regiment of soldiers he would be in the same position as a tailor or shoemaker who sells to individuals.

On the other hand, it has been clearly laid down in the two cases referred to (*M'Kinlay* and *Laing*) that the statute does not apply to accounts between merchant and merchant. One of these was the case of a contract between parties and their agents in Glasgow, who were remunerated by commission, and the other was a case of a contract between manufacturers and a mercantile house abroad, in which the remuneration or consideration for the contract was the price of the goods.

It appears to me that the present case belongs to the class of mercantile transactions, because, although the pursuer is not by profession a merchant, he did mercantile business with the defender, who was abroad.

As regards the other ground of the Lord Ordinary's judgment, it is always a difficult question to decide whether correspondence amounts to legal obligation;

[1] North British Railway Co. v. Smith Sligo, Dec. 20, 1873, 1 R. 309, per Lord Shand, p. 312.

[2] Barr v. Edinburgh and Glasgow Railway Co., *vide supra*, p. 890, note 8.

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founded upon the 460th and following sections of the Merchant Shipping Act, 1854. The complainers objected that the Sheriff-substitute had no jurisdiction under the statute libelled, but that objection having been repelled, the complainers brought the present suspension and interdict to have the Sheriff-substitute interdicted from proceeding with the said petition. The Lord Ordinary has repelled the reasons of suspension and dismissed the note, holding that the Sheriff-substitute had and has jurisdiction to deal with the petition presented to him, under the sections of the statute there libelled and founded on. That judgment is now before us for review.

I agree with the Lord Ordinary in thinking that the question presented for decision depends upon the construction of the 460th section of the Merchant Shipping Act, but my agreement with the Lord Ordinary ends there. I cannot adopt the construction which the Lord Ordinary puts upon that section.

By the section in question it is provided that "whenever any dispute arises (with respect to salvage) between the owners of any ship . . . and the salvors, as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof, by arbitration or otherwise, then, if the sum claimed does not exceed £200" (which is the case here), "such dispute shall be referred to the arbitration of any two Justices of the Peace" (or in Scotland under section 501 to the Sheriff or Sheriff-substitute) "resident . . . at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident by reason whereof the claim to salvage arises."

The jurisdiction thus conferred is special and extraordinary. It is extraordinary in the sense that what the statute authorises the Justices or the Sheriff to do could not be done by them in the exercise of their ordinary jurisdiction, and special in regard to the manner and time within which the jurisdiction is to be exercised,—special also in this respect that the judgment of the Justices or Sheriff on the salvor's claim is to be final in all cases where the sum awarded does not exceed £50. In short, what the statute provides for is a Court of arbitration to which the parties must submit, if its authority is invoked either by the salvor or the owner of the property salved, and by which the disputed claim shall be determined (finally as I have said in certain cases) practically at once, and without either the procedure or the necessary delay arising from the procedure of ordinary Courts of law. The respondents might have taken the benefit of this statute's provision, undoubtedly, had they chosen to do so, at Scarborough, immediately after their salvage service had been rendered. But the questions are, can they now, at Peterhead, adopt this statutory mode of having their claim determined, and has the Sheriff-substitute there any jurisdiction under the statute to entertain the respondents' demand? Both of these questions must, in my opinion, be answered in the negative. The jurisdiction conferred by the statute—extraordinary and special as I have pointed it out to be—can only be exercised by the persons, and in the circumstances, specified in the statute. According to my reading of the statute, the persons to exercise the jurisdiction are the Justices or Sheriff resident at or near the place where the salved ship is lying, or at or near the first port or place to which she has been brought after the salving,—that is to say, the Justices or Sheriff resident at or near the first port or place of safety which the salved ship has reached after or by reason of the salving, whether that place be a harbour in which she floats or a beach where she is stranded, or a dock or slip on which she has been placed

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for repair. The Lord Ordinary thinks that this statutory jurisdiction is conferred on the Justices or Sheriff resident at or near the place where the salved ship is lying when the dispute arises as to the amount of the salvors' claim, and holds that these two conditions are satisfied in the present case, because the dispute as to the salvors' claim arose at Peterhead, and the "Restless Wave" was then lying there. But I find nothing in the statute to warrant the view that the time when the dispute arises enters into the matter of conferring the jurisdiction at all. The words upon which the Lord Ordinary bases his view, and it was the view urged upon us in argument by the respondents—are these:—"Whenever any dispute arises," &c. These words, however, do not indicate a point of time; they point to a certain event. They are not equivalent to "at the time when any dispute arises," but "in the event of any dispute arising." If the Lord Ordinary's view was the right one, then the time of the dispute must be combined with the place where the salved ship is lying. You must have the dispute arising at the place where the salved ship is lying at that particular time. This might rarely occur, except in the case which I think the statute alone contemplated and provided for, namely, the salvors' claim advanced and disputed at the first place of safety to which the salved ship had been brought by the salvors. In short, I think the statute provides a special remedy for settling salvage claims, where such claims are made matter of dispute, at the place of safety to which the salved ship has first been brought after the occurrence which gives rise to the claim. If this special remedy is not then and there resorted to, the salvors' claim can only be enforced by an appeal to the ordinary Courts of law. It appears to me that this view of the statute is supported by the consideration that the Justices or Sheriff are required to issue their award within forty-eight hours of the time when the dispute has been referred to them. They are entitled, no doubt, to extend that time by a writing under their hand, but the contemplation of the statute is that the award will be issued within the time there specified. Now, such summary disposal of the dispute is quite intelligible if the dispute is to be taken up at the first place of safety which the salved ship shall reach. The salvors are there; the crew of the salved ship are also there. The salved ship itself is there, open to the inspection of the Justices, or any "person conversant with maritime affairs," whose assistance they are entitled to take. In these circumstances the Justices may quite well issue their award speedily. It is not contemplated, I think, that they shall have pleadings, lead proof, and pronounce judgment thereon as a Court of law. They are to determine as arbiters a question which it is in the interest of all concerned should be determined at once. But it is difficult to conceive how this summary mode of settling the dispute can be applied, if the dispute arises months after the salvage services have been rendered, and many miles away from the place to which the salved ship was first brought.

The Lord Ordinary's judgment proceeds upon the view that the dispute as to the salvage arose at Peterhead. But is it quite clear that that is so? It appears to me, taking the statements on record, that the dispute as to the salvage arose at Scarborough. The respondents aver that immediately after the two boats got safely into Scarborough the demand for salvage was made. The complainers admit this, and say that their answer to the demand was that it was extravagant, and if that statement is accepted then the dispute arose in Scarborough and not at Peterhead. But whether the complainers' statement is accepted as made or not, it is clear on the respondents' averments that they

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made their claim at Scarborough, and that their claim was not then admitted. They had undoubtedly some claim, and therefore the only question was as to its amount. Now, it seems to me that if the amount claimed was not admitted a difference or dispute as to the amount claimed at once arose. And thus the dispute as to the salvage claim arose at Scarborough, where the salved ship was lying, and the Justices at Scarborough alone had the right to determine under the statutory jurisdiction the amount to be awarded to the salvors. It is not necessary, however, to press this view after the opinion I have expressed as to the meaning of the 460th section of the Act.

There is just one other point to be noticed. The respondents directed their petition not only against the owners of the salved ship, but against the company with which the salved ship was insured. I think it quite certain that the statutory jurisdiction does not cover such a claim. The Justices and Sheriff can only pronounce an award against the owners of the salved property, as it is only in disputes between the salvors and such owners that they are authorised to pronounce any award at all. In any view therefore, as regards the insurers, the Sheriff had no jurisdiction. But it is unnecessary to make any special finding with regard to them, for on the whole matter I am of opinion that the reasons of suspension should be sustained and the interdict formerly granted declared perpetual.

The LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the interlocutors of the Lord Ordinary, and suspended, interdicted, prohibited, and discharged in terms of the note of suspension and interdict.

W. CROFT GRAY, B.L.—R. C. GRAY, S.S.C.—Agents.

No. 169.
June 9, 1891.
Davidson v. Davidson.

GEORGE DAVIDSON, Pursuer (Appellant).—*Jameson*—*Burnet.*
ANN DAVIDSON, Defender.

Sheriff—33 *and* 34 *Vict. cap.* 86, *secs.* 12 *and* 13—*Appeal.*—The Sheriff-substitute of a county divided into two districts by an order of a Secretary of State following on the Statute 33 and 34 Vict. cap. 86, refused a warrant to cite to the Court at the head burgh of the county a defender belonging to another district of the county. *Held* that an appeal against this refusal was incompetent.

2D DIVISION.
Sheriff of Aberdeenshire.
I.

GEORGE DAVIDSON, residing in Aberdeen, raised an action of accounting against Ann Davidson, designed as residing at Gallahill, St Fergus, in the county of Aberdeen.

The Sheriff-substitute (Grierson), on 26th May, pronounced this interlocutor:—"Having heard the pursuer's agent on his motion for a warrant to cite the defender to the Court at Aberdeen in respect of the order of the Secretary of State, of date 10th June 1885, refuses the same."*

* An order by a Secretary of State, on 10th June 1885, bore that the Secretary prescribed "that, from and after the date hereof, the following arrangements shall take effect with respect to the Sheriff Courts in the Peterhead district of the county of Aberdeen:—(1) All cases, civil and criminal, arising in the district of the county of Aberdeen, hitherto known as the Peterhead district, shall be called, tried, and proceeded with within the said district. (2) A Court shall be held at Peterhead once a-week, on a stated day, during three weeks out of every four, according to such regulations as may be prescribed by the Sheriff.

No. 169.
June 9, 1891.
Davidson v. Davidson.

The pursuer appealed, and argued;—The Sheriff had power to cite all persons within his jurisdiction to his head burgh.[1] This warrant should have been granted, and the defender after being cited could appeal to the discretion of the Sheriff to order the action to proceed elsewhere. The present case must be taken on the same footing as if the action had been dismissed for want of jurisdiction, or for any other cause.[2] [LORD YOUNG.—But this action has not been dismissed. If the Sheriff-substitute had added the words "dismisses the action," you might have had an appeal, for then he would have disposed of the whole merits of the case.] But there was a difficulty in point of process, for an action could not be dismissed till it was in Court, and, without a warrant of citation, the action could not be brought into Court. [LORD RUTHERFURD CLARK.—I do not at present see why you should not get the action dismissed, and then I think we could probably deal with it.] In substance that was what had been done.

LORD JUSTICE-CLERK.—I think we must dismiss the appeal as incompetent.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT dismissed the appeal as incompetent.

HENRY & SCOTT, W.S., Agents.

No. 170.
June 10, 1891.
M'Lean v. M'Lean.

MRS FLORA M'LEAN AND OTHERS, Pursuers (Appellants).—*Mackay—W. Campbell.*
MALCOLM M'LEAN AND ANOTHER, Defenders (Respondents).—*M'Kechnie—Craigie.*

Lease—Crofter—Bequest of holding—Crofters Holdings (Scotland) Act, 1886 (49 *and* 50 *Vict. c.* 29), *sec.* 16.—*Held* (1) that the power conferred on a crofter under section 16* of the Crofters Holdings (Scotland) Act, 1886, of

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for the despatch of all business, civil and criminal, competent in the Sheriff Court."

[1] Tait v. Johnston, Feb. 28, 1891, 18 R. 606.

[2] Whyte v. Gerard, Nov. 30, 1861, 24 D. 102, 34 Scot. Jur. 58.

* The Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. c. 29), sec. 16, enacts,—"A crofter may by will, or other testamentary writing, bequeath his right to his holding to one person, being a member of the same family, that is to say, his wife, or any person who, failing nearer heirs, would succeed to him in case of intestacy (hereinafter called the 'legatee'), subject to the following provisions:—

"(*a*) The legatee shall intimate the testamentary bequest to the landlord . . . within twenty-one days after the death of the crofter. . . .

"(*d*) If the landlord . . . intimates that he objects to receive the legatee as crofter in the holding, the legatee may present a petition to the Sheriff praying for decree declaring that he is the crofter therein as from the date of the death of the deceased crofter, of which petition due notice shall be given to the landlord . . . and if any reasonable ground of objection is established to the satisfaction of the Sheriff he shall declare the bequest to be null and void . . .

"(*g*) If the legatee shall accept the bequest, and the bequest is not declared to be null and void as aforesaid, the legatee shall be entitled to possess the holding on the same terms and conditions as if he had been the nearest heir of the crofter.

"(*h*) If the legatee does not accept the bequest, or if the bequest is declared to be null and void as aforesaid, the right to the holding shall descend to the heir of the crofter in the same manner as if the bequest had not been made."

No. 170. June 10, 1891. M'Lean v. M'Lean. 1st Division. Sheriff of Argyllshire. C.

bequeathing his holding was validly exercised in favour of a niece, although there were in existence sons and daughters of the crofter.

NEIL M'LEAN, a crofter, Cornaigbeg, Tiree, died, survived by two sons and five daughters, and by nephews and nieces.

He left a deed of settlement, dated 1st October 1890, in which he bequeathed to his niece, Flora M'Lean (a daughter of one of his brothers), his right to his holding under the Crofters Holdings (Scotland) Act, 1886,* as her own absolute property. The bequest was duly intimated to the landlord in terms of the statute, and he expressed his willingness to accept her as tenant.

In December 1890 Flora M'Lean, with the concurrence and consent of her husband and the executors under the will of the deceased, presented a petition of removing from the dwelling-house and lands of the croft of Cornaigbeg, against Malcolm M'Lean, the eldest son of the deceased, and Margaret M'Lean, one of the daughters of the deceased.

The pursuers founded upon the deed of settlement in favour of Flora M'Lean, and pleaded;—The female pursuer having the sole legal right and title to the holding of crofts at Cornaigbeg aforesaid, which belonged to the deceased, is entitled to decree as prayed for.

The defenders pleaded, *inter alia*;—(2) The bequest founded on is null and void, in respect that the female pursuer is not a member of the same family as the deceased Neil M'Lean, and that nearer heirs have not failed. (3) The female pursuer does not possess the qualification of a legatee required by section 16 of the "Crofters Holdings (Scotland) Act, 1886," and the bequest to her is null and void. (4) The defender being the eldest lawful son and nearest lawful heir of the deceased Neil M'Lean, is entitled to retain possession of the said croft.

On 10th March 1891 the Sheriff-substitute (Maclachlan) pronounced this interlocutor:—"Finds that the deceased Neil M'Lean, crofter, Cornaigbeg, Tiree, by his settlement, dated 1st October 1890, bequeathed his right to the holding possessed by him at Cornaigbeg aforesaid to his niece, Mrs Flora M'Lean, the female pursuer: Finds that the said Mrs Flora M'Lean does not possess the qualification of a legatee required by section 16 of the Crofters Holdings (Scotland) Act, 1886, and that said bequest is insufficient to exclude the claim of the defender Malcolm M'Lean, as eldest son and heir to the deceased, to the said holding. Therefore assoilzies the defenders from the conclusions of the action."†

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* Quoted *supra*, p. 885, note.

† "NOTE.—By section 16 of the Crofters Holdings (Scotland) Act, 1886, a crofter is empowered to bequeath his holding to one person being a member of the same family, and the question is whether a niece can be so considered when the deceased has left sons and daughters. The section defines a member of the same family as meaning the wife or any person who, failing nearer heirs, would succeed to the crofter in the case of intestacy. If this were to mean, as the pursuers contend, any who might succeed in the hypothetical case of there being no nearer heirs in existence, it would leave the power of bequest practically unlimited, and the section itself would be meaningless, because any person, however distantly related, might claim to be included in this description. It is not difficult, however, to come to the conclusion that by the above expression is meant those who would succeed in the case of intestacy, nearer heirs having failed—that is to say, the next of kin—and that the nearer heirs must fail before the holding can be bequeathed to more distant relatives. In the present case the deceased's next of kin are his sons and daughters, including the issue of any that may have predeceased him, and it is only when those fail that a niece can be included among the next of kin or have the holding bequeathed to her."

No. 170.

June 10, 1891.
M'Lean v. M'Lean.

The pursuers appealed, and argued;—There was no trace in the Act of any intention on the part of the Legislature to restrict the crofter's choice in the bequest of his croft at his death. He might bequeath it to his wife or to any person of the same family. The word "family" included the whole series of persons standing in the order of intestate succession as heirs. The contention that the bequest was limited to the person who happened to be heir-at-law to the crofter at his death was obviously ill-founded when regard was had to the provisions contained in subsections (*g*) and (*h*) of the 16th section. These provisions contemplated that the legatee need not necessarily be the nearest heir-at-law in order to have right to the bequest.

Argued for the defenders;—Upon a sound construction of the 16th section all the nearest heirs must be exhausted before any person other than the wife or eldest son could succeed. In that view the pursuer could not have the croft bequeathed to her until the heir-at-law and those nearer than her in blood to the deceased were dead.

LORD PRESIDENT.—The question which we have to determine is as to the construction of the 16th section of the Crofters Holdings (Scotland) Act, 1886, which provides that "a crofter may, by will or other testamentary writing bequeath his right to his holding to one person, being a member of the same family, that is to say, his wife, or any person who, failing nearer heirs, would succeed to him in case of intestacy (hereinafter called the 'legatee') subject to the following provisions."

Now, the power of bequest is limited thus. It must be exercised in favour of one person—to prevent the subdivision of crofters' holdings—and that one person must be a member of the same family. It may be his wife, but the only other person suggested in the section is a person who, "failing nearer heirs, would succeed to him in case of intestacy."

Now, I do not think that the Act means the existing nearest heir. On the contrary, I think the language is repugnant to such a construction. It says,—"Any person who, failing nearer heirs, would succeed in case of intestacy." Now, a person who would not succeed except in a case of failure of nearer heirs cannot himself be the nearest heir. We must therefore look for some other person, and he is one who is not the nearest heir at present, but who, failing nearer heirs, would be in the legal order of succession *ab intestato*.

I entertain no doubt that that is the true meaning of the clause.

LORD ADAM.—This question depends upon the construction of the 16th section of the Crofters Holdings (Scotland) Act, 1886. I agree with Mr M'Kechnie that the construction is clear, but I do not think that it is clear in the direction which he maintains.

The clause gives power to a crofter to leave his right to his croft to one person of the same family, who may be his wife "or any person who, failing nearer heirs, would succeed to him in case of intestacy," that is to say, any person who, if there were no nearer heirs, would be entitled to serve. There is a limitation to one person, who may be his wife, or some one else who is of the same blood as himself.

But the right is not confined to his wife and the nearest heir only, for there are subsections of the 16th section from which we find that the landlord has the right to object to the person named as legatee. But if the legatee accepts, and no objection is offered by the landlord, then the legatee is to be "entitled

No. 173.
June 12, 1891.
Pringle v. Pringle.

The petitioner reclaimed, and argued;—(1) The Lord Ordinary was right upon the first point. The question as to competency depended upon

the provisions allowed by the statute for 'the child or children to be procreated of the said intended marriage who shall not succeed to the said entailed lands.'

"It is declared that 'the said provisions to younger children are granted by the said Alexander Pringle under all the conditions and provisions, and subject to all the restrictions and limitations contained in the said statute.'

"It is also declared that the 'provisions before written to children of the said intended marriage are hereby declared to be in full satisfaction to the whole children of the said intended marriage (including the heir who will succeed to the foresaid lands and estates) of all bairns' part of gear, legitim,' &c. It is provided in the last place 'that execution shall pass hereon at the instance of' certain persons named, 'for the implement of the whole provisions hereinbefore written, conceived in favour of' Mrs Pringle 'and the child or children of the said intended marriage.'

"It was contended for the second and third heirs that the marriage-contract contained an implied obligation securing the descent of the estate to the issue of the marriage, and that as no children had been born of the marriage the disentail was incompetent without the consent of the marriage-contract trustees, which had not been obtained. This contention was founded upon the fact that although the provisions are for the children 'who shall not succeed to the entailed estates,' the legal rights of the heir who will succeed to the entailed estates are excluded.

"I am of opinion that the argument of the next heirs is not well founded, there being, in my judgment, no obligation in the marriage-contract of the nature contemplated in the 17th section of the Act of 1882.

"The provisions for children in the marriage-contract are those authorised by the Aberdeen Act, and are necessarily limited to the children who shall not succeed to the entailed estates.

"For the heir who shall succeed to the estate there is no provision whatever. The exclusion of his legal rights might or might not be effectual if he should claim legitim, and I do not think it necessary to express any opinion upon that question. But I cannot find anything in the contract amounting to an obligation securing the descent of the estate to him.

"It is probably true that his legal rights were excluded, because it was assumed that he would succeed to the estates, but I do not think that that amounts to an obligation securing that he shall succeed. . . .

"2. It will be observed that the main differences between Mr Menzies and Mr Hope are (1st) as to the value of the hill pasture; and (2d) as to the number of years' purchase upon which the capital value of the estate should be ascertained.

" . . . As regards the number of years' purchase, however, I think that Mr Menzies has proceeded upon an erroneous principle. He explains that the estate is in an exceedingly dilapidated condition; and in his second report he says that he has taken only twenty years' purchase of the annual value, because a purchaser would have to expend £7000 or £8000 upon necessary buildings, improvements, and repairs. 'I considered it better,' he says, 'to reduce the number of years' purchase to suit the dilapidated condition of the estates than to take off a fixed sum.'

"Now, Mr Menzies has estimated the yearly value of the estate as it at present exists, that is, in its present dilapidated condition, and he informs me that the number of years' purchase of the rental which an estate in the district in which Whytbank and Yair are situated might be expected to bring is twenty-six. As, however, an expenditure of £7000 or £8000 would be required to put the estate into thoroughly good order, he allows only twenty years' purchase. It seems to me that by following this method of calculation Mr Menzies has to some extent deducted the depreciation of value caused by the dilapidated condition of the estate twice over. No doubt if money is not spent on the estate it will become still more dilapidated and of still less yearly value. But

the construction of the 17th section of the Entail Act of 1882. Cases which dealt with the barring of legitim could therefore only be used

the £7000 or £8000 of which Mr Menzies speaks is not only the sum which is necessary to keep the estate up to its present value, but also what would be required to convert it into an estate in thoroughly good order and repair, including the building of an additional farm-steading. But if the estate was put into thorough order it would become of greater yearly value than it is at present, and the increased yearly value would represent the return which the purchaser would expect to get for his additional expenditure. He would get an estate of the present value for his purchase-money, and would increase the value of that estate by spending £7000 or £8000 more. What Mr Menzies has really done, therefore, is to take the present value of the estate, calculated according to the ordinary rules of valuation (*i.e.*, twenty-six years' purchase of the present yearly value), and then to deduct from that the sum required to make the estate more valuable. I do not think that that is a sound principle, and therefore, while I accept Mr Menzies' estimates of the present yearly value, I shall allow twenty-six years' purchase of that value, which he tells me is what might reasonably be expected for a residential estate in the district. I therefore take twenty-six years' purchase where Mr Menzies has taken twenty (except as regards the feu-duties at Clovenfords), and the result is to bring out a total value of £30,184, 11s. 8d. instead of £24,358, 11s. 8d.

"I should further explain the view which I take of the principle upon which the woods and plantations (other than those around the mansion-house and in the policies) should be valued in a case of this sort, because I heard a good deal of argument upon this point. Mr Menzies reports that almost all the woods are of that age that they might be cut down and sold by the heir in possession. In these circumstances, it was suggested on the one hand that no value should be given for the woods at all, as the petitioner might cut them down and sell them; and on the other hand that, as the woods have not been cut down, they form part of the estate, and that their full value—that is the value of all the trees—should be included.

"I do not think that either of these extreme views is sound. In valuing an estate upon which there are woods and plantations the valuer would assume that the woods would be dealt with in the ordinary course of prudent administration—that ripe or backgoing trees would be cut, that young plantations would be thinned, and that the removal of old trees would be accompanied by a reasonable amount of planting. Upon such an assumption only can the value of woods be properly estimated, because the value of woods to an estate does not lie wholly in the value of the timber. For example, one use of woods is for shelter, and another is as a covert for game, and both of these uses involve the maintenance of the woods. I see no good ground for adopting a different mode of valuation in a question between heirs of entail. What the Court has to do in a case of this sort is, I apprehend, to ascertain the fair value of the estate, so that the value of the expectancy or interest of the next heirs may be fixed. Such fair value cannot in my opinion be arrived at by assuming that the heir in possession will act in a way totally opposed to the course of prudent estate management, simply because he has in law power to do so.

"Applying these principles to the present case I am satisfied with the way in which Mr Menzies has dealt with the woods.

"He has added something to the value of the adjoining fields in respect of shelter, and he has placed a value upon the woodlands and upon the annual cuttings, which are capitalised at the same rate of purchase as the other yearly returns from the estate.

"I was asked to note that both parties moved me to allow a proof as to the value of the estate. I did not, however, see my way to do so. The practice of ascertaining the value of the estate in entail petitions by remit to a man of skill selected by the Court is well settled, and I should be sorry to disturb that practice, because there is no class of questions less suited to determination by proof than questions of mere value."

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June 12, 1891. Pringle v. Pringle.

illustratively, and had no bearing here. "Securing by obligation" under the 17th section could only mean by obligation enforceable by law, and there was no such obligation here. There was no contract here, like that in the case of *Scott Douglas*,[1] which would have been defeated by the granting of the petition without the consent of the marriage-contract trustees. An heir of entail in the position of the present petitioner could not settle anything upon the next heir. All that he could do was to bar himself from taking advantage of his statutory right to disentail. (2) Here the Lord Ordinary ought to have given effect to Mr Menzies' views. Mr Menzies was of opinion that a large expenditure was necessary in order to maintain the present rental, and he had done rightly in making a deduction on that account. If good ground were shewn, it might be just to split up what he had allowed for necessary maintenance, and what for improvement, but it had not been shewn that any portion of the sum deducted fell under the latter category.

Argued for the second and third heirs;—(1) The consent of the persons at whose sight execution of the marriage-contract provisions was to pass was required before the petition could be granted. By the terms of the marriage-contract "the heir who will succeed to the foresaid entailed lands and estates" was specially included in the whole children of the marriage, whose legal rights were barred. There was a necessary implication running through the deed that the eldest child was to succeed, and the obligation by which it was secured was that the petitioner would not challenge the entail or defeat the succession.[2] (2) Mr Menzies had made a palpable error in arriving at his valuation here, and the Lord Ordinary's mode of dealing with it was right.

The first objection was ultimately not insisted in.

At advising,—

LORD PRESIDENT.—The question in this case relates to the mode of ascertaining the value of the estate upon which the interests of the substitute heirs fall to be computed, and it is a question which may admit of doubt. The estate is represented as being in a very dilapidated condition, and as requiring very considerable outlay in sanitary arrangements and repairs before it can be made an eligible place for purchase. But it must at the same time be kept in view that this dilapidated estate as it stands is all that the heir in possession has got under the entail, and that it is so dilapidated is a misfortune alike for the heir in possession and for his successors. In estimating the value of the lands in order to compute the interests of the next heirs, it seems to me therefore that we must take this estate as it at present stands, and then determine the number of years' purchase of the rental.

Mr Menzies, in his report, has estimated property in that neighbourhood to be worth twenty-six years' purchase of the rental, but in order to obtain that price for this estate he considers that it would be necessary, in the first place, to expend a sum of from £7000 to £8000 upon it. He accordingly reaches his valuation by taking twenty instead of twenty-six years' purchase of the rental. I do not follow his reasoning when he does so. I do not think there is any valid ground why the value of the estate of the heir in possession should be diminished in this way. The estate as it stands is in a dilapidated condition and is hardly in a fit state to be exposed, but neither the heir in possession nor

[1] Scott Douglas, June 9, 1883, 10 R. 952.

[2] Maitland v. Maitland, Dec. 14, 1843, 6 D. 244, 16 Scot. Jur. 162; Kintore v. Kintore, June 28, 1884, 11 R. 1013, affd. H. L. 13 R. 93.

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the heir in expectancy states that it is to be made better. Accordingly, I think we must take the rental as it actually stands.

The Lord Ordinary has arrived at the result that the value of the estate must be taken as it stands at present, and without addition or deduction of any kind, and I agree with him.

LORD ADAM.—I think the question which we have to decide is what is the present marketable value of the estate in its existing condition. If it is in a dilapidated state the value will be so much the less, if on the other hand it is in good condition the value will be so much the more. For my own part I should say that in such a question as the present, where the value of an estate has to be computed with regard to the expectancies or interests of the next heirs, each estate must be valued according to its own circumstances; and that no general rule can be laid down applicable to all such cases.

In this particular instance, I understand that what Mr Fletcher Menzies has done is in the first place to take the ordinary average value of estates in the neighbourhood and to fix that at twenty-six years' purchase of the present rental as it stands, holding that to be a fair and proper value to put upon the estate. I can quite fancy that an estate may be in a very dilapidated condition, such as would require an immediate expenditure of a considerable amount in order to maintain the existing rental. In such a case I think it would be right that a diminution should be made either from the number of years' rental or from the capital sum at which the value has been calculated. Such a deduction would be made because any purchaser would take the condition of the estate into consideration in offering a price. On the other hand, I can also understand that a small expenditure might largely increase the value of an estate, and a purchaser in this view might be induced to think that it was worth more than twenty-six years' purchase. In such a case I think it would be right to add something to the twenty-six years.

The present is a different case. As Mr Menzies informs us, the ordinary value of estates in the neighbourhood is twenty-six years' purchase. Mr Menzies says it would take an expenditure of £7000 or £8000 to put the estate into good order and repair, and, accordingly, he proposes to deduct a sum of that amount from the capital sum representing the twenty-six years' purchase value. The way in which he does this is to reduce the twenty-six years' purchase to twenty years, which is to do the same thing in another way. But he has failed to observe that by the expenditure of £7000 or £8000 a very much more valuable estate than the present would be created, an estate which would probably produce a larger rental.

I agree with the Lord Ordinary that the method which Mr Menzies has taken is wrong in principle, and that the value of the heir's expectancy must be taken according to the present rental. Accordingly, if twenty-six years' purchase is the value of the estate in its present condition, I think that is the value upon which the expectancy of the next heirs falls to be computed.

LORD M'LAREN.—The question in this case relates to the value of the estate upon which the expectancies of the substitute heirs of entail fall to be computed. The interests of these heirs are recognised by statute, and the calculation involves an actuarial problem—one of the elements of which is the capital value of the estate. The question as to which the Lord Ordinary and the professional gentle

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man who has been consulted have expressed opinions as is to the proper mode of calculating the value of an estate like the present.

I have not been able to satisfy myself that either the Lord Ordinary or Mr Menzies has proceeded on proper data in fixing the principle upon which the value of the estate is to be determined. I shall state the objections I have to the course they have adopted, and state what I conceive to be the better way, in the hope that this subject (which does not involve matter of law, but only of arithmetic) may be reconsidered. I agree that Mr Menzies' method is open to criticism, because he takes a low rental and applies to it a reduced number of years' purchase corresponding with the depreciation of the subject. I think the Lord Ordinary's criticism upon this method is sound, that it seems to involve a double deduction referable to the same cause. It was said at the bar that substantial justice would be done, and that the value of the estate might thus be arrived at approximately. It certainly appears to be a rough and unsatisfactory method of reaching that result.

But I think that the Lord Ordinary's method is likewise fallacious, because he proceeds by taking a low rental and capitalising it at twenty-six years' purchase. I am unable to see that this method will result in a true valuation. How do we know that a purchaser would give twenty-six years' purchase for the estate in its present condition? He might consider that the present rental could not be maintained and that further expenditure would be required. Within a very short time a large sum of money would probably have to be expended in order to obtain a suitable tenant for the place; and without such expenditure the present rental could not be maintained for twenty-six years.

The view which I venture to suggest is, that the capital value should be estimated in the same way as it is usually estimated for an intending purchaser.

It is no doubt true that the heir in possession is not called upon to lay out money to increase the value of the estate, but seeing that he has the power of selling the estate and also of charging it for improvements, it seems not unreasonable that in estimating the value of the expectancy we should take the estate in its dilapidated condition, but keeping in view that it is capable of being put into shape by its present owners or by a purchaser. The purchaser would be likely to reason in this way,—the estate in its present condition will not yield me a return for my money, how much money will it cost me to put it into such order that it will yield me a proper return?—that is to say, the full yearly rental which the estate is capable of yielding if put into tenantable condition. He would then consider, what is the number of years' purchase at which land of this description generally sells in the district. Having got these elements, and assuming that twenty-six years' purchase is a proper basis, then the value would be twenty-six times the amount of the full rental, less the sum necessary to put the estate into proper tenantable condition.

In suggesting this mode of valuation, I think I do no injustice to the heir in possession, because I assume that he is not bound to lay out anything upon the estate, at the same time that I affirm that the true test of value is the sum which an intending purchaser would give for the property.

LORD KINNEAR.—I agree with the Lord Ordinary.

THE COURT adhered.

MURRAY & FALCONER, W.S.—GILL & PRINGLE, W.S.—Agents.

WILLIAM ROSS RANNIE, Pursuer.—*M'Kechnie—G. W. Burnet.*
GEORGE OGG, Defender.—*Johnston—M'Clure.*

No. 174.
June 12, 1891.
Rannie v. Ogg.

Process—Proving of tenor—Untested deed—No written adminicles—Parole evidence.—In an action of proving the tenor, the pursuer sought to set up a deed by which he alleged that the defender had, during his lifetime, conveyed away from himself certain property absolutely to A, his deceased wife's sister, with whom he lived as his wife, whose heir-at-law the pursuer was. No draft or other written adminicle was produced, and the deed libelled in the summons as the deed to be set up was undated, unsubscribed, and untested. The *casus amissionis* alleged was that the granter had destroyed the deed while it was in his possession. The pursuer adduced parole proof, and the only material evidence was that of a solicitor who deponed that the deed had been fifteen years before the date of the proof, and some years after its execution, submitted to him for his opinion as to its effect, and while he was unable to speak to its terms, his impression, derived from entries in his ledger, was that it was or must have been an absolute *inter vivos* deed in favour of A and her heirs. The defender, while admitting that he had destroyed a deed in favour of A, deponed that it was *mortis causa* and undelivered.

Held that the pursuer had failed to prove his case.

Question whether even if the pursuer had established the tenor of the body of the deed, decree of proving the tenor could be pronounced in respect he was unable to prove the tenor of the testing-clause.

Observations on the remedies in the case of an alleged fraudulent destruction of a deed.

1ST DIVISION. C.

In 1852 George Ogg, feuar, Turriff, Aberdeenshire, went through a form of marriage with Alexina Rannie, sister of his deceased wife, and thereafter lived with her till 1875, when she died intestate, leaving two children by him.

In February 1890 William Ross Rannie, confectioner, Penn Yan, New York, having served heir-at-law to his aunt, Alexina, raised an action against Ogg, to have it declared "that the defender, the said George Ogg, executed a disposition in favour of the now deceased Alexina Rannie, daughter of John Rannie, sometime baker in Turriff aforesaid, of date the 1854, and that the said disposition was of the following tenor, *videlicet*:—'I, George Ogg, feuar, residing in Turriff, Aberdeenshire, for the love, favour, and affection which I have and bear to Alexina Rannie, daughter of John Rannie, baker in Turriff aforesaid, have disponed, as I hereby alienate and dispone, from me, my heirs and successors, to and in favour of the said Alexina Rannie, her heirs and assignees whomsoever, heritably and irredeemably, All and Whole that piece of ground lying within the town of Turriff and county of Aberdeen —[the boundaries of the subjects were then described],—and I oblige myself to infeft the said Alexina Rannie and her foresaids, to be holden *a me vel de me*, and I resign the said lands and others for new infeftment, and I assign the writs, and have delivered the same, according to inventory, and I assign the rents, and I bind myself to free and relieve the said Alexina Rannie and her aforesaids of all feu-duties, casualties, and public burdens, and I grant warrandice, and I consent to registration hereof for preservation; moreover, I desire any notary to whom these presents may be presented to give to the said Alexina Rannie or her foresaids sasine of the lands and others above disponed.—In witness whereof': And it ought and should be found and declared by our said Lords that the decree to be pronounced by them herein shall be in all respects as valid and effectual a document to the pursuer in all cases, in probation as well as others, as the original disposition would be if extant, notwithstanding the same has been abstracted or lost, and cannot now be found."

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The pursuer averred;—(Cond. 2) "In or about the year 1854 the defender, who was then heritable proprietor of the subjects described in the summons, conveyed the said subjects to the said Alexina Rannie. The disposition or other deed of conveyance granted by the defender in favour of the said Alexina Rannie was delivered by him to her." (Ans. 2) "Admitted that defender was at said date proprietor of said subjects. *Quoad ultra* denied." (Cond. 3) "The pursuer, as heir-at-law of the said Alexina Rannie, is now proprietor of the said subjects. He did not however become aware that the succession had opened to him till October 1888. Shortly after the fact became known to the pursuer, he came to this country and went to see the defender at Turriff in December 1888. The defender then admitted to the pursuer that he (the pursuer) was the rightful owner of the property. The defender at the same time handed to the pursuer the title-deeds of the property, and they still remain in the possession of the pursuer." (Ans. 3) "Admitted that pursuer called upon defender in or about the month of December 1888. *Quoad ultra* denied." (Cond. 4) "On examining the title-deeds so handed to him the pursuer did not find among them the disposition or deed of conveyance granted by the defender in favour of the said Alexina Rannie, and as the defender refused to deliver to the pursuer the said disposition or other deed of conveyance, the pursuer raised an action against the defender in the Court of Session, concluding, *inter alia*, for delivery of the said disposition or other deed of conveyance. A print of the closed record in that action is herewith produced, and referred to." (Ans. 4) "Admitted that there was not a deed of conveyance in favour of the said Alexina Rannie among the title-deeds, and that pursuer raised an action as stated. *Quoad ultra* denied, under explanation that no such deed as that alleged at any time existed." (Cond. 6) "Thereafter, on 11th January 1890, the defender was examined as a haver before Sheriff-substitute Hamilton Grierson at Banff, and being called upon to produce the said disposition or other deed of conveyance, he deponed that the deed was in his possession about fifteen years ago, that he then destroyed it by burning it, and that he had no copy or draft of it. A copy of the deposition is herewith produced, and referred to." (Ans. 6) "Admitted that defender was examined as a haver upon 11th January 1890, and the said deposition is referred to. Denied that defender deponed, or intended to depone, in the sense or to the effect alleged, and explained that the deed referred to in said deposition as having been destroyed was an unstamped and undelivered deed of settlement by the defender, containing provisions in favour of the said Alexina Rannie. The defender is in his eightieth year, and at the diet of the commission foresaid he was entrapped, owing to the ambiguous form of the question as put, into making an apparent admission, which if it is to be understood in the sense set forth in this action by the pursuer, has no foundation in fact. . . ." (Cond. 7) "The pursuer has been unable to ascertain by whom the said disposition was prepared, or to discover any copy or draft thereof, and he believes that no copy or draft thereof is now extant. It is necessary, in order that the pursuer's right of property in the said subjects may be established, that the tenor of the said disposition or other deed of conveyance should be proved. In these circumstances the present action has been rendered necessary." (Ans. 7) "Admitted that there is no draft or copy of the kind alleged in existence, and averred that no such principal, copy, or draft did at any time exist. *Quoad ultra* denied."

The pursuer pleaded;—The disposition libelled having been destroyed by the defender, and being necessary for the purpose of establishing the

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pursuer's title to the said property, decree of proving of the tenor ought to be pronounced in terms of the conclusions of the summons.

The defender pleaded;—(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) No written adminicles being libelled on for proving the tenor of the alleged disposition, the action should be dismissed. (3) The disposition libelled never having been in existence, the defender should be assoilzied.

On 16th May 1890 the Lord Ordinary (Kinnear) made great avizandum with the cause to the First Division.

On 4th July the Court pronounced this interlocutor:—"Before answer as to the sufficiency of the adminicles and of the *casus amissionis*, allow the pursuer to prove the tenor of the writ libelled on, and the *casus amissionis* thereof; and allow the defender a conjunct probation."

Alexander Rannie, one of Alexina's brothers, deponed,—In 1852, when, after his first wife's death, Ogg desired to marry Alexina, the proposed marriage was opposed by her family. The family, however, ultimately consented on condition that Ogg should execute a deed making over to her absolutely the property in question which he had acquired in 1849 from John Rannie, brother of witness and of Alexina Rannie. In 1875 witness came from America, where he resided, to visit Alexina, who was ill, and he then obtained possession of the deed, which he found in a trunk upstairs in Alexina's house. He was unable to speak to the terms of the deed further than that it was an irrevocable deed to Alexina, her heirs, or assigns whomsoever. Immediately after Alexina's death, he, accompanied by Ogg, went to consult a Mr Alexander George, solicitor at Macduff, with a view to seeing if the deed in question could not be set aside. The pursuer, who was Alexina's heir-at-law, had been well provided for by his father, and it was proposed that, if possible, some provision should be made for Alexina's children by Ogg. Witness and Ogg took the deed with them and left it with George, who next day told them that, in his opinion, it was an irrevocable deed in favour of Alexina, and that under it the pursuer would succeed. George advised that the deed should be put aside, and that Ogg should make up his own title, and then proceed to execute a will in favour of the children. Ogg accordingly made a will in terms of this advice.

The pursuer deponed as follows,—In 1888 he visited this country from America for the purpose of enforcing his claims to the property, and paid a visit to Ogg at Turriff. Ogg there admitted that he had executed a deed absolutely in favour of Alexina, and on witness' agreeing to allow him to stay on in the premises rent free until a certain date, he handed to witness the title-deeds to the property in order that witness might get a disposition drawn up by a lawyer in his own favour. Witness produced a note-book in which the terms of this agreement were entered. Witness then handed the papers to Alexander M'Lennan, a cousin of his wife's, and M'Lennan having told him that the deed in question was not among the papers, he returned to Ogg, who then told him that he did not know where it was. Thereafter, by advice of his friends, Ogg drew back from the agreement and refused to admit witness' claim. A few days later, at Banff Bridge Railway Station, when called upon to explain his conduct, Ogg, in the presence of M'Lennan, admitted to witness that he had executed the deed absolutely in Alexina's favour. Witness then, accompanied by M'Lennan, visited George to take legal advice on the matter.

Alexander M'Lennan deponed that he had himself handed the deed to Alexina. He was unable to speak to its terms further than that it was

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an absolute deed in her favour. He corroborated the last witness as to the conversation at Banff Bridge Railway Station.

Alexander George (the material parts of whose evidence are quoted below),* deponed, that when the pursuer and M'Lennan paid him the

* Alexander George deponed,—"I am a solicitor at Macduff, and provost of that burgh. I remember having a call from the pursuer along with M'Lennan, a friend of his, on 10th December 1888. They produced to me a letter of introduction from Alexander Rannie, the uncle of the pursuer. Shortly, their object was to take steps for the recovery of the property which is the subject of this action. I had no recollection of the transaction in which I had been engaged in 1875, beyond the fact that there had been one, and I arranged that they should call for me next day. They did so. They both called. Before they called I had looked up my ledger, and some of the facts and circumstances were brought to my mind in consequence, and they gave me their story of what had taken place in 1875. . . . Rannie came back on the 13th December. He brought with him the title-deeds of the property. He said he had got them from Mr Ogg in order that I might prepare a conveyance by Mr Ogg to him, the pursuer. He handed me the titles. . . . Going back to 1875, I remember having a call during that year from Alexander Rannie, the pursuer's uncle, with reference to this same property. I have looked up an account which stands in my business books, and which was rendered to Mr Ogg in connection with what was done then, and have by that means refreshed my memory of what took place. Alexander Rannie called first on 2d July 1875. He brought those titles I have now produced, along with the disposition by Mr Ogg conveying the property covered by these titles to Alexina Rannie. His sister Alexina Rannie had died shortly before that, and he wished to know who would succeed to this property in respect of his sister's death. I said that on the statement he made to me my opinion was in favour of the heir-at-law, Alexina Rannie's heir-at-law. Alexina Rannie had left children, and Alexander Rannie wished the property to go to her children, and my duty was to prepare a deed in favour of the children in respect of this disposition in favour of Alexina Rannie; and in consequence the titles were left with me that I might consider the matter. . . . My advice was that, in my opinion, Alexina Rannie's heir-at-law had right to the property, but that if Mr Ogg was to take the risk of that, I thought he should just put a warrant of registration upon his disposition in his own favour, *i.e.*, the disposition dated 1849, and record it, and be infeft. (Q.) And what was to happen to Alexina Rannie's deed? (A.) It would just be laid aside. (Q.) Was that advice taken by Mr Rannie and Mr Ogg? (A.) Yes. I received instructions to put on the deed a warrant of registration, which I did, and which you will find on the disposition in favour of Mr Ogg. He did more than that at this time. He then instructed me to prepare a settlement. I did so. He signed it on 28th July 1875. I have the draft here. The testing-clause is not in. Referring to business account, I find I wrote him on 28th July to come and sign the settlement. I do not find a meeting signing it, but I know it was signed. I am aware that it was executed about that time, and that it was delivered to them. Generally, that settlement is in favour of Ogg's children by Alexina Rannie. I cannot tell who was Alexina Rannie's heir-at-law at that time. . . . (Q.) Tell me as precisely as you can the nature and terms of the deed by the defender in favour of Alexina Rannie? (A.) I could not tell the terms of the deed. All I know is this, that I have a distinct recollection that I advised that in my opinion the heir-at-law had a claim. Consequently, I can only say I was satisfied it was a valid deed, otherwise I could not have given the advice that the heir-at-law had a claim to the property. (Q.) Can you give us the date of the deed? (A.) I have no recollection of the date of the deed. (Q.) In the second place, can you inform us who the witnesses were? (A.) Not at all. (Q.) In the third place, can you tell us who the solicitor was who drew the deed? (A.) No. (Q.) Do you recollect whether there was one name in the testing-clause? (A.) I do not recollect anything of the deed beyond the fact that I can tell that I was satisfied at the time that the deed was valid, and effectually

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visit in 1888, he refreshed his memory as to what had taken place in 1875 by referring to entries in his ledger. From these he was able to say that Alexander Rannie and Ogg had left the deed with him for his consideration, and that although he could not speak to the terms of the deed, his impression was that the deed must have been an absolute disposition in Alexina's favour.

The defender deponed that he had refused to sign a deed absolutely in Alexina's favour, but consented to sign, and did sign, a *mortis causa* deed in her favour. That deed was preserved in a trunk in which the spouses kept their papers and clothes. Witness admitted the visit to George spoken to by Alexander Rannie, but denied that the deed in question was the subject of conversation at the consultation, for he had prior to the visit burnt it. The only object of the visit was to make a provision in favour of Alexina's children.

Argued for the pursuer;—(1) On a consideration of the proof, he had established the tenor of the deed in question as well as it could possibly in the circumstances be established. The evidence of Alexander Rannie, George, and M'Lennan led irresistibly to the conclusion that the deed was in existence shortly after Alexina's death, and contained an irrevocable *inter vivos* gift. It could not be said that the deed was not duly delivered, for the defender admitted that it was put away by his wife in a trunk in which they kept their mutual effects. If the deed had been, as the defender maintained, merely a *mortis causa* deed, where was the use of the defender's destroying it, for under it his wife could have no rights until his death? (2) As matter of law, the question as to the necessity of adminicles in an action of proving the tenor had been treated by the Court as a question depending on the circumstances of the case.[1] In the present case

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conveyed the property to Alexina Rannie. . . . (Q.) Why do you say that it was a valid deed? (A.) I just say that it was a valid deed, and hence my advice, my opinion that the heir-at-law was entitled to the property, and not George Ogg. That was the whole substance of the inquiry. (Q.) Do you mean anything more than this—that it was a probative deed in the first place, and that it bore to convey the property in the second place? (A.) It was just a deed of conveyance, valid according to Scotch law; that is all I have to say. (Q.) Was there anything to indicate whether it was a *mortis causa* deed or an *inter vivos* deed? (A.) I am satisfied it was not a *mortis causa* deed, or the heir-at-law would have had no claim. (Q.) What satisfied you that it was an *inter vivos* deed? (A.) Just what I have said already. (Q.) What satisfies you now that the deed was an *inter vivos* deed? (A.) What satisfies me now is the fact that I advised the heir-at-law to claim under it. . . . . (Q.) Can you tell me why you were so satisfied? (A.) Just upon the information submitted to me by looking at the deed, and upon information submitted to me by Alexander Rannie. (Q.) Will you tell me what information was submitted to you by Alexander Rannie? (A.) That this deed was given by Ogg to this Alexander Rannie's sister, who lived with him as his wife, as a consideration to her—as a provision for her; and more than that, was given to her as a provision for her, and that the deed was handed over to her and was in her possession, and it was on that information that I gave my opinion. (Q.) Was the deed stamped? (A.) I will just answer that question as I did all the others—it must have been stamped, otherwise I would not have had the opinion that I had."

[1] Lithgow v. Murray, Jan. 2, 1680, M. 15,799; Stair, iv. 32, 9; Ersk. Inst. iv. 1, 55; Ogilvy v. Napier, Jan. 22, 1612, M. 15,786; Earl of March v. Montgomery, July 19, 1743, M. 15,820; Winton & Co. v. Thomson & Co., June 10, 1862, 24 D. 1094; A v. B, Nov. 21, 1749, M. 15,823; Winchester v. Smith, March 20, 1863, 1 Macph. 685, 35 Scot. Jur. 395; Falconer v. Stephen, Dec. 9, 1848, 11 D. 220, and July 12, 1849, 11 D. 1338, 21 Scot. Jur. 520—[See also Leckie v. Leckie, July 12, 1884, 11 R. 1088, Ed.].

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they fell to be dispensed with. The defender admitted that he had destroyed a deed in favour of his wife, and therefore everything must be assumed against him.

Counsel for the defender were not called upon.

LORD PRESIDENT.—The defender in this action of proving the tenor must, in my opinion, get decree of absolvitor. No adminicles have been produced, and the *casus amissionis* is said to be that the deed, of which it is sought to prove the tenor, was destroyed by the defender while it was in his possession, and while it might be presumed to have been an undelivered deed.

In these circumstances it appears to me that this is an attempt for the first time in our law to set up a written document by parole evidence alone. The deed, being in the possession of the supposed granter, must be presumed to have been an undelivered deed, and therefore one which it was in his power to put an end to at his pleasure. It is not averred that the granter was under any obligation to grant such a deed as this is represented to have been, and therefore not entitled to destroy it.

The tenor of the deed cannot be proved except by parole evidence, and this is an entire novelty in the practice of actions of proving the tenor. The evidence led here is quite insufficient for the object desired.

But the difficulty of the pursuer's case does not end there. He sets forth as the deed to be set up a deed which ends with the words "in witness whereof," and proceeds no further.

There is no evidence whatever to shew that the deed ever had a testing-clause or was ever subscribed by the granter. No names of witnesses are given, and it is not said that it was a holograph deed.

I see no escape from the conclusion that the pursuer has failed to shew anything like sufficient grounds to support his case, and that the defender is entitled to absolvitor.

LORD ADAM.—I am of the same opinion. As your Lordship has said, this is a proposal to set up an alleged disposition by parole proof only, there being no written adminicles whatever.

That is a very uncommon case, but I desire to guard myself from saying that in no conceivable case would it be competent to set up the tenor of a writing by parole proof only. There may be cases (I can figure them myself) in which the tenor, *i.e.*, the words sought to be set up, may be ascertained by parole evidence distinctly. I reserve my opinion until such a case arises.

In this particular case, however, I have no difficulty, and I agree with your Lordship that there is no evidence whatever of the tenor of the deed which it is proposed to set up. We have only the evidence of a law-agent, who says that the deed was left with him upon a certain day, and that, in his opinion, it was a binding absolute disposition of the property conveyed in it. He does not profess to know the terms of the deed, nor can he state its tenor. In such a case it appears to me the pursuer has entirely failed to prove the tenor of the writing.

It further appears to me that, even if we were to pronounce decree in terms of the libel, we should be setting up a document which is absolutely worthless, in respect it lacks a testing-clause and the subscription of the maker and witnesses.

LORD M'LAREN.—There is no doubt that this case contains an element of

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novelty in that there is no written evidence to supplement the parole evidence as regards the tenor of the deed which is sought to be set up. I should be sorry to think that the law was such that in no circumstances could a deed which had been fraudulently destroyed be set up by parole evidence, supposing its tenor could in fact be ascertained by such evidence.

A case might arise for the consideration of the Court in which the deed sought to be set up was a mere copy of a statutory form, with the names of the parties and a description of the subjects disponed duly inserted. In such a case every word might be supplied from the memory of the draughtsman having before him the printed style and the deed from which the description of the subjects was taken.

But the second point adverted to is really the critical point in the case. It is not proved that the deed alleged to have been destroyed was an absolute and irrevocable deed in favour of the lady with whom the granter lived as his wife. We have not got the evidence of the solicitor who prepared the deed or of the instrumentary witnesses. It is very remarkable that it has not been found possible to trace the draft of the deed, because we know that solicitors are in the habit of preserving their drafts.

That being so, the only evidence of the contents of the deed which we have before us is the statement of a solicitor who many years after saw the deed, and who states his impression (an impression which he says he derived from entries in his ledger), that the deed was or must have been an absolute deed. Such evidence is altogether insufficient to establish the tenor of the deed in dispute as an absolute deed.

I am therefore of opinion that the pursuer has failed to prove his case. That is his misfortune. It may be a hardship to the pursuer that a deed which was once in existence, and in which he thinks he has an interest, cannot now be set up, but this is only the unavoidable result of the inability of the pursuer to adduce more satisfactory proof of the tenor of the deed.

Lord Kinnear.—I agree that even if the pursuer had made out his case in substance we could not have given decree in terms of the conclusions of the summons, because such a decree would have been perfectly futile. The purpose of an action of proving the tenor is to replace a lost document by a new document in precisely the same terms, and with the same legal effect. Now, if decree were to be given in terms of the conclusions the pursuer would be furnished with a document of no legal effect whatever, because he would be given a document undated, untested, and not even subscribed. I do not say this as a mere criticism of the summons, because I think the draughtsman could not help himself. He could not libel a complete instrument, because he did not know what were in fact the terms of the instrument which is said to have been destroyed. And therefore, if the case had been proved in substance, it would seem to me very doubtful whether the pursuer's remedy would have been a proving of the tenor.

If the pursuer had proved what he alleges, that the granter of the deed had delivered it to the grantee for the purpose of constituting a legal right in her and her heirs, had recovered possession of it without her consent, and destroyed it after her death for the purpose of defeating the right of her heirs, I am far from thinking that he would have had no remedy even although he could not prove the tenor of the deed. That would have been a case of fraud, and if the

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granter of a deed has fraudulently destroyed it, I do not doubt that he may be compelled to execute and deliver a new deed in its place. But I doubt very much whether the grantee could have decree of proving the tenor if he could not prove the exact terms either of the entire deed or at least of as much of it as is required to make a complete legal instrument.

But I agree with your Lordships that he has failed to prove the substance of his case, and I think it material to observe what it is that he undertakes to prove. He has to prove that this document was conceived in such terms as to give him a benefit which there is no reason for supposing that the defender ever intended for him. It was perfectly reasonable and natural that he should settle his property upon his wife and her children, and all the more so because the law did not recognise the marriage. But it is not to be supposed that he had any intention of settling it in terms that would carry it away from the children and from himself to a stranger if his wife should die during his lifetime. And therefore the pursuer has to satisfy us that as matter of fact it was expressed in terms that would have that effect. But there is no evidence of its terms. The only evidence is that of a solicitor, who says that "in his opinion" it had a certain legal effect. That is not evidence of matter of fact on which we can proceed.

The kind of evidence that is necessary must go to prove the actual contents of the deed. The solicitor might not be able to speak to the exact words of the deed, but if he had studied it and had any recollection of it he could without much difficulty have said whether it was a conveyance in fee to the deceased lady, with a destination to her heirs and assignees. He might have said that there was no destination in favour of her children or of anyone except her, and no clauses reserving the granter's liferent or dispensing with delivery. If he could have spoken to these matters of fact, his evidence might have deserved consideration. These are ordinary clauses, and a solicitor who had read and remembered the deed would have known whether it contained these clauses. But he is not asked what its clauses were, and we cannot accept a statement of opinion as a substitute for evidence of fact.

There is only one other matter remaining—the defender's alleged admission made to the pursuer when he came upon a visit to Turriff. That is not corroborated in any essential respect, and I do not think that the admission is proved by the pursuer's statement alone.

I therefore agree with your Lordships in thinking the pursuer has failed to prove his case in substance.

LORD PRESIDENT.—I desire to add that I think the element of fraud is not in this case at all. If there had been a relevant averment of fraud on the part of the maker to destroy a right created by himself, there would certainly be a remedy, but not such as the present action. As to what that remedy would have been, I reserve my opinion.

THE COURT pronounced this interlocutor:—"Find that the tenor of the deed libelled has not been proven: Therefore assoilzie the defender from the conclusions of the summons, and decern."

WAUGH & M'LACHLAN, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

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Steel v. Kirk-Session of St Cuthbert's Parish.

JAMES STEEL, Pursuer (Reclaimer).—*Asher—Taylor Innes—M'Lennan.*
KIRK-SESSION OF ST CUTHBERT'S PARISH, Defenders (Respondents).—*D.-F. Balfour—Ure.*

Church—Encroachment on burying-ground—Powers of kirk-session—Heritors.—*Held* that the heritors in a parish, as proprietors in trust of the parish church and churchyard, along with the kirk-session, as administrators thereof, were entitled, in a case of high expediency, to encroach upon the burying-ground in enlarging the church, although this involved the removal of soil from a portion of the ground which had for a long period been used as a common burying-ground—no private rights being interfered with, sixteen years having elapsed since the last interment, and the churchyard having been closed as a burying-ground.

Observed (*per* the Lord President) that the rights of a kirk-session in regard to the church and burying-ground of a parish are rights of administration only.

Church—Burying-ground—Right of singular successor.—*Observed* that a singular successor in an estate has no right of sepulture in part of a burying-ground which has been acquired by his predecessor in title.

1ST DIVISION.
Ld. Stormonth Darling.

THE CHURCH OF THE PARISH OF ST CUTHBERT'S, Edinburgh, was built in 1775, and having been for some years prior to 1887 in an unsatisfactory condition, both as regards its sanitary and its structural arrangements, the kirk-session resolved in that year, with the consent of the heritors and afterwards of the presbytery, to make considerable alterations and improvements upon it. For this purpose, and to satisfy the requirement of the heritors that there should be as many lineal feet for allocation in the restored church as in the old one, it was found necessary to encroach upon the churchyard, by which the church was surrounded. The churchyard had been closed as a burying-ground by order of the Sheriff in 1874, as it had become so crowded with interments as to be a nuisance under the Public Health Act, 1867.

It was originally proposed that the foundation of the new building should be a thick layer of concrete laid above a portion of the ground which had been used as the common burying-ground prior to 1874. But it afterwards appeared that, in 1840, from 10 to 15 feet of forced earth had been deposited on the original surface east of the church, and that about 4 to 5 feet had been added in 1858, and that, in order to make the new building perfectly secure, it would be necessary to carry the foundations down to the solid ground, and this course was approved of at a meeting of the heritors of the parish on 5th May 1890.†

Immediately after the meeting this action was raised by James Steel, one of the heritors, against the kirk-session, concluding for declarator (first) that the defenders "are not entitled to build over the burying-grounds of said parish or any portion thereof; (second) that they are not entitled to encroach upon and destroy or change the original and natural use and purpose of said burying-grounds; (third) that they are not entitled to open up or remove any of the soil or earth of the graves of said burying-grounds, or of the remains of the bodies which have been interred therein." There were corresponding conclusions for interdict.

C.

* Decided May 28, 1891.

† The minute of this meeting bore that the chairman stated that valued rent heritors only would be entitled to take part in it; that Bailie Steel had moved in opposition to the motion authorising the kirk-session to proceed with the excavations, that the operations be not sanctioned, as they would interfere with the graves to the east of the church,—five voting for the motion and two for Bailie Steel's amendment. The notice calling this meeting bore that it was to be held "for the purpose of considering certain matters in connection with the reconstruction of the parish church, and for taking any action in regard thereto, or otherwise, and for dealing with any other parochial matters."

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The pursuer stated that the proposed new church was to extend to a distance of 70 feet from west to east and 120 feet from north to south over the entire breadth of the common burying-ground, which had been the place of public sepulture for the parishioners of St Cuthbert's for centuries down to 1874; that the proposed transepts to the north and south of the church would encroach upon the private tombs, and particularly on the private tomb belonging to the estate of Dean, now the property of the pursuer. "If the proposed building operations be carried out, the portion of the graveyard so built over will be destroyed, the graves of centuries desecrated, and the use and purpose of the burying-grounds will be wholly changed and destroyed, and several tombstones, some of great age, and others so recently erected as 1873, will be removed." The pursuer further stated that it was quite possible to do all that was necessary without encroachment on the burying-ground.

It was further alleged that the meetings of the heritors at which approval was given to the proposal of the kirk-session to proceed with the reconstruction of the church were not legally convened, no proper notice of the intention to build over the churchyard having been given. There were several thousands of heritors in the parish, many of whom would have been present had they known what the real intention was, while in point of fact the approval was carried by a majority of five votes against two.

The defenders stated that the ventilation and means of egress from the church, which had both been condemned as radically bad, could not be improved except by a complete change of the entire structure of the building, the cubic capacity of the church being totally inadequate for the number of sitters; that it was found to be necessary, if the defects in question were to be efficiently remedied, that the churchyard should be encroached upon, but only to the extent of about 43 feet on the eastward side of the church.

The pursuer pleaded;—1. The public burying-ground in question being wholly filled with human remains deposited for generations down to 1874, the defenders are not entitled to build over the said ground, or to dig up, remove, or otherwise disturb or violate the remains of the dead. 2. *Separatim*, The said burying-ground having been for centuries before 1874 the parochial place of sepulture, and all interments in it having been made in reliance upon the protection of the law, the defenders are not entitled to change its proper use and destination, and to build over the same, or to dig up, disturb, or remove the remains committed to it. 3. No necessity existing or being stated for opening up, encroaching upon, or building over the said burying-ground, decree of declarator and interdict should be at once pronounced as concluded for. 4. The burying-grounds in question having been declared by the Sheriff to be a nuisance, under the Public Health (Scotland) Act, 1867, as stated, and having been ordained "to be closed," the defenders are not entitled to open up said grounds, nor to disturb the soil or earth thereof, or the remains of the bodies interred therein, in breach of the said order, without legal sanction. 5. The pursuer is further entitled to decree in respect that the duty of maintaining the church and the burying-ground as separate subjects is by law entrusted, not to the kirk-session, but to the heritors, who are not entitled to delegate their trust or to bargain for its abandonment. 6. The alleged consent of the heritors to the defenders making encroachments upon the burying-grounds is of no legal avail, in respect (1) it is *ultra vires* of the heritors; (3) certain heritors were at said meeting refused liberty to vote by the chairman, and this refusal affected the decision of the meeting.

The defenders pleaded, *inter alia*;—3. The proposed encroachment on the churchyard being, in the circumstances condescended on, necessary

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or at all events strongly expedient, interdict ought not to be pronounced as craved.

The Lord Ordinary pronounced an interlocutor allowing a proof, and the pursuer having reclaimed, the Court adhered.

It appeared that the proposed extension of the church eastward would cover 269 superficial yards of what had been prior to 1874 common burying-ground, and that it would be necessary to carry the foundations of the walls through from 15 to 20 feet of forced earth. The laying of the foundations would necessitate the removal of soil in which nearly 300 interments had been made. It also appeared that the soil was of a porous nature, and that seven or eight years was an average time for a body to decay, and that it had been the custom while the burying-ground remained in use to reopen graves for fresh interments after the lapse of seven or eight years. It further appeared that at a depth of from 3 to 5 feet the soil contained no more carbonic acid than was commonly found in ordinary forced earth, shewing that the organic remains had been entirely decomposed with the exception of dry bones. The public authorities of the city had remonstrated with the kirk-session as to the state of the sanitary arrangements of the church, and the heritors had obtained a report from Dr Hunter Stewart, Demonstrator of Public Health in Edinburgh University, to the effect that the church was in a thoroughly insanitary condition from insufficient ventilation, and had at meetings previous to that of 5th May 1890 agreed to contribute £2000 towards a sum of £17,000, which it was estimated the proposed work would cost, the £15,000 being defrayed by the congregation.

The tomb belonging to the family of Nesbit of Dean, which estate had been purchased by the pursuer, was an arched vault under the doorway. It was sunk, and there was a stair going down to it and a door at the bottom of the stair, but the evidence shewed that it would not be materially interfered with by the reconstruction of the church.

The Lord Ordinary (Stormonth Darling), on 9th January 1891, assoilzied the defenders.*

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* "OPINION.—The object of this action is to prevent a proposed reconstruction of the parish church of St Cuthbert's, Edinburgh, on the ground that it involves an encroachment on a portion of the churchyard. This reconstruction has been resolved on after full deliberation by the proper authorities, *i.e.*, the heritors and kirk-session, with the approval of the presbytery, as a measure necessary for the health and comfort of the congregation. No appeal can be made to a Court of law against such a resolution except on the ground either of interference with private right, or of breach of the trust reposed in the heritors and kirk-session, as administrators of the church and churchyard for parochial purposes. The pursuer puts his case on both grounds, for he says that the proposed operations will interfere with the 'Dean Tomb,' which is situated under the present church, and which contains the ashes of his predecessors in title in the estate of Dean, and he also says that the reconstructed church will enclose, and its foundations will disturb, a very large number of graves in the portion of the churchyard to the east of the present church, which formerly was part of the common burying-ground of the parish, but was closed by order of the Sheriff in 1874. I am of opinion that the pursuer has not made out his case on either head.

"The question of the 'Dean Tomb' may be disposed of in a sentence. It is the resting-place of the ancient family of Nesbit of Dean, and the pursuer does not say that it has been in use for many years. In argument he disclaimed all intention of using it himself. Nevertheless he might be entitled to protect it from encroachment if he could shew that the proposed operations were calculated to injure it. But it is an arched vault below the present church, and it at present carries the weight of the outer wall. The architect explains that the

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The pursuer reclaimed, and argued;—1. It was the duty of the heritors to maintain and keep intact the burying-ground for the benefit of the

only change to be made is that one of the pillars supporting the new gallery will rest on the haunches of the arch. It seems to me that the pursuer has altogether failed to prove that this slight alteration will to any extent affect its stability.

"His main contention, however, relates to the disturbance of the common burying-ground, and here he appeals to that natural sanctity which the law recognises as attaching to places of sepulture. I speak of course of the public churchyards of Scotland and not of private cemeteries, which are regulated by the law of contract.

"It seems to me that a distinction must be drawn between churchyards which are still in use, and those, like the present, which have been closed by order of the proper authority. With regard to the former, surviving relatives have an interest to see that they are preserved for future interment. With regard to the latter there is, I think, no higher right than to secure that, in the words of Erskine (ii. 1, 8), 'these, when they are no longer to continue such, should be sequestrated from the ordinary uses of property till the remains of the bodies there interred shall have returned to their original dust.' This may involve a right on the part of representatives of the dead to have the lairs enclosed, and to have free access to visit them at suitable times. Nothing more than this was decided by the cases of *Mansfield* v. *Wright*, March 17, 1824, 2 Sh. App. 104, and *Turner* v. *Arbuckle*, February 16, 1869, 7 Macph. 538.

"In the present case the pursuer does not appear in the character of a representative of any of the dead whose graves he says will be disturbed. Nor has he been able to adduce as witnesses any such representatives, for Mr Crawford and the Rev. A. B. Brown are relatives of a family whose burying place is not to be interfered with, except by the temporary removal of a mural tablet, and the corbelling of a few stones over the area of the lair; and the grave of Mr Hutton's relatives is outside the proposed building altogether. Even when a graveyard is still in use, the case of *Hill* v. *Wood* (Jan. 30, 1863, 1 Macph. 360), fully recognises that a case of necessity, or of such high expediency as amounts in law to necessity, may be made out for encroaching on a private burying place, against the wishes of those who have a right to it, for the purpose of enlarging the parish church. It seems to me that much less is required to justify encroachment for this purpose on ground which has ceased to be used for sepulture, and that a dissentient heritor, asserting no private interest either of a patrimonial or sentimental kind, must, before he can succeed, be able to shew that the proposed interference with the disused graves is wanton, without adequate reason, and of a kind to outrage public decency by desecration of the resting-places of the dead. In my view, these considerations have a direct relation to one another, for it will require a much stronger case to justify a serious disturbance of graves, involving the re-interment of recognisable human remains, than if the operations are to be conducted in ground where the resolution of the remains into their kindred dust is all but complete.

"It is of importance, therefore, to consider what are the defects in the present church which have led the kirk-session to resolve on an expenditure of over £17,000, and the heritors to assess themselves for a contribution of £2000. It may be conceded that the disrepair is not such as to impose on the heritors a legal obligation to rebuild. But the test of what they might be compelled to do cannot, I think, be the test of what they may lawfully do or consent to being done. It has been proved that the church is in various respects inconvenient, insanitary, and even dangerous. The seats and passages are too narrow, the floor is too low, there is no vestry, there is no retiring-room of any kind except the session-house, the upper gallery is objectionable on many grounds, the egresses have been condemned by the burgh engineer, the ventilation is most defective, and the air-space available for each sitter is quite insufficient, being something like 113 cubic feet per sitter, whereas it ought to be from 150 to 200 feet. It is out of the question to suggest that the accommodation for

parish. They held it in trust for that purpose, and they were not entitled to give up any part of it or divert the use to which it was put to any

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the population of so large a parish could properly be curtailed, and if the present number of sittings is to be maintained, and all these defects are to be remedied, it is obvious that a considerable enlargement of the area of the church is absolutely necessary.

"The pursuer hardly ventures to deny this, but he suggests that there are other modes of obtaining the desired improvements without encroaching on the burying-ground. In particular, he says that a new site might be obtained, or that the church might be extended on the present site without going beyond the walks which surround it. With regard to the latter suggestion, it is enough to say that on the north there are private lairs still in use which are close to the church, that on the west there is the steeple which bars extension on that side, and that the space occupied by the walks on the south and east is not sufficient, besides being of such configuration as to make it impossible to build an edifice of suitable shape. With regard to the suggestion for a change of site, I cannot assume that the Teind Court would authorise transportation. A strong instance to the contrary is afforded by the case of *Wilson* v. *Ogilvie*, Dec. 16, 1809 (reported in the Supplement to Connell on Parishes, pp. 63-5), where a small majority of the heritors of the parish of Falkirk had resolved that a new church should be erected on a different site, 'chiefly on the ground that, as the new church was to be considerably larger than the old, a number of the graves in the churchyard would be thereby disturbed,' but the change was opposed by the minister and a minority of the heritors, and the report bears that 'the Court were of opinion that no change should be made on the situation of a church unless upon very strong grounds, and that no sufficient reasons had been shewn in this case for making the change. The Judges were clear, however, that the proprietors of the graves disturbed must receive full indemnification, and that a clause to this effect should be inserted in the interlocutor.' From this it appears that the lairs to be encroached upon were still in use, and therefore the case is instructive as shewing that the conversion, even of such ground from the use of sepulture to the kindred use of forming a site for a new parish church, so far from being unlawful, may be preferable to a change of site where enlargement of the church becomes necessary.

"It remains to be considered what is the character and extent of the encroachment which the proposed operations will involve. The pursuer calculates that about 700 interments made within the twenty years immediately preceding the closing of the common ground will be included within the area of the new building. So far as these are to be affected merely by being enclosed within the walls of the church, it cannot, I think, be said that there is anything to shock the feelings, even of the most sensitive. But the pursuer further says that, of these 700 interments, about 300 will be actually displaced by the necessity which has arisen for carrying the outer walls down to the solid ground, through a depth of from 15 to 20 feet of forced earth. I think these calculations may be accepted as fairly accurate. But the important fact is, that not one of these interments took place later than sixteen years ago, and that they all were made under what may be called normal conditions, *i.e.*, in plain deal coffins, placed in earth of a character which is precisely ascertained by the witness Henderson's journal of bores, but which may roughly be described as a sandy clay. That being so, it is plain that the pursuer's allegation in his answer to the defender's fourth statement (page 17 of record), to the effect that the new church 'will be planted in a pit of human bodies, mouldering through every stage of decay,' is a mere piece of forensic hyperbole. The answer supplied by the evidence in this case to Hamlet's question, 'How long will a man lie in the earth ere he rot?' is very similar to the answer which was made by the gravedigger in the play. Ferguson, one of the sextons of St Cuthbert's, says, from his own observation, that a body decomposes there in from five to eight years, and Dr Hunter Stewart, who examined the soil, and made some interesting experiments on the air contained in the soil, gives it as his opinion

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other purpose, except upon reasons of necessity or of the highest expediency.[1] The whole ground here over which it was proposed to build was occupied by graves, and the evidence shewed that it would be impossible to find a foundation without very serious interference with the remains with which the common burying-ground to the east of the church was crowded. There was no case of necessity or of high expediency here. The church might be altered and repaired without any encroachment on the churchyard, and the defects in the structure and sanitary arrangements of the church ought to be, and could be, adjusted without violating public decency or desecrating the graveyard. 2. Further, the valued rent heritors only had been convened to the meeting of heritors at which approval was given to the proposals of the kirk-session. But it had been held in a series of cases[2] that all the owners of heritable property in the parish—including feuars—were liable to assessment upon their real rent for such purposes as the rebuilding of the church. There were several thousands of such persons in the parish of St Cuthbert's,—and as they were legally bound and might be called upon to pay the cost of the contemplated repairs, they ought to have been called to the meeting,—and not, as was the case, the valued rent heritors only. Accordingly, the resolutions passed at the meeting of heritors on 5th May 1890 were inept, and the consent of the heritors to the scheme of the kirk-session was still wanting.

Argued for the respondents;—1. It was admitted that if a case of necessity or of the highest expediency were shewn, a portion of the parish churchyard might be diverted by the heritors from its original use to the object of enlarging the parish church. Here there was such a case, and the authorities which had been cited supported that view. The public officials had called attention to the defect in the sanitary arrangements

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that 'eight to ten years in such a soil as the common ground of St Cuthbert's would result in the complete decomposition and disappearance of the soft parts of the human body.' This opinion is strongly confirmed by his examination of the air, which, at depths of 3 and 5 feet, was found not to contain more carbonic acid than is commonly found in ordinary forced earth. His conclusion, therefore, is (and in this Professor Crum Brown agrees), that the ground in question does not now contain any traces of burial except pieces of bone, decomposed, but recognisable as bone, and some fragments of the wood of coffins.

"In these circumstances I think it is impossible to say that the proposed operations will involve anything like desecration of the graveyard, or any outrage on public decency or private sentiment. If the concurrent belief of practical and scientific men should, in any particular case, turn out to be erroneous, I assume that the defenders will take care that any coffin remaining entire, shall be reverently re-interred. I assume the same with reference to the bones which will certainly be discovered. But I do not think it necessary to insert any proviso in the interlocutor to that effect, nor, indeed, are the conclusions of the summons appropriate for such a purpose. From these conclusions, as they stand, I think the defenders are entitled to absolvitor."

[1] Russell v. Marquess of Bute, Dec. 8, 1882, 10 R. 302; Earl of Mansfield v. Wright, March 17, 1824, 2 Sh. Apps. 104; Wright v. Elphinstone, July 20, 1881, 8 R. 1025; Turner v. Arbuckle, Feb. 16, 1869, 7 Macph. 538, 41 Scot. Jur. 283; M'Bean v. Young, Jan. 22, 1859, 21 D. 314, 31 Scot. Jur. 167; Hill v. Wood, Jan. 30, 1863, 1 Macph. 360, 35 Scot. Jur. 216; Wilson v. Ogilvie, Dec. 16, 1809, Connell's Parochial Law, Supplement, p. 63; Ure v. Ramsay, June 5, 1828, 6 S. 916.

[2] Highland Railway Co. v. Heritors of Kinclaven, June 15, 1870, 8 Macph. 858, 42 Scot. Jur. 487; Scottish North-Eastern Railway Co. v. Gardner, Jan. 29, 1864, 2 Macph. 537; Boswell v. Hamilton, June 15, 1857, 15 S. 1148.

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of the church, and it was impossible to remedy these and to reseat the church for the accommodation of the same number of persons as before without encroaching on that part of the graveyard which had at one time been used as the common burying-ground. But the important fact was that this part of the graveyard had been closed since 1874, when, by order of the Sheriff, burials in it had ceased. There was ample evidence to prove that any remains interred in that ground had long since been resolved into dust. 2. In regard to the objection that the real rent heritors had not been called to the meeting of heritors and had not sanctioned the proposed alterations, no real rent heritor had appeared at that meeting and tendered a vote which had been rejected, or had taken or now took any exception to what had been done. It was not sought to levy the assessment upon real rent, and, in truth, the valued rent heritors were alone entitled to deal with a question relating to the reconstruction of the church.[1] It was only when objection was taken by a valued rent heritor to his being made exclusively liable that the Courts had in certain cases held that the assessment must be levied upon real rent. The body who had been subjected to assessment here were the valued rent heritors, and the administration of the trust was necessarily with the body who were subject to assessment.[2] This objection therefore failed.

At advising,—

LORD PRESIDENT.—The Lord Ordinary by the interlocutor under review has assoilzied the defenders from the conclusions of the action, and in order to appreciate fully the effect of that judgment we must attend to what the conclusions of the action are. The action concludes that the defenders are not entitled to build over the burying-ground of the city parish of St Cuthbert's, or any part thereof; and, second, that they are not entitled to encroach upon and destroy or change the original and natural use and purpose of the said burying-ground; and third, that they are not entitled to open up or remove any of the soil or earth of the graves of said burying-ground, or of the remains of the bodies which have been interred therein.

Now, I am of opinion that the pursuer has not succeeded in establishing any of the propositions which are embraced in the conclusions of declarator. On the contrary, I think he has entirely failed to establish any one of them. The defenders are the kirk-session of the parish of St Cuthbert's, and the pursuer is an individual heritor who challenges the proceedings of the kirk-session upon the grounds embodied in the conclusions to which I have just referred. Now, the position of the kirk-session in regard to the church and burying-ground of any parish in Scotland may be described generally as administrative merely. But the position of the heritors is different. They are the proprietors of the church and of the churchyard.

I think that is so important a proposition in regard to the present case that I venture to repeat what I said in the case of the *Duke of Roxburghe*, 3 R. 734, —"The legal rights of the heritors in connection with the parish church are, I think, very well settled. I do not think there can be any dispute about what they are. The heritors have the burden, which is imposed by statute, of building and maintaining parish churches, as well as other ecclesiastical buildings, and the buildings which they so build and maintain are in law the property of the heritors. But I need hardly add that they are only property in trust—in trust, that is to say, for the whole body of the parishioners within the parish,

[1] Connell's Parochial Law, Supp., p. 17.

[2] Ecclesiastical Buildings Act, 1868 (31 and 32 Vict. cap. 96), sec. 23.

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and when in the division of the area among the heritors the accommodation in the parish church comes to be appropriated, so much to one heritor and so much to another, I think, in like manner, each individual heritor becomes trustee for those of the parishioners that reside upon his estate. The portion of the area that is assigned to him is not his property in any sense of the word." And I see that Professor Rankine says, in reference to churchyards (2d edn., p. 163), that "the rules of law in regard to the property and use of the parish church apply equally to the churchyard, with some modifications, which may be traced in the main to the difference between the occupation had of the two subjects." Now, in the *Duke of Roxburghe's* case there was some division of opinion, but not upon the matter which I am now referring to. And the judgment was also in part reversed, but still that does not affect the proposition in law which I think is established by that case.

Now, the heritors of the parish, in conjunction with the kirk-session—that is, the proprietors of the church and churchyard, along with the existing administrative body—have become satisfied that the church is not in a fit condition for the occupation of the large congregation which resort to it, and they find that the only way in which the evil can be remedied is that a portion of the churchyard shall be built over by the addition to the church. The heritors, being proprietors in trust both of the one subject and the other, are entitled to consider and decide, with the approval of the kirk-session and of the presbytery of the bounds, in what way they shall exercise their trust powers, in this sense, that if it is found that it is desirable or highly expedient that one of the trusts should yield to the other—as in the present case—that a portion of the churchyard should be built over in order to increase the accommodation in the church, then I apprehend it is quite within the power of such parties to come to that resolution and act upon it. Now, it is undoubtedly the condition of their doing so, in the first place, that no one shall be debarred from any legal right by what they propose to do, and in the second place, that there shall be no undue or improper interference with the rights of the parishioners either in the one subject or in the other, and therefore it becomes necessary to consider, as the Lord Ordinary has done, what is the condition of the churchyard, or rather of that portion of it which is proposed to be built over in order to extend the church and make it more convenient for occupation.

In the first place, it is to be observed that the portion of the churchyard to be built over is no longer in use as a burying place. It has been shut up by lawful authority, and no more burials can take place there. And this has been the condition of that portion of the churchyard for a long period. It has not been for a great many years lawful to bury the dead in that portion of the churchyard. The ground proposed to be built over no doubt was a part of the public burying-ground of the churchyard for a very long period; and human remains were for a long period of years undoubtedly consigned to mother earth in that portion of the ground. But it is a very well established fact, leading to a rule of law, that after a certain period human remains resolve into their original dust, and it is by no means necessary to maintain the ground, in which they are buried, intact. Now, in these circumstances, it appears to me that the defenders have completely established their defence. They have shewn that the churchyard, which belongs in property to the heritors, is no longer required, as regards that portion of it proposed to be built over, for the purposes of burial. Indeed, it would be unlawful to continue to bury bodies there. And therefore

any legal obstacle to the extension of the church over that ground is entirely removed.

It is perhaps not necessary, but it may be desirable, just in a word to advert to that species of right which a heritor or even a parishioner may have in a portion of the churchyard which has been dedicated to the use of his family, where he has acquired a right of sepulture by possession, or by a grant from the heritors and kirk-session. But it must be observed that there is no question of that kind raised here, or at least raised in such a way that it can be disposed of. Mr Steel, the pursuer, says that he is the successor in title of Nisbet of Dean, and as such has a right of property, or some inferior right, in that portion of the churchyard which has been used by that family. Now, it is quite new to me to hear that a successor in title has a right to continue the sepulture of his own family in ground which has been acquired for the burying place of another family altogether, to whom he has merely succeeded by purchase of land. That is quite unknown, and there is no other case of alleged interference with ground where there is any right of this description claimed by anyone.

Therefore the obstacles which the pursuer has sought to set up against the proposed reconstruction or addition to the parish church seem to me to be entirely removed, and I am of opinion with the Lord Ordinary that the defenders are entitled to absolvitor.

LORD ADAM.—The defenders in this case, the kirk-session of St Cuthbert's, have at their own hand no right or title to interfere with the burying-ground of the parish, but they say, and I think correctly in point of fact, that they have obtained the consent of the heritors of the parish, and therefore it appears to me that the question in this case is whether the heritors could be interdicted from carrying out the proposed extension of the church.

Now, I agree with your Lordship that the heritors are the proprietors of the church and the churchyard for parochial purposes. The church, no doubt, is primarily intended for the purpose of worship, and the churchyard for the purpose of sepulture, but it cannot be said that the heritors are under no circumstances entitled to divert the church or the churchyard from the primary purposes for which they were intended. There have been numbers of cases where the churchyard has been appropriated for the extension of the church. The question therefore is one of necessity, desirability, or high expediency, and I think the kind of case which must be made out depends on circumstances. I can quite understand that, where patrimonial, or, as Lord Neaves called them in one case, "*quasi*-patrimonial" rights have been acquired, a strong case of expediency, amounting almost to necessity, must be made out before such rights can be interfered with. Again, I can understand that if the portion of a churchyard which is desired for the purpose of enlarging the church would probably be required for the primary purpose for which it was intended, a strong case would have to be made out for interfering with that primary purpose. I can understand further that a strong case would have to be shewn, where the ground affected had been in quite recent times used for purposes of burial, and it was proposed to disturb human remains when it was neither decent nor proper that they should be disturbed. There is no case here of any such kind. The ground proposed to be taken for the extension of the church was formerly the common burying-ground of the parish of St Cuthbert's, and there will therefore be no interference with any patrimonial rights. Again, there would never

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be any further burials in this part of the churchyard in any case, because the common burying-ground was closed by the authority of the Sheriff in the year 1874. Further, the seventeen years which have elapsed since 1874 make it impossible that there should be any interference with graves where recent interments have taken place, and it was also brought out in the proof that in such places as this human remains return, as the Lord Ordinary says, to their "kindred dust" in the course of seven or eight years.

I think, therefore, that it is not necessary that any great case of expediency should here be made out, because I cannot see that there can be any great interference with the feelings or rights of anyone. There would indeed have been as much or more interference with the graves in question if the ground had remained a burial-ground, as in that case they would ere this have again been used for the purpose of burial.

The question remains whether a case of expediency or necessity has been made out, and I think enough has been shewn with regard to the safety of the congregation in the matter of access, their health in the matter of ventilation, and the necessary conveniences and comforts of a church like this at the present time, to justify what seems to me to be a case of very limited interference with other rights. I think it is also proved that the necessary enlargement of the church cannot be made in any other direction than the proposed one. I accordingly have no hesitation in saying that the Lord Ordinary has come to a right conclusion.

LORD M'LAREN.—I concur with your Lordship in the chair, and I have really very little to add. The enlargement of the church is proposed to be made by the kirk-session mainly out of funds provided by the congregation and by public subscription, but I think the sum of £2000—which was considered to represent truly the sum necessary to put the existing church in proper repair—has been contributed by the heritors. In all that the kirk-session propose to do they have the support of the heritors, and therefore I think the case must be taken, in any question of power, just as if the heritors were themselves coming forward by a resolution of the majority proposing to do this thing. I conceive that the whole administrative title to the church and the churchyard is represented by the heritors and the kirk-session, who in this matter are agreed. Then I think that unless we are to say that under no circumstances can a parish church, planted in the middle of a churchyard, be enlarged, it follows that the administrators of the churchyard and the fabric erected upon it must have the discretion of encroaching upon that part of the churchyard which has been appropriated to sepulture, and that is in most cases the whole of the part unoccupied by the fabric of the church. They are the best judges as to the direction in which the enlargement is to proceed, and as to the time of making it, and if they exercise their discretion properly and according to law, they would of course not make an extension which would involve the disturbance of the ground in which interments had recently taken place. Now, it is admitted that if such a thing were proposed, and I do not think it likely that any body of heritors would propose it, the Court might interfere, because the discretion of this public body, if exercised in a manner contrary to law, is open to challenge. But in my opinion no case has in fact been made out for interfering with that discretion. It does not appear to me that any injury has been qualified to anyone, or that there is any disturbance of human remains of a nature or in a degree different from what would necessarily take place if there had been no burial in this ground for a hundred years. I

think there are ample precedents to justify the course which the heritors and kirk-session here propose to take, and that they are entirely within their rights. No. 175.

June 12, 1891. Steel v. Kirk-Session of St Cuthbert's Parish.

LORD KINNEAR concurred.

THE COURT adhered.

JOHN PAIRMAN, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

SIR W. T. F. A. WALLACE, BART. AND OTHERS (Wallace's Marriage-Contract Trustees), First Parties.—*D.-F. Balfour—C. J. Guthrie.* No. 176.

TESTAMENTARY TRUSTEES OF R. A. WALLACE AND SPOUSE, Second Parties.—*Dickson—Fleming.*

JOHN A. A. WALLACE AND ANOTHER, Third Parties.—*D.-F. Balfour—C. J. Guthrie.*

JANETTE F. A. WALLACE AND OTHERS, Fourth Parties.—*D.-F. Balfour—C. J. Guthrie.*

June 12, 1891. Wallace's Trustees v. Wallace.

Succession—Faculties and powers—Power to appoint under "conditions, provisions, and limitations."—By antenuptial marriage-contract the trustees were directed, after the death of the survivor of the spouses "to pay over" certain funds "to or for behoof of" the surviving child or children of the marriage, "in such shares or proportions, and subject to such conditions, provisions, and limitations" as the spouses or the survivor of them should appoint.

By mutual trust-disposition and settlement, in exercise of the reserved power of appointment, the spouses directed their testamentary trustees to hold these funds for behoof of their children in equal shares, and to pay to them the income, it being provided that the shares of the sons should be paid at majority, and that in the case of the daughters the share of each should be settled upon her at marriage for her sole and exclusive use, and held by trustees for her behoof, "with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, the same shall be paid, assigned, and conveyed to her heirs and executors." In regard to the disposal of the fee of the shares of unmarried daughters the trustees were directed to pay or assign the same "according to the direction which each such daughter may leave by any testamentary deed," and failing the execution of such deed "to her heirs and executors."

In a question raised after the death of the survivor of the spouses between the trustees under the trust-disposition and settlement and the daughters (none of whom were married), who contended that their parents were not entitled to restrict their rights to a liferent with power to test, *held* (following *Lennock's Trustees* v. *Lennock*, 8 R. 14), that the appointment was valid.

Succession—Faculties and powers—Conditions annexed to a gift—Ultra vires.—By antenuptial marriage-contract the trustees were directed after the death of the survivor of the spouses "to pay over" certain funds "to or for behoof of" the surviving child or children of the marriage, "in such shares or proportions, and subject to such conditions, provisions, and limitations" as the spouses or the survivor of them should appoint.

By mutual trust-disposition and settlement, in exercise of the reserved power of appointment, the spouses directed their trustees in making payment to their children of their respective shares of the funds in question to take them bound to repay the same "in the event of such son or daughter succeeding to the said estate of L." The contingency had not occurred at the death of the survivor of the spouses.

Held that the direction was *ultra vires* and ineffectual, but that its invalidity did not affect the appointment in other respects.

BY antenuptial marriage-contract, dated 25th August 1859, between Robert Agnew Wallace and Jane Colquhoun Bell, the former bound himself to pay to the trustees under the contract a sum of £5000, to be invested in their names, the interest to be paid to him, and if he died survived by his wife, to her. 1ST DIVISION. C.

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June 12, 1891. Wallace's Trustees v. Wallace.

Then followed this provision,—"Upon the death of the survivor of the said promised spouses, the said trustees shall pay over the said principal sum to or for the behoof of the surviving child or children of the said intended marriage, and the issue of any of them who may have died leaving issue, in such shares or proportions and subject to such conditions, provisions, and limitations as the said promised spouses, during their joint lives, and failing either of them, as the survivor of them, shall appoint by any writing under their, his, or her hand, and failing such appointment, equally among them, share and share alike (such issue succeeding always only to the shares to which their parents would have been entitled had they been in life), at the periods and under the same powers of advance as are provided in regard to the disposal of the first sum of £5000 hereinafter assigned by the said Jane Colquhoun Bell to the said trustees."

Mrs Wallace also conveyed a sum of £5000 to the trustees under the contract—the provisions in regard to the disposal of which after the death of the survivor of the spouses were identical with those regarding the disposal of the husband's £5000. The shares of the sons were in each case to be payable on their attaining majority, and of the daughters on their attaining majority or being married, whichever event should first happen. There was a power to make advances for behoof of minor children.

By mutual trust-disposition and settlement, dated 21st December 1878, the spouses expressed themselves as desirous of exercising the powers conferred upon them by the contract of marriage with regard to the fee of the sums thereby conveyed, the fourth purpose of that deed being as follows:—"Fourthly, We direct our trustees to hold the whole residue of our estate and effects, including therein the several sums conveyed by the foresaid contract of marriage, and over which we have a power of appointment for behoof of the children of our marriage who may survive us, and the lawful issue of any who may predecease us, . . . but excluding always that one of our children who may have succeeded to the estate of Lochryan, and that in equal shares and proportions" (then followed a declaration that advances to any of the children should be taken into account and deducted from their shares), "and we direct the said trustees to pay to, or apply for behoof of, our said children the whole free annual income of our several estates, and that equally amongst them, share and share alike, and on the arrival of our sons at majority respectively to pay to or assign to each of them an equal share of our several estates, and on the marriage of our daughters respectively, to settle and secure on each daughter, for her sole and exclusive use during her marriage, an equal share of our several estates, so that the same shall be held by trustees for her behoof, exclusive always of the *jus mariti* and right of administration, or other right whatever of her husband, with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, the same shall be paid, assigned, or conveyed to her heirs and executors . . . and in regard to the disposal of the fee of the shares of any of our said daughters who may not marry, we direct the said trustees to pay, assign, or dispone the same according to the directions which each such daughter may leave by any testamentary deed; and failing the execution of such deed, to pay, assign, or convey the same to her heirs and executors: And we further direct the said trustees, on making payment of a share of our said estates to a son, or on settling a share for behoof of a daughter, to take the said son, or the trustees for behoof of such daughter, bound to repay the same, but without the addition of interest, and so that the same may form an addition to the funds available for division among our other children, in the event of such son or daughter succeeding to the said estate of Lochryan. . . .

Mr Wallace died on 8th June 1887, and Mrs Wallace on 4th April 1890. They left nine children, two sons and seven daughters, none of whom had at that date succeeded to the estate of Lochryan. The daughters were all unmarried.

A difference having subsequently arisen between the trustees under the marriage-contract and those under the trust-disposition and settlement in regard to the administration and disposal of the two sums of £5000 conveyed to the marriage-contract trustees as above narrated, a special case was presented to which the parties were (1) the marriage-contract trustees; (2) the trustees under the trust-disposition and settlement; (3) the two sons; and (4) the daughters.

The only questions to which it is necessary to advert were the following, as amended at the bar:—"(2) Is the provision in the said trust-disposition and settlement directing the trustees on making payment of a share of the deceaseds' estate to a son, or settling a share for behoof of a daughter, to take the said son or the trustees for behoof of such daughter bound to repay the same in the event of such son or daughter succeeding to the estate of Lochryan, a condition which the spouses were entitled to adject to the appointment exercised by them under the powers reserved in the said contract of marriage, and ought it to receive effect? (3) Are the provisions in the said trust-disposition and settlement as regards the shares of the deceaseds' estates destined by the said marriage-contract to the fourth parties a valid exercise of powers reserved to the spouses in the said contract of marriage, and ought they to receive effect? or are the parties of the fourth part respectively entitled to payment of their shares of the said sums of £5000 on their respectively attaining majority, or being married, whichever of these events shall first happen?"

In regard to question 2, the third and fourth parties maintained that the provisions in the trust-disposition and settlement restricting the right of any child who might have succeeded to the estate of Lochryan at the time the sums of £5000 came to be divided, and providing, in the event of none of the third and fourth parties having succeeded to the estate at that time, that each of them or their trustees should come under an obligation to repay their share on thereafter succeeding, were inept and ineffectual, the spouses not having been entitled by the terms of the contract of marriage to impose the restrictions. The second parties maintained that the provisions should receive effect, and that they were bound to obtain an obligation to the effect in question.

In regard to question 3, the fourth parties maintained that they were entitled to payment of their shares upon their attaining majority or being married, whichever of these events should first happen. The second parties, on the other hand, maintained that the fourth parties were not entitled to payment of their shares, but that the same fell to be retained by the second parties until the marriage of any of the fourth parties, and on any of the fourth parties being married that her share fell to be conveyed to trustees to be held for her behoof in accordance with the provisions of the trust-disposition and settlement.

Argued for the first, third, and fourth parties;—(1) There was no case in which a provision binding trustees to obtain an obligation from a beneficiary to repay his share of the trust-estate in the event of his succeeding to something else had been put in force by the Court, and it could not be implemented. Besides, the imposition of such a restriction was not within the powers conferred by the marriage-contract. (2) The daughters' right to a share of the fee of the estate which was provided for in the marriage-contract could not be restricted, as in the mutual trust-disposition and settlement, to one of liferent with a power to test.

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Any condition or limitation imposed in the later deed must be consistent with the right of fee which was involved in the direction of the marriage-contract to "pay over the capital to or for the behoof of" the beneficiaries, which the condition or limitation in question was not.[1] The clause in the case of *Lennock's Trustees* was not the same as the present, for there the daughters had no general power of bequest, and there was no ulterior destination to the beneficiaries' own heirs and executors involving the introduction of strangers to the benefit.

Argued for the second parties;—(1) The true reading of the clause of gift was that every bequest was conditional upon the recipient not taking the estate of Lochryan. It was within the reserved power of appointment to impose such a condition.[2] (2) The power of appointment was validly exercised, and the use of the word "limitation" practically covered the creation of a trust.[3] This was confirmed by the terms of the direction "to pay to or for the behoof of." The trust-disposition professed to dispose of the whole fund, and did not give it to persons other than those mentioned in the marriage-contract.

At advising,—

LORD ADAM.—The important question we have now to consider in this case is whether the power of appointment which the father and mother reserved to themselves has been well exercised in the mutual trust-deed and settlement which was executed by the spouses.

It appears to me that if the question had not been concluded by decision it would have been open to argument. But I am of opinion that it is impossible to distinguish the case of *Lennock's Trustees* from the present. The matter arose there for decision in exactly similar circumstances. The conditions and limitations of the power were expressed in precisely the same way. I therefore think the case of *Lennock's Trustees* is conclusive, and accordingly that the appointment is a good one.

Another question which has been put to us is in regard to the construction of the following clause,—"And we further direct the said trustees on making payment of a share of our said estates to a son, or on settling a share for behoof of a daughter, to take the said son or the trustees for behoof of such daughter bound to repay the same, but without the addition of interest, and so that the same may form an addition to the funds available for division among our other children, in the event of such son or daughter succeeding to the said estate of Lochryan." I do not very well see how that could ever become an operative condition. It appears to me to be quite ineffectual and *ultra vires*. But assuming that it is *ultra vires*, I think the law is clear; it is laid down as follows in Sugden upon Powers, p. 526,—"Where conditions are annexed to the gift, not authorised by the power, the gift is good, and the condition only is void, so that the appointee takes the fund absolutely." Holding the condition to be void, I think it has no effect upon the appointment in other respects.

LORD M'LAREN.—The most important of the questions we are asked to answer

[1] Gillon's Trustees v. Gillon, Feb. 8, 1890, 17 R. 435; Baikie's Trustees v. Oxley, Feb. 24, 1862, 24 D. 589, 34 Scot. Jur. 338; Moir's Trustees, June 11, 1871, 9 Macph. 848, 43 Scot. Jur. 462; Munro v. Munro, Feb. 13, 1810, F. C.

[2] Bonhotes v. Mitchell's Trustees, May 27, 1885, 12 R. 984.

[3] Lennock's Trustees v. Lennock, Oct. 16, 1880, 8 R. 14; Bryson's Trustees v. Clark, Nov. 26, 1880, 8 R. 142; Carver v. Bowles, 1831, 2 Russell and Myl. 304.

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in this case relates to the exercise by the spouses of the powers reserved to them in the clause of the antenuptial marriage-contract dealing with their children's provisions. They reserve to themselves a qualified power of distribution. The children's provisions are to be paid to them by the trustees upon the death of the survivor of the spouses "in such shares or proportions, and subject to such conditions, provisions, and limitations" as the spouses, or the survivor of them, should appoint. There is a decision of the Second Division of the Court, which is directly in point,—the powers in that case (*Lennock's Trustees* v. *Lennock*) and in the deed before us are expressed in identical terms, and the powers were executed in substantially the same way. The Court there held that the power was well exercised, and I agree in the view that a power to apportion among the children of the marriage, and to impose conditions and limitations entitles the spouses, as is the case here, to direct that the fund be held by trustees for the daughters, the income to be paid to them for life, and they to have a testamentary power of disposal. Whether the exercise of such a power can be extended further so as to provide for the event of the daughters not availing themselves of the power of disposal, I give no opinion. I see great difficulty in the way of extending the signification of the reserved power, because, whenever a new course of succession is introduced, persons are taken in who are not proper objects of the power. Here the framers of the settlement have avoided that difficulty, and while they have provided that the daughters shall not have power to dispose of their shares by way of anticipation, they have at the same time given them the power of disposing of the fee by testamentary deed. So far, I think, the power of appointment has been vaidly exercised. On the other points of the case, I concur in the judgment proposed.

LORD KINNEAR and the LORD PRESIDENT concurred.

THE COURT pronounced this interlocutor:—"Answer the second question as amended at the bar in the negative; answer the first alternative of the third question as amended at the bar in the affirmative . . . and find, declare, and decern accordingly."

JOHN CLERK BRODIE & SONS, W.S.—WALLACE & BEGG, W.S.—Agents.

No. 177.
June 13, 1891.
Mackenzie v. Ewart.

JAMES MACKENZIE, Pursuer (Reclaimer).—*M'Kechnie—J. C. Watt.*
WILLIAM EWART AND OTHERS, Defenders (Respondents).—*Salvesen.*

Bankruptcy—Cessio—Decree of cessio in debtor's absence—Form of interlocutor granting decree—Bankruptcy and Cessio (Scotland) Act, 1881 (44 *and* 45 *Vict. c.* 22), *sec.* 9.—The Bankruptcy and Cessio Act, 1881, sec. 9, enacts, "if the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may, in the debtor's absence, pronounce decree of *cessio bonorum*."

In a petition for *cessio*, the Sheriff pronounced this interlocutor:—"Having heard parties' procurators, in respect the debtor has failed to appear at this diet for examination as ordered by last interlocutor, and has not taken means to satisfy the Sheriff-substitute that his absence was not wilful, decerns the debtor . . . . to execute a disposition *omnium bonorum*."

The Court (*rev.* judgment of Lord Kincairney, *diss.* Lord Trayner), *reduced* the decree in respect that the Sheriff-substitute had set forth a reason for granting decree other than that he was satisfied that the debtor's absence was wilful.

Question whether it was essential that the Sheriff in granting decree of *cessio* in the absence of the debtor should set forth the reason of his judgment.

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June 13, 1891. Mackenzie v. Ewart.

2D DIVISION. Lord Kincairney. B.

IN March 1890, William Ewart, butcher, Alness, and Alexander John Dallas, solicitor, Tain, presented a petition for *cessio* in the Sheriff Court at Dornoch against James Mackenzie, farmer, Walkerdale, Sutherland, and on 18th March the Sheriff-substitute (Mackenzie) pronounced an interlocutor by which he, *inter alia*, ordained the debtor to appear for examination on 15th April.

On 15th April the Sheriff (Low) on the application of the debtor's agent adjourned the proceedings until the 6th May.

On 6th May the debtor failed to appear for examination and the Sheriff-substitute pronounced this interlocutor:—"In respect the debtor has failed to appear at this diet for examination as ordered by last interlocutor, and has not taken means to satisfy the Sheriff-substitute that his absence was not wilful, decerns the debtor, James Mackenzie, farmer, Walkerdale, Rosehall, to execute a disposition *omnium bonorum* to and in favour of Robert Munro, writer in Tain, who is hereby appointed trustee for behoof of the creditors of the said debtor."

On 1st December the debtor brought an action against Ewart, Dallas, and Munro, concluding for reduction of this decree, *inter alia*, on the ground that it was disconform to statute in respect that it did not bear that the Sheriff-substitute was satisfied that the debtor's failure to appear was wilful.*

On 24th February 1891, the Lord Ordinary (Kincairney) assoilzied the defenders.†

The pursuer reclaimed, and argued;—The decree was disconform to the statute and fell to be reduced. That statute, dealing as it did with *cessio*, which was truly a diligence, was *strictissimi juris*.[1] The object was to punish debtors who had been cited to attend meetings and who contumaciously absented themselves. Wilful absence of the debtor must be proved to the satisfaction of the Sheriff, who must state in his interlocutor that he was satisfied that the absence was wilful; otherwise the clause had no application. Here it was impossible to say from the terms of the Sheriff-substitute's deliverance that he was satisfied that there had been wilful absence. When he said that the debtor had not taken means

* The Bankruptcy and Cessio Act, 1881, sec. 9 enacts,—"If the debtor fails to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may, in the debtor's absence pronounce decree of *cessio bonorum*."

† "OPINION.— . . . 4. It was objected that the decree of *cessio* was disconform to the requirements of the statute. The statute authorises a decree in absence when the Sheriff is satisfied that the debtor's absence is wilful. In this case the Sheriff did not find this expressly, but found in effect that he was not satisfied that the debtor's absence was not wilful. It was represented that this clumsy use of the double negative expressed only that the Sheriff was not satisfied either way, and did not know whether the absence was wilful or not. If it were necessary to adopt that construction, the decreet would be bad. The interlocutor is very strangely and unfortunately expressed, but I construe it to mean that he was satisfied that the pursuer's absence from the meeting, which had been fixed on the motion of his own agent, was wilful, because not satisfactorily explained, and that the Sheriff-substitute was therefore in a position to pronounce decree. Whether his opinion that the absence was wilful was well-founded, or the reverse, I cannot consider. I must accept the interlocutor as correct. On the whole, although the interlocutor is open to obvious criticism, I do not think that the decree is reducible on the ground of the irregularity in the proceedings."

[1] Reid v. Somerville & Co., June 6, 1889, 16 R. 751.

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to satisfy him that his absence was not wilful, it was obvious that the Sheriff-substitute had not been able to make up his mind whether it was wilful or not.

Argued for the defender;—It was not imperative as matter of style that the Sheriff should state in his interlocutor that he was satisfied that the debtor's absence was wilful. He must merely be satisfied of the fact. When then he pronounced decree in the absence of the debtor, the obvious inference was that he had first satisfied himself that the absence was wilful. But taking the deliverance as it stood, although it might be open to criticism, fairly read it meant nothing else than that in absence of satisfactory explanation on the subject, the Sheriff-substitute was satisfied that the absence was wilful.

At advising,—

LORD JUSTICE-CLERK.—In this case a petition was presented against the pursuer for the purpose of having *cessio* ordered by the Sheriff-substitute, and it appears that upon the second occasion on which the matter was taken up in the Sheriff Court, and to which occasion the case had been adjourned, the pursuer was not present in Court. In these circumstances the Sheriff-substitute was entitled, if he was satisfied that the pursuer's absence was wilful, to grant decree of *cessio* at once.

The only question of real difficulty in the case is whether the Sheriff-substitute required as matter of form to state in his interlocutor pronounced in absence of the pursuer that he found the pursuer's absence was wilful.

I cannot say that I have formed a very definite opinion upon the matter, and I do not find it necessary to consider it here, because in point of fact the Sheriff did state what he found in the interlocutor which we have before us. He did not find expressly that the pursuer's absence was wilful, but that the pursuer "has not taken means to satisfy the Sheriff-substitute that his absence was not wilful."

Now, can that be taken as amounting to an expression by him that in his opinion the absence of the pursuer was wilful?

I am inclined upon the whole to think that it cannot. To find that a man has not taken means to shew that his absence was not wilful is different from finding that his absence was wilful. Whether the Sheriff does or does not require in an interlocutor granting decree of *cessio* in the wilful absence of the pursuer expressly to state that his absence is wilful, I am inclined at all events to say that where he does proceed to express the grounds of his decision in terms which do not necessarily imply that the absence was wilful, his interlocutor cannot stand. There must therefore be decree of reduction.

LORD RUTHERFURD CLARK.—I agree in the course which your Lordship proposes.

I confess that I think, where a *cessio* is granted against an absent debtor, that it would be better in all cases as matter of style to say that the debtor's absence was wilful. I do not say that I think that such a statement is essential to the sustaining of the deliverance, but I think that it is in accordance with the proper form to be adopted in any case where there are such proceedings before the Sheriff.

Here the Sheriff-substitute has not made any such finding, but proceeds upon a totally different ground. He grants decree of *cessio* for a reason expressed in peculiar terms. He says,—"The Sheriff-substitute . . . in respect the

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debtor has failed to appear at this diet for examination as ordered by last interlocutor, and has not taken means to satisfy the Sheriff-substitute that his absence was not wilful, decerns the debtor . . . to execute a disposition *omnium bonorum*." That is the only reason stated by the Sheriff-substitute for granting *cessio*, and I think it is a reason which the statute does not warrant. I am therefore of opinion that we ought to reduce the decree.

LORD TRAYNER.—I agree with Lord Rutherfurd Clark in thinking that it might be advisable for the Sheriff, when he is granting decree of *cessio* in the absence of a debtor, to find in his interlocutor granting decree that the debtor's absence was wilful. I do not think, however, that the want of such a finding by him would afford any ground for impugning the regularity of the procedure. The statute requires that the Sheriff shall be satisfied that the debtor's absence is wilful, but does not require in terms that he shall say so. But if the Sheriff pronounces a decree in absence of the debtor, I should hold that he had satisfied himself of what was antecedently necessary before he could pronounce decree, viz., that the debtor's absence was wilful.

But the difficulty here arises not from silence on the part of the Sheriff-substitute as to the debtor's absence being wilful, but from the fact that what is said on that subject by the Sheriff-substitute leaves it open to doubt whether he was satisfied that the absence was wilful or was not satisfied that it was not.

I agree with the Lord Ordinary in thinking the interlocutor is open to criticism, but I also think with him that the fair reading of the interlocutor is that the debtor's absence was held to be wilful because he had not explained his absence so as to satisfy the Sheriff-substitute that it was other than wilful. I should on these grounds be prepared to hold that the Sheriff's proceedings were in accordance with the statutory requirements, and that the decree of *cessio* should not be set aside.

The LORD JUSTICE-CLERK intimated that LORD YOUNG, who was present at the hearing, concurred in the judgment.

THE COURT recalled the Lord Ordinary's interlocutor, and granted decree of reduction.

A. P. PURVES & AITKEN, W.S.—ALEXANDER ROSS, S.S.C.—Agents.

No. 178.
June 13, 1891.
Walker v. Lang.

JAMES KING WALKER, Respondent and Appellant.—*M'Kechnie—Maclaren.*

JOHN LANG (Procurator-fiscal of the Dean of Guild Court of the City of Glasgow), Respondent.—*Ure—Craigie.*

Burgh—Dean of Guild—Appeal—Jurisdiction—Exclusion of review—Glasgow Police Act, 1866 (29 *and* 30 *Vict. cap. cclxxiii.*), *secs.* 384 *and* 277.—In terms of sec. 384 of the Glasgow Police Act, 1866, the Master of Works gave notice to the proprietor of a back court, requiring him to fence it, and intimated that if he had any objections he must lodge the same in writing with the Clerk to the Police Commissioners within six days.

No objections were lodged, and thereafter the Dean of Guild, on the application of the Procurator-fiscal, after hearing the proprietor's objections, but without a record having been made up, pronounced an interlocutor, granting a warrant for the execution of the work at the proprietor's cost on the ground that there was danger to persons using the court from the want of a fence.

The proprietor having appealed, the Procurator-fiscal objected that the appeal

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was incompetent under sec. 277 of the Act,* in respect that no record had been made up.

The appellant contended that, as the public had no right of access to the court, the want of a fence could not be "dangerous" in the sense of the Act, and that the Dean of Guild had exceeded his jurisdiction in granting the warrant.

Held that the interlocutor was in pursuance of the Act, and that the appeal was incompetent, as no record had been made up.

Opinions that the Dean of Guild would not have been entitled to refuse a motion to have a record made up.

1ST DIVISION.
Dean of Guild of Glasgow.
C.

ON 19th December 1890, there was served upon James K. Walker, 65 Bath Street, Glasgow, a notice by the Master of Works of the city of Glasgow, in the following terms:—"By virtue and in terms of the Glasgow Police Act, 1866,† I hereby give notice to you that there is no fence for protecting the back court, . . . of which you are 'proprietor.' . . . And I hereby require you to execute the following work, in order to comply with the provisions of the said Act, viz.:—To erect an iron fence railing, . . . and to have the whole work completed in a tradesmanlike manner, and that within ten days from this date, to my entire satisfaction. If you consider yourself aggrieved by the requisition hereinbefore contained, you may, within six days hereafter, deliver to Mr John Lang, Clerk to the Police Commissioners, City Chambers, written objections signed by you, in order that the Magistrates or the Dean of Guild may inquire into, try, and decide the questions competently raised in such objections, in terms of the said Act."

Walker did not lodge written objections within the time required by the notice.

On 27th April 1891, a petition and application at the instance of John Lang, Procurator-fiscal of the Dean of Guild Court, for the public interest, was presented against Walker, and a warrant was asked to execute the work specified in the notice, "and thereafter to ascertain and fix the cost thereof, and decern against the defender" for the same, "all in terms of and to the effect provided for in the Glasgow Police Act, 1866, before referred to."

Of the same date the Dean appointed the petition to be served upon Walker.

On 15th May 1891, the parties were heard before the Dean.

The Dean pronounced this interlocutor:—"Finds that the objections now stated to the notice by the Master of Works ought to have been intimated, in terms of the Act, within six days from the date when the notice was served upon the defender; therefore repels the same: Finds that the back court referred to in the petition is surrounded by an area about 10 feet in width and from 3 feet 6 inches to 4 feet 9 inches in depth without any fence or protection, and is consequently dangerous to those requiring to use said court: Grants warrant to the petitioner to execute the operations specified in the notice by the Master of Works as craved, and *quoad ultra* continues the case."

* Section 277 of the Glasgow Police Act, 1866, enacts,—"Every proceeding before the Dean of Guild in pursuance of this Act shall be subject to the following rules and regulations. . . . Where a record is not made up the decision given by the Dean of Guild shall be final, and not subject to suspension, advocation, or appeal, or to any other form of review, or stay of execution."

† The Glasgow Police Act, 1866, sec. 384, enacts,—"The Master of Works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk or flue, or any chimney-head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction."

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Walker appealed.

The respondent objected to the competency of the appeal, and argued;—The proceedings adopted by the Master of the Works, and subsequently by the respondent, were not proceedings founded upon the common law.[1] They were proceedings "in pursuance" of the Glasgow Police Act, 1866, in the sense of the 277th section of that Act, and as no record had been made up, they were not subject to review.

Argued for the appellant;—Section 384 gave the Master of Works power by notice to require "the proprietor or occupier of a land or heritage to fence the same." The notice was to be enforced by the procurator-fiscal of the Dean of Guild Court. The section must therefore be restricted to the case where the land or heritage unfenced was a source of danger to the public. The appellant's ground was not accessible to the public, and could not therefore be a source of danger to the public. The notice was not then authorised by section 384, and therefore, together with the petition and application following thereon, it could not be held to be "in pursuance" of the Act. Section 277 was therefore inapplicable. If the respondent's view were sound, the Dean of Guild, by refusing to allow a record to be made up, might prevent appeal in any case.

LORD PRESIDENT.—I think we are bound to sustain the objection to the competency of this appeal. The Glasgow Police Act of 1866 in section 277 provides that "where a record is not made up the decision given by the Dean of Guild shall be final, and not subject to suspension, advocation, or appeal, or to any other form of review." Now, these words are quite plain in their meaning, and not susceptible of construction. The only difficulty suggested by our sustaining the objection to competency is that it may entitle the Dean of Guild to refuse to allow a record to be made up. Now, I am not moved by this suggestion, for if the Dean of Guild took that course he would exceed his jurisdiction, and there would certainly be a remedy in this Court notwithstanding the 277th section. I am therefore for sustaining the objection to the competency of the appeal.

LORD ADAM.—The 384th section of the Glasgow Police Act provides that "the master of works may by notice, given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk or flue, or any chimney-head or can, or any sign, signboard, or other thing connected with or appertaining to any building therein which appears to be dangerous, to his entire satisfaction." The "manner hereinafter provided" refers to section 386, which again refers us back to sections 321 and 322 for the particulars which require to be stated in any such notice and also the objections which may be lodged thereto. Section 322 provides that "if any proprietor to whom such notice has been given considers himself aggrieved by the requisition therein contained, he may, within six days thereafter, deliver to the clerk written objections signed by him," and then follows the procedure to be observed. The procurator-fiscal shall apply to the Dean of Guild for a warrant to cite the objecting proprietor, and the Dean of Guild is thereupon to inquire into and to decide the question raised.

Now, what took place was this: The Master of the Works served a notice under the 384th section on the appellant, setting forth the particulars required by section 321. Thereafter the appellant's duty was to have appeared and

[1] Allan v. Whyte, Dec. 20, 1890, 18 R. 332.

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lodged objections, if he so desired, and to have had the case heard upon a record.

The appellant, however, did not take that course, and the case was handed over to the respondent, the Procurator-fiscal, in order that the notice might be enforced in terms of section 322 of the Act, and accordingly, on 27th April 1891, the Procurator-fiscal presented a petition and application to the Dean of Guild for that purpose, and his interlocutor is now here under review.

That brings us to the question whether under the 277th section the interlocutor of the Dean can be appealed against. By that section, it is provided that "Every proceeding before the Dean of Guild in pursuance of this Act shall be subject to the following rules and regulations," and there follows,—"Where a record is not made up, the decision given by the Dean of Guild shall be final, and not subject to suspension, advocation, or appeal, or to any other form of review or stay of execution." Here no record was made up, nor was any motion made to the Dean for leave to have a record made up. When the petition and application came up for hearing on the 15th May, the appellant had an opportunity of putting himself in a position to make a competent appeal by moving for a record, but this he failed to do.

The question then is, was this a proceeding "in pursuance of the Act"? I have not the least doubt that it was. It was not in any form or sense a common law proceeding.

I am therefore of opinion, on the whole matter, that as the proceedings shew *ex facie* that they were taken upon the authority of the Glasgow Police Act, and not at common law, and as no record was made up, section 277 applies, and excludes the interlocutor appealed against from our review.

LORD M'LAREN.—I am of the same opinion.

Machinery has been provided in the Act whereby any fair question of law upon the construction of the statute may be brought by appeal to the superior Court, the necessary preliminary being that there should be a record made up, so that the Court may know what is the question between the parties.

Now, when provision is made for appeal under certain conditions and these are not complied with, I think the party must be held responsible for the want of success of his own appeal. He had means provided him by statute, and he has neglected to use them.

LORD KINNEAR.—I am of the same opinion. The decision appealed against is one pronounced by the Dean of Guild in the exercise of his jurisdiction, and arose out of proceedings in pursuance of the Glasgow Police Act, 1866, and not out of proceedings at common law. No record was made up, and I am therefore of opinion that appeal is excluded by section 277.

I quite agree with your Lordship that the statute does not give the Dean of Guild a discretionary power to refuse to allow a record to be made up. That is a right which parties have by statute, and the Dean cannot prevent their exercising it.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties upon the competency, sustain the objection to the competency of the appeal, dismiss the appeal."

WM. HENRY CURR, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 179.

June 18, 1891.

Allan v. Roberton's Trustees.

MRS HANNA KEIR OR ALLAN, Pursuer (Appellant).—*Black.*
JAMES ROBERTON'S TRUSTEES, Defenders (Respondents).—*Salvesen.*

Reparation—Lease—House rendered uninhabitable owing to mineral workings of persons other than landlord.—A lease of a house contained a stipulation that the landlord should keep the house wind and water-tight. The house was rendered uninhabitable during the currency of the lease by subsidence caused by the mineral operations of a coal company in the vicinity who were not tenants of the landlord, but who had encroached upon his minerals. The tenant raised an action against the landlord for the damage sustained by the landlord failing to keep the house wind and water-tight.

The Court *assoilzied* the defender, holding that he was not bound to restore the subjects to a habitable condition, and was not liable in damages for failing to do so, the house having been destroyed by the fault of others for whom he was not responsible.

2D DIVISION. Sheriff of Lanarkshire, at Airdrie. M.

IN May 1886, Mrs Hanna Keir or Allan became tenant under Mr James Roberton, of Lauchope, of a house and ground at Parkneuk, in the county of Lanark, by lease dated 17th May 1886, for a period of five years, at a rent of £9.

The lease provided,—"The proprietor agrees to keep the roof of the houses water-tight, but the interior of the houses are to be kept in repair by the tenant."

Mrs Allan entered into occupation of the subjects under the lease.

In January 1888 damage was suddenly caused to the buildings by a subsidence arising from mineral workings, and on 14th September thereafter Mrs Allan abandoned the premises in consequence of their having become uninhabitable.

She thereupon presented a petition in the Sheriff Court at Airdrie against her landlord in which she prayed the Court to ordain him to pay her £50 as damages.

The pursuer pleaded, *inter alia;*—(2) The pursuer having suffered damage by the failure of the defender to make and keep the house let by him to the pursuer wind and water-tight, though informed of its condition, the defender is bound to compensate her for the loss and injury thereby sustained. (4) The defender was bound to maintain the pursuer in the occupancy of the said house, and he, having failed to do so, is liable in the damage sustained by the pursuer in consequence of such failure.

The defender pleaded, *inter alia;*—(3) The defender having on his part fulfilled the obligations under which he came to the pursuer, decree of absolvitor should be pronounced. (4) The damage to said house not being caused by the fault of the defender or his tenants the defender is not responsible for any loss or damage to pursuer that may have arisen therefrom.

Mr Roberton having died in the course of the action, his trustees were sisted as defenders.

It was proved that on one night early in January 1888 a subsidence from mineral workings took place, and seriously rent both the front and back walls of the house. It was further proved that the Legbrannock Coal Company, the tenants of a neighbouring coalfield not the property of Mr Roberton, had encroached on his minerals, and had about the time of the accident been working these up to a point within about 30 feet from the east end of the house, and that this encroachment was the cause of the accident. The proof shewed that the damage was very serious, and that without rebuilding the walls the house could not have been restored to a tenantable condition.

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On 27th May 1890 the Sheriff-substitute (Mair) having considered the proof awarded the pursuer £25 in name of damages.

On appeal, the Sheriff (Berry), on 21st November 1890, pronounced this interlocutor:—"Finds that in January 1888 the walls of the said house became seriously cracked and the house otherwise injured through a subsidence arising from mineral workings in the immediate neighbourhood; that the mineral workings which caused the said subsidence were those of persons for whom the original defender was not responsible: . . . . Finds in law . . . . that the defenders are not liable in damages for the loss sustained by the pursuer through the injuries caused to the house, or through her having removed therefrom, or through failure on the part of the original defender to restore the house to a tenantable condition: Therefore recalls the interlocutor appealed against: Assoilzies the defender from the conclusions of the action."

The pursuer appealed, and argued;—The landlord was liable to his tenant for damage due to subsidence, where the excavations which caused the subsidence were upon the landlord's own mineral estate. In order to avoid circuity of action, the tenant here preferred to proceed directly against the landlord, although third parties were the wrongdoers.[1] (2) The landlord had refused to implement his agreement to repair and rebuild the premises.

Argued for the defender;—The pursuer's remedy was directly against the wrongdoing coal company.[2] There was no need for her to proceed against the landlord, whose only contract with the pursuer was to keep the subjects water-tight, and who was clearly not answerable for the acts of third parties.[3]

At advising,—

LORD TRAYNER.—The pursuer of this action was tenant of a house and ground at Parkneuk, in the county of Lanark, under a lease granted by the late Mr Roberton, of Lauchope. That lease was dated in May 1886, and was to endure for five years. In September 1888, however, the pursuer abandoned the premises let to her in consequence of the same having been rendered uninhabitable through the mining operations of the Legbrannock Coal Company in the vicinity thereof. These operations resulted, as the proof shews, in the practical destruction of the house, and in damage to the pursuer's furniture, as well as to a wooden shed which she had erected for a piggery. For the damage thus sustained she seeks by this action to make her landlord liable. The Sheriff-substitute decided in favour of the pursuer, and assessed the damages at £25, but on appeal the Sheriff recalled that judgment and assoilzied the defender. I am clearly of opinion that the Sheriff was right.

The pursuer can only succeed in her action on shewing that she has suffered damage through breach of contract on the part of the defender, or through wrong done by him. Now, the only contract between the parties was the contract of lease. Under that contract the landlord's obligation was to maintain the subjects let wind and water-tight, and to repair whatever in the fabric of the building became defective through natural decay. But the landlord was under no obligation to restore or rebuild the subjects if they were destroyed by *damnum fatale*, or by the fault of others for whom he was not responsible. That, however, is what happened. The workings of the Legbrannock Company, who

[1] Menzies v. Whyte, Feb. 29, 1888, 15 R. 470; Kidd v. Byrne, Byrne v. Johnston, Dec. 16, 1875, 3 R. 255.

[2] Addison on Torts, 411.

[3] Duff v. Fleming, May 18, 1870, 8 R. 769.

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were not the tenants of Roberton, destroyed the pursuer's house, and the lease thus came to an end *rei interitu*,—not through any fault of the landlord. It appears clear enough, therefore, that no claim arises against Mr Roberton (or his representatives, who are now the defenders) on the ground of breach of contract. It is not alleged that Mr Roberton failed to fulfil all the obligations incumbent on him before the destruction of the pursuer's house. Nor has she any claim against the defenders on the ground of wrong. The wrong from which she suffered was done not by the defender but by third parties, whose conduct was not in any way under the defender's control. If the pursuer has a claim in respect of the damage she has sustained (and it appears more than probable she has), it is a claim against the wrongdoer, but not against the defender.

The pursuer maintained that she was entitled to damages against the defender on the ground that after the destruction of her house he had agreed to rebuild or repair the same so as to make it suitable for her occupation, and that he had failed to do so. I think this part of the pursuer's case is not proved.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff of 21st November 1890: Dismiss the appeal, and affirm the interlocutor appealed against: Of new assoilzie the defenders from the conclusions of the action."

A. STEWART GRAY, W.S.—H. B. & F. J. DEWAR, W.S.—Agents.

No. 180.

June 13, 1891.* Earl of Home v. Assessor for Dundee.

EARL OF HOME, Appellant.—*C. K. Mackenzie.*
ASSESSOR FOR DUNDEE, Respondent.

Valuation-roll—Buildings unlet and unfit for occupation.—A piece of ground in the neighbourhood of a large manufacturing town was let to the Crown for 94 years, and buildings thereon were occupied as military barracks. On the expiration of this lease the buildings reverted to the proprietor, and were unoccupied. They were entered in the roll at £305, the rent at which they were entered when occupied by the Crown. It was proved that they could not be let without considerable outlay being made to alter their condition.

The Court *reduced* the valuation to £100, consented to by the proprietor.

Observed (*per* Lord Wellwood) that the valuation might fall to be increased if the proprietor delayed in the future to render the subjects fit for occupation.

Lands Valuation Appeal Court. Ld. Kyllachy. Ld. Wellwood.

AT a Valuation Court for the city and burgh of Dundee, held on 12th September 1890, to dispose of appeals against the valuation of the Assessor of the city and burgh, the Earl of Home appealed against the valuation of subjects in Barrack Park, Dundee, which were entered in the Valuation-roll at £305.

Case 127.

The Magistrates sustained the valuation, and his Lordship appealed. From the case it appeared that the subjects in question consisted of three large buildings in the Barrack Park of Dudhope, Dundee, formerly in the occupancy of the Crown (War Department), and used as (1) a military barracks, (2) officers' quarters, and (3) an hospital, together with the adjoining ground, chiefly occupied and required for access to the buildings.

* Decided Feb. 17, 1891.

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Prior to Martinmas 1889 the subjects, which belonged to the appellant, had been held by the Crown as subtenant under a ninety-four years' sublease (the principal lease being for ninety-nine years). Under the Crown's sublease the rent payable for the ground and barracks together amounted to £163, 16s. Up to 1887-88, the Crown not being subject to taxation, it was not considered of practical importance to insist on a valuation of Crown property. The question having been raised by various public bodies throughout the kingdom as to whether the Crown, as a matter of expediency, might not voluntarily bear their share of local assessments, the War Office was approached in this instance to consent to include the buildings erected by the Crown in the valuation. In 1887-88 the consent of the Rating Department of the Treasury was obtained to include the whole buildings *in cumulo* as of the annual value of £305, and as belonging to and occupied by the Crown. They had remained at that sum ever since, and the Crown had paid rates upon them till now both as owners and occupiers. The tenancy of the Crown ceased at Martinmas 1889, and the subjects had since been in the possession of the appellant and unoccupied. No rent had since been paid for them by any party to the appellant. The appellant led evidence to shew that the subjects could not be let in their present condition for any purpose, and that an expenditure of £1000 would be necessary so to alter their condition as to give them a lettable value. The appellant stated that he was willing that the subjects should be entered at the nominal value of £100. The Assessor maintained that the question to be considered was, what the subjects would bring as rent in their actual state for any purpose. No attempt had been made to let them, and he maintained that it was groundless to say that three large substantial buildings in a great manufacturing town would not let for any purpose, either as storehouses, warehouses, or otherwise.

At advising,—

LORD WELLWOOD.—In this case we think the valuation should be £100 and not the old rent. On the evidence the barracks could not be let in their present condition for any purpose. Considerable expense will be necessary to make them lettable, and therefore as the buildings stand they really have no lettable value at all. While I am of opinion that for this year the valuation should be reduced to a nominal sum, I do not want to lead the appellant to suppose that this state of matters can go on indefinitely. There will probably be a limit to the time for consideration as to what should be done with the buildings. The question may be different next year if nothing has been done to the buildings to render them fit for occupation.

LORD KYLLACHY.—I concur. All I decide is, that the old valuation of £305 is not a proper valuation for the subjects in their present condition. What the proper valuation for the subjects may ultimately be found to be I do not inquire. All I say is, that £100, on which the appellant is willing to pay, appears on the information before us to be ample.

THE COURT were of opinion that the Magistrates' decision was wrong, and that the annual value should be reduced to the sum of £100.

ROBERT STRATHERN, W.S.—PARTY—Agents.

No. 181.

June 13, 1891.*
Aberdeen Cemetery Co., Limited, v. Assessor for Aberdeen.

THE ABERDEEN CEMETERY COMPANY, LIMITED, Appellants.—*J. Dove Wilson.*
ASSESSOR FOR ABERDEEN, Respondent.

Valuation-roll—Cemetery—Yearly value.—Held that one-half of the net profits of a cemetery company was a reasonable sum to take as representing the annual value of the land belonging to the company and used as a cemetery.

Lands Valuation Appeal Court.
Ld. Wellwood.
Ld. Kyllachy.

Case 124.

AT a Valuation Court for the burgh of Aberdeen, held on 12th September 1890, to dispose of appeals against the valuations by the Assessor of the burgh for the year from Whitsunday 1890 to Whitsunday 1891, the Aberdeen Cemetery Company appealed against the Assessor's entry, in which the cemetery was valued at a yearly rent of £297 and the lodge at £13, 10s. The appellants contended that the valuation should be reduced to £171 for the subjects in question.

The Assessor had arrived at the valuation by ascertaining the net profits of the company for the year and entering one-half thereof as the rent which a hypothetical tenant would be likely to pay for the liberty to carry on the business of the company. The value so ascertained the Assessor had allocated between the cemetery and the lodge.

The Magistrates sustained the valuation, and the appellants craved a case, in which the above facts were stated.

Argued for the appellants;—The valuation fell to be reduced, having regard to the recent case of the *Craigton Cemetery Company*,[1] in which less than one-third of the net profits made by that company was fixed as a reasonable annual value for the purposes of the Valuation Act.

There was no appearance for the Assessor.

LORD WELLWOOD.—I am not prepared to say that half the net profits is not a reasonable rent to take as representing the annual value. No doubt cemeteries are not usually let, but it does seem to me that half the net profits is a sum at which I should expect a tenant to be well content to take the cemetery. I therefore think the Magistrates are right.

LORD KYLLACHY concurred.

THE COURT were of opinion that the determination of the Magistrates was right.

T. R. GILLIES, Advocate, Aberdeen, Agent for Appellants.

No. 182.

June 13, 1891.†
Bank of Scotland v. Assessor for Edinburgh.

THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND, Appellants.—*Murray—C. J. Guthrie.*
ASSESSOR FOR EDINBURGH, Respondent.—*Jameson—Boyd.*

Valuation-roll—Bank buildings with dwelling-houses occupied by bank officials—Cumulo or separate valuation.—The premises of a bank, including the banking-office and the dwelling-houses of two bank officials, were entered in the Valuation-roll as a *unum quid* at one *cumulo* valuation. The bank appealed, and maintained that the offices and dwelling-houses ought to be separately valued in order to satisfy the purposes of a local Act, which, in authorising an assessment, made a distinction between the assessment of dwelling-houses and offices. The houses formed part of the main bank buildings—one of them had internal communication with the office and the other had not.

* Decided Feb. 17, 1891.

[1] Craigton Cemetery Co., Limited, v. Assessor of the Lower Ward of Lanark, Feb. 2, 1889, 16 R. 802.

† Decided March 10, 1891.

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Lands Valuation Appeal Court.

Ld. Wellwood.

Ld. Kyllachy.

Case 117.

Held that the dwelling-house which had no internal communication with the business premises ought to be separately valued, and that the dwelling-house which had such communication ought to be valued along with the office as a *unum quid*.

(VIDE *ante*, May 30, 1890, 17 R. 839.)

At an Appeal Court held by the Magistrates of the burgh of Edinburgh on 10th day of September 1890, for the purpose of hearing and disposing of appeals against valuations made by the Assessor for the year from Whitsunday 1891, the Governor and Company of the Bank of Scotland appealed against an entry in the Valuation-roll by which the dwelling-houses of two officials of the bank and the office of the bank, which were all in the same building, were entered at a lump sum of £2500.

The appellants did not dispute the correctness of the valuation, but desired that the subjects should be divided according to the purpose for which each part of them was used, and that a separate entry in the Valuation-roll should be made for each part or division, stating the value thereof. The grounds upon which they sought the change in the entry were that it was necessary for the purposes of certain assessments, and in compliance with the provisions of the Act 17 and 18 Vict. c. 91, that the valuation of the dwelling-houses should be separately entered from the bank-office in the Valuation-roll.

A process of suspension had been raised in the Court of Session at the instance of the Bank of Scotland to determine the question whether the Edinburgh and District Water Trustees were entitled, under their Acts, to levy the full domestic water-rate upon the premises used by the bank for its business. Under the Edinburgh and District Water Trust Acts, the water-rates were assessed and leviable upon the various heritages according to the Valuation-rolls applicable thereto. As the current entries in the Valuation-roll did not contain a separate valuation of (1) the office or business premises occupied by the Bank of Scotland, and (2) the houses owned by the bank and occupied by their cashier and bank-messenger, the suspension was dismissed, leaving it open to the bank to apply for a rectification of the Valuation-roll by entering the business premises and the houses under separate valuations.

The whole subjects of the bank consisted of one block of building separate and detached from any other building. The building was used as follows:—(1) Partly for carrying on the banking business; (2) partly as a dwelling-house for Mr Bell, the cashier, who lived in the upper flats; and (3) partly as a dwelling-house for Mr Lindsay, one of the bank-messengers, who lived in a part of the basement floor. Mr Bell's house was entered by a gate on the east end of the building leading to an outside passage or terrace, and thence by a door into a staircase, which formed the only access to Mr Bell's house for his family and servants. This staircase formed part of the main building, and the connection with the rest of the building was through a door on the first-floor landing, which formed an entrance to the business part of the building, and which was used by Mr Bell in going between his house and the bank, and also by the messenger. The large outside door of the building was closed and opened from the inside, and could not be opened or closed from the outside. The messenger or porter who closed the bank for the night left the bank by the door leading into the stair, which also formed the access to Mr Bell's house, and having handed the keys to Mr Bell, who was custodier thereof, did not enter the bank again, but left by the staircase at the east end of the building. His own dwelling-house on the basement was not connected with the rest of the premises by any internal communication, but was entered by a separate gate at the east end of the building leading down an

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outside stair to a separate outside door. Mr Bell and Mr Lindsay occupied their houses as officials of the bank, and their occupancy depended upon their remaining so.

The Assessor referred to *Bank of Scotland* v. *Assessor for Edinburgh*, decided May 30, 1890, 17 R. 839, and stated that the question in regard to the messenger's house had been raised in that case; but that the Judges having differed in opinion, the Magistrates' decision was allowed to stand.

The Magistrates adhered to their former decision, and dismissed the appeal.

The appellants craved a case, from which, and from the report in 17 R. 839, to which the parties referred, the above narrative is taken.

The arguments submitted by the parties were the same as those reported on p. 842 of 17 R., and fully appear otherwise from the opinions of the Judges.

At advising,—

LORD WELLWOOD.—I remain of the opinion which I expressed last year, namely, that when there is no internal communication between premises occupied as a dwelling-house and adjoining business premises the annual value of the former should be entered separately in the Valuation-roll if this is desired by the proprietor, although both sets of premises form part of the same tenement. For my reasons I refer to the opinion which I delivered last year reported in 17 R. 844. I therefore think that the value of the messenger's house, between which and the bank's business premises there is no internal communication, should be entered separately in the roll.

The cashier's house is in a different position. But for the door of communication between the bank's business premises and the stair leading to the house, I should have held that the value of the house should also be entered separately. But in the present condition of the premises the cashier can enter the bank without going into the street. The internal private stair leading to the cashier's house, which is really part of the house, is used not merely as an access to the house, but also as an access to the bank for the purpose of shutting and opening it, and the cashier himself is the custodier of the keys after bank hours.

It is true that a very slight structural alteration would cut off the bank's business premises altogether from the dwelling-house, and that other arrangements might be made for opening and shutting the bank which would not entail the use of the stair leading to the cashier's house. But I think the safer view is to deal with the premises as they at present stand. I think there is a solid distinction between a dwelling-house which has absolutely no internal communication with the business premises, and one which is connected with them in such a way that access can be obtained from the one to the other without passing into the street or common stair or passage. I therefore think that the value of the cashier's house should not be entered separately in the roll.

LORD KYLLACHY.—The test I think here is whether the houses in question are capable, not merely physically but all conditions being considered, of being separately let, and having a separate rent or value attached to them. As regards the house occupied by the messenger, and which has no internal communication with the rest of the bank, I agree with the opinion of Lord Wellwood at the last Court. I see no reason, at least none appears in the case, why, if the bank chose, this house should not be separately let to a suitable tenant, or assigned by way of pension to an old servant, or otherwise dealt with as a separate and independent dwelling.

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As regards the other house, the house occupied by the cashier, I think there is room to distinguish. There is here an internal communication, and that being the case, I see no reason for differing from the judgment of last year, in which judgment both my brethren concurred.

I am therefore of opinion that the determination of the Magistrates is wrong as regards the messenger's house, and right as regards that of the cashier.

THE COURT were of opinion that the determination of the Magistrates was wrong in the case of the messenger's house, and right in the case of the cashier's house.

TODS, MURRAY, & JAMIESON, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

No. 183.

June 13, 1891.*
M'Farlane and Dailly v. Assessor for Dundee.

WILLIAM M'FARLANE, Appellant.—*W. L. Mackenzie.*
DANIEL DAILLY, Appellant.—*R. V. Campbell—Law.*
ASSESSOR FOR DUNDEE, Respondent.—*Party.*

Valuation-roll—Public-house—Goodwill—Consideration other than rent.—The proprietor and occupier of a public-house having died intestate leaving a son and daughter, both in minority, his law-agents acting generally in the interests of the heir and executor, accepted an offer of £660 for the goodwill of the business, shop fittings, &c., made on condition of the offerer obtaining a transfer of the licence, and a five years' lease of the premises at £80 per annum. The rent of £80 was a full rent for the premises when used as a licensed public-house, the value of the premises without the licence being about £30. The value of the shop-fittings, &c., was £150. The £510 paid for goodwill had not been apportioned between the heir and the executor, and there was no evidence that any part of it belonged to the heir.

Held that as it had not been proved that any part of the £510 belonged to the heir the latter sum could not be regarded as a consideration other than the rent stipulated for in the lease, and that therefore the premises fell to be valued at £80.

Lands Valuation Appeal Court.
Ld. Wellwood.
Ld. Kyllachy.

WILLIAM M'FARLANE, proprietor of a shop in Lochee Road, Dundee, carried on a spirit business in the premises, and died intestate in 1889, leaving a son and daughter in minority.

Messrs Shield & Kyd, who acted as law-agents for the family, advertised the business for sale as a going concern.

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On 29th October 1889 Daniel Dailly junior made an offer of the sum of £660 sterling for goodwill, fittings, and utensils, on condition (1) that a transfer of the licence "should be obtained at the first Court"; and (2) that a five years' lease should be granted at £80 per annum.

This offer was on 19th November accepted by Messrs Shield & Kyd, who explained to the offerer that the lease would be "granted by the heir to the property, who is in minority."

On 5th December William M'Farlane in terms of this acceptance granted the lease in Dailly's favour at a rent of £80.

The Assessor entered the premises for the year ending Whitsunday 1891 at a sum of £172. He refused to hold the lease as fixing the yearly rent or value of the subjects. He was of opinion that the sum paid for goodwill, £660, less £150 taken by him as the fair value of the fittings, &c. included in the purchase, fell to be spread over the years of the lease, and added to the rent in the lease.

M'Farlane and Dailly appealed against the entry at a Valuation Court for the city and burgh of Dundee held on 12th and 19th September 1890.

The appellants maintained that the valuation should be reduced to £80

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(1) as the rent payable under the lease; or (2) as the proved annual value of the subjects.

They led evidence, from which the following facts appeared. The subjects, apart from the spirit licence, were worth from £25 to £30 a-year, and with the spirit licence might fairly be valued at £80. From 1881 the rent had stood in the Valuation-roll at from £70 to £80, and for the year 1889-90 at £70. It was admitted that the Assessor's valuation was greatly in excess of any valuation which had been put upon similar premises in the neighbourhood. The sum paid for goodwill, while not included in the confirmation of the executry, had not been paid to the heir in the heritage, but remained in the hands of the law-agents acting for both of the minors.

The Magistrates, by a bare majority, sustained the Assessor's valuation.

M'Farlane and Dailly obtained a case, in which the above facts were stated.

Argued for the appellants;—The case of *Drummond*[1] should not be followed. The sum paid as goodwill was paid in order to gain an entrance into the trade. It was of a personal nature, and formed no part of the landlord's heritable estate. No part of it had been paid to the heir. The landlord was not accepting a lower rent in respect of the sum paid for goodwill. It was proved that the subjects, apart from the goodwill, were worth about £30 a-year, and he now got £80, which had been the valuation of the premises since 1882.[2]

Argued for the Assessor;—The sum paid for goodwill was to be considered as a consideration other than the rent, and fell to be taken into account in fixing the value of the premises.[3]

At advising,—

LORD WELLWOOD.—This is an exceptional case, and one not likely to occur again. The late Mr M'Farlane, the father of the appellant William M'Farlane, carried on a spirit business for several years prior to his death in a shop in Lochee Road, Dundee, he being the proprietor of the premises. He died in the course of the year 1889 intestate, leaving a son and daughter, both minors. His agents at the date of his death were Messrs Shield & Kyd, Dundee. It was plain that in the interests both of heir and executor it was desirable that the business at Lochee Road should be sold as a going concern. Accordingly, Messrs Shield & Kyd, acting for the family, or rather taking them into their own hands without distinguishing specially between the interests of heir and executor, advertised the business for sale as a going concern; and in the end the appellant Dailly made an offer of the sum of £660 sterling for goodwill, fittings, and utensils, on condition (1) that a transfer of the licence be obtained at the first Court, and (2) that a five years' lease should be granted at £80 per annum. This offer was accepted by Messrs Shield & Kyd, who explained to the offerer that the lease would be "granted by the heir to the property, who is in minority."

Messrs Shield & Kyd accordingly arranged with William M'Farlane, the heir, to grant a lease at a rent of £80, which he did. The question for our decision is, whether the rent in the lease is to be taken as the annual value of the subjects.

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[1] Drummond v. Assessor for Leith, Feb. 5, 1886, 13 R. 540.

[2] Nicolson and others v. Assessor for Port-Glasgow, March 12, 1886, 23 S. L. R. 603; Bell's Trustees v. Bell, &c., Nov. 8, 1884, 12 R. 85.

[3] Assessor for Kilmarnock v. Allan, March 9, 1887, 14 R. 581; Assessor for Kilmarnock v. M'Nally, March 9, 1887, 14 R. 582; Drummond v. Assessor for Leith, *vide supra*, note 1.

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I am not much surprised at the Magistrates being very closely divided in opinion. The difficulty arises from so large a sum in name of goodwill having been given. The bare majority of the Magistrates have accepted the view that the whole of the sum to be imputed to goodwill, viz., £510, is to be held as increased rent belonging to the heir. I think that this view is plainly erroneous, because the goodwill of the business was certainly not wholly connected with the premises. It was undoubtedly, at least to some extent, of a personal character, and without the consent of the executor's factor the licence probably could not have been transferred. As confirming this view I may point to the admission that the valuation of £172 per annum brought out on the footing of the whole sum of goodwill being spread over the years of the lease is greatly in excess of any valuation which has been put on similar premises in the neighbourhood, and more than double the previous valuation of the property in question.

As yet the sum of £510 has not been apportioned between heir and executor, and all that is certain is that the heir gets a rent of £80 a-year. Now, it is proved by the evidence that £80 a-year was, prior to the death of the minor's father, a full valuation of the premises when used as a licensed house. It is certain that in letting the premises for a rent of £80 the present proprietor gets an enhanced return of £50 a-year for the premises, and that the rent stipulated for is a full and fair rent for which the premises might be expected to let from year to year as a licensed house if the sum paid for goodwill were left out of view. In this respect the case differs from previous cases in which clearly a lower rent was accepted in respect of a sum paid for goodwill. There is also this difference, that in those cases one and the same person got both the sum paid for goodwill and the rent.

Now, there is no evidence that any part of the £510 has been paid to the heir or belongs to him. It is possible that it may be ultimately held to belong entirely to the executor, the heir having already received an enhanced rent for the premises in respect of the business having been sold as a going concern.

I therefore propose, at least for this year, that the premises should be entered at the rent named in the lease. If eventually it is decided that part of the £510 is to be paid to the heir, we shall have to consider whether an addition should be made to the valuation, and if so, to what extent and in what manner.

LORD KYLLACHY concurred.

THE COURT were of opinion that the determination of the Magistrates was wrong, and that the rent stated in the lease should be entered.

WYLIE, ROBERTSON, & RANKIN, W.S.—PARTY—Agents.

No. 184.

June 13, 1891.*
Duke of Fife v. Assessor for County of Elgin.

THE DUKE OF FIFE, Appellant.—*Jameson—Dickson.*
ASSESSOR FOR THE COUNTY OF ELGIN, Respondent.—*Party.*

Valuation-roll—Lease—Meliorations—Sum paid by incoming to outgoing tenants—Consideration other than rent.—The incoming tenant of a farm let to him for nineteen years at a rent of £500 paid to the outgoing tenants a sum of money for meliorations payable to them by the landlord under the expiring lease. His lease contained the stipulation that he should be entitled at its termination to repayment from the landlord of the sum so paid by him, or of such other sum not exceeding it, as the meliorations should then be valued at.

* Decided March 10, 1891.

No. 184.

June 18, 1891.
Duke of Fife v. Assessor for County of Elgin.

Lands Valuation Appeal Court.
Ld. Wellwood.
Ld. Kyllachy.

Case 119.

Held that as the payment by the tenant relieved his landlord of an obligation which he would otherwise have had to meet, there was a consideration other than the rent, and that a sum equivalent to four per cent on it fell to be added to the rent contained in the lease.

A LEASE was entered into by the Duke of Fife with William Rose and James Black of the farms of Sheriffston and Foresterseat, in the parish of St Andrews and county of Elgin, in which it was provided that at its termination the outgoing tenants were to be entitled to repayment from the Duke or the incoming tenant of the value of certain houses and buildings on the farm, and of other meliorations made thereon according to valuation.

The lease having expired at Whitsunday 1882, the Duke let the farms to James Black, one of the joint tenants in the previous lease. The lease was for nineteen years from Whitsunday 1882, at the yearly rent of £500, "in consideration of the rent and other prestations hereinafter mentioned," and of the prestations, &c. contained in the relative regulations and conditions of let of the farms on the estate.

The lease contained the following stipulation;—"In respect the said James Black, at his entry to said farms under this lease, paid the outgoing tenants the sum of £1044, 15s. sterling, as meliorations payable to them under the then expiring leases of said farms, being £700 on buildings on Sheriffston, £300 for buildings on Foresterseat, and £44, 15s. for metal pipes for conveying the water to the mill-dam at Sheriffston, it is hereby provided and agreed that, at the expiry of this lease, the said James Black and his foresaids will be entitled to repayment from the said Earl of Fife and his foresaids, or the then incoming tenant to the farms, of the said sum of £1044, 15s., or such sum, not exceeding that amount, as the buildings on the said farms and the said water-pipes shall then be valued for, in terms of the clause of arbitration in the foresaid regulations and conditions, after allowing a sum of £1006, 7s. 8d. as heritors' valuation (less a fair sum to be deducted for tear and wear on the buildings representing the said sum of £1006, 7s. 8d.) as a first charge thereon, said sum of £1006, 7s. 8d. being composed of £206, 7s. 8d. expended by the said Earl of Fife on buildings on the said farms under the previous lease, £500 expended by him under this lease, and £300 expended by the said James Black, for which he was and is to receive no compensation."

The Assessor for the county of Elgin entered the farms at a yearly rent of £556, 15s.

He arrived at this valuation by adding to the rent of £500 (1) the interest of £300 which the tenant had expended without any claim for compensation, and (2) a sum equivalent to 4 per cent on the sum paid by the tenant for meliorations to his predecessors.

The Duke appealed against this valuation at a Court of the Committee of the County Council of Elgin, held on 12th and 18th September 1890, and contended that the proper rent to be entered in the Valuation-roll was £515, being the rent stipulated in the lease, plus £15 as the interest of the £300 already expended by the tenant, and for which the latter was to receive no compensation.

The Valuation Committee were unanimously of opinion that in respect the tenant had paid to his predecessors in the farm a sum of £1044, 15s. for meliorations, for which, under the lease, he was entitled to repayment from the proprietor at its expiry of the value of the said meliorations at that time, but not exceeding the sum of £1044, 15s., the Assessor was entitled to put an additional value upon the farm over and above the rent stipulated in the lease. The Committee accordingly sustained the Assessor's valuation.

The Duke craved a case, in which the above facts were stated.

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Argued for the appellant;—All the present benefit enjoyed by him was the actual rent stipulated in the lease, plus the benefit of the expenditure of £300 by the tenant. Any beneficial interest competent to him as proprietor in the meliorations in question could only emerge at the termination of the lease, and even then he would have to pay for them. They clearly did not form a consideration other than the rent.[1]

The Assessor was not called upon.

At advising,—

LORD WELLWOOD.—In this case I am of opinion that the determination of the Valuation Committee is right. Under the previous lease in favour of William Rose and James Black, which terminated at Whitsunday 1882, the outgoing tenants were entitled to repayment from the proprietor or incoming tenant of the value of certain houses and buildings on the farm, and certain other meliorations made thereon, as the same should be valued at the termination of the lease.

The noble appellant let the farm to James Black, one of the joint tenants, under the previous lease, for nineteen years, from Whitsunday 1882, "in consideration of the rent and other prestations hereinafter mentioned," and of the prestations, &c., contained in relative regulations and conditions of let of the farms on the Fife estate. The lease contains the stipulation which is quoted in the case.

Now, on the termination of the former lease, either of two courses was open to the proprietor. He might settle with the outgoing tenants by paying them the value of the buildings and meliorations himself, or he might do so by arranging with the incoming tenant that the latter should pay for them. He preferred to adopt the latter course, and accordingly Black paid the outgoing tenants £1044, 15s. as meliorations payable to them, that sum being made up, as we see, to the extent of £1000 for buildings on Sheriffston and Foresterseat, and £44, 15s. for metal pipes. The question is, whether that payment by the incoming tenant was not a consideration other than rent in the sense of the sixth section of the statute. I am of opinion that it was. The proprietor was thereby relieved of an onerous obligation—repayment of an outlay necessary to make the subjects lettable during the currency of that lease, and it is to be presumed that the tenant got the lease at a smaller rent than he would have had to pay if the landlord had settled with the outgoing tenants himself. This much is clear. The buildings were on the ground at the beginning of the lease, and the subjects as they then stood were worth annually more than a rent of £500, because the tenant found it worth his while not only to pay an annual rent of £500, but to make an immediate outlay of £1044, 15s., which otherwise the landlord would have had to provide. The rent in the lease was therefore not a yearly rent conditioned as the fair annual value of the subject without other consideration.

It is true that at the expiry of the lease the tenant will be repaid the then value of the buildings and meliorations, but this does not, I think, affect the question before us, which is, Did the proprietor, before granting, and as a condition of granting the lease, stipulate for and receive a consideration other than the rent? The answer to that is, that he did receive a present consideration in

[1] Martin v. Assessor for Burgh of Leith, June 14, 1889, 16 R. 799; North British Railway Co. v. Assessor for Glasgow, March 12, 1890, 17 R. 846; Trustees of Dundee Harbour, &c. v. Assessor for Dundee, March 19, 1886, 13 R. 829.

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that he was relieved during the currency of the lease of making an outlay of £1044, 15s.

The cases relied on by the appellant are clearly distinguishable. In *Stewart's Factor* v. *The Assessor for Leith*, 16 R. 799, case No. 95, the tenant was, no doubt, bound to erect a circus on the ground, but this, the Judges held, was simply in order to give an additional security for the rent. Instead of it being declared that the building was to become the property of the landlord, it was provided that the tenant should be entitled to remove it at the termination of the lease.

In the other case—*The North British Railway Company* v. *The Assessor for Glasgow*, 17 R. 846, case No. 108—the tenant was not taken bound to erect any buildings, but he was given liberty to do so, the landlord being at liberty to acquire such buildings, if erected, at a valuation at the expiry of the lease. The landlord thus got no benefit or consideration other than rent.

I do not think that these cases have any application here.

LORD KYLLACHY concurred.

THE COURT were of opinion that the determination of the Valuation Committee was right.

J. K. & W. P. LINDSAY, W.S.—PARTY—Agents.

No. 185.

June 13, 1891.* Cowdenbeath Coal Co. v. Assessor for County of Fife.

THE COWDENBEATH COAL COMPANY, Appellants.—*Jameson—Salvesen.*
ASSESSOR FOR COUNTY OF FIFE, Respondent.—*Constable.*

Valuation-roll—Lease—Agreement—Dwelling-houses in connection with colliery—Consideration other than rent.—During the currency of a mineral lease for thirty-one years, under which the rent payable by the tenants was a royalty on the output of coal, the landlord and tenants entered into an agreement with a view to extend the mineral workings, under which the tenants were to erect certain additional miners' houses upon the lands belonging to the landlord, but then let to an agricultural tenant. The mineral tenants were to be entitled to repay themselves the cost of erection by retaining the royalties over and above a certain sum per annum, on condition of erecting an equal number and value of houses on ground belonging to themselves. The houses on the landlord's property were to be maintained and insured against fire by the tenants, who were also to settle the claims of the agricultural tenant for the land taken for the houses, and to relieve the landlord of certain assessments. At the termination of the lease the houses, so far as paid for out of the royalties, were to be left to the landlord, and *quoad ultra* he was to have the right to take them over at a valuation, and failing his doing so the tenants were to be entitled to remove the materials. Houses were erected on the landlord's lands under this agreement, and were in the occupation of miners, who paid a rent to the tenants. The Assessor entered them at that rent as the property of the tenants.

The Court *held* that the entry was wrong, being of opinion (1) that the agreement fell to be read as part of the lease; (2) that it contained no consideration other than the rent, with the exception of the sum paid for insurance; and therefore (3) that with the exception of the latter sum the subjects were covered by the royalty payable under the mineral lease.

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Case 120.

THE COWDENBEATH COAL COMPANY were tenants under the Earl of Zetland of his Lumphinnans minerals in the county of Fife, which with certain miners' and other houses, sixty-six in number, were let to the company under lease dated 2d August 1881, for thirty-one years from Martinmas 1883. The company were entered in the Valuation-roll as tenants under this lease at an annual value of £2526, 3s. 10d.

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In March 1886 the company entered into an agreement* with his Lordship for providing additional workmen's houses to enable the company further to develop the mineral workings on Lumphinnans under the lease.

In pursuance of this agreement, the company erected 130 miners' houses, of which fifty-four were on land belonging to Lord Zetland, of which the company obtained a sublease from his agricultural tenant at a rent of £36, 10s. 2d., and seventy-six on land belonging absolutely to the company. The surplus royalty retained by the company under this agreement in respect of the fifty-four houses amounted at the date of the appeal to £526, 3s. 10d.

The Assessor for the county of Fife entered the fifty-four houses which had been built upon Lord Zetland's lands in the Valuation-roll as the property of the company at £258, the rents payable to the company by the miners occupying them respectively, and £6 for houses unlet.

The Valuation Committee having confirmed the Assessor's entry, the company appealed.

The case set forth the facts above stated.

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* The agreement provided,—"The second parties (the tenants) having applied to the said Earl to co-operate with them in providing additional workmen's houses, for enabling them to develop the working of the minerals in his estate of Lumphinnans . . . have agreed and hereby agree to the following conditions, namely :—

"First, One-half of the additional houses required from time to time shall be erected by the second parties on the said Earl's lands of Lumphinnans. . . .

"Second, The other half of the additional houses so required shall be erected by the second parties upon such parts of the ground belonging to themselves in the vicinity as shall be approved of by the first parties.

"Third, Upon an equal number and value of houses being erected as aforesaid on ground belonging to the said Earl and the second parties respectively . . . the said second parties shall be entitled to retain any excess over the sum of £2000 per annum of royalty rents payable by them under the foresaid lease after the last date hereof (after deducting the rebate of ten per cent to which they are entitled), which excess shall be applied towards repayment of the cost of the houses referred to in article first hereof, including drainage and fencing, but declaring that the total amount to be repaid to them shall not exceed the sum of £2100, with interest at the rate of five per cent from the dates of outlay.

"Fourth, The whole of the houses referred to in articles first and second shall be upheld by the second parties in good repair during the remainder of the foresaid lease. . . .

"Fifth, It shall be optional to the landlord at the end of the said lease to take over any of the houses referred to in article first of which the cost shall not have been repaid by him as aforesaid, and that at a valuation by two arbiters. . . . If not so taken over, the second parties shall have power at the termination of the said lease to remove the materials of the said houses. . . .

"Sixth, It shall also be optional to the landlord, at the termination of the said lease, to take over the houses referred to in article second, and any ground attached thereto, at a valuation as aforesaid, such valuation including the price to be paid for the site of the said houses and the ground attached thereto. . . .

"Seventh, The second parties oblige themselves to settle the claims of the tenant of Lumphinnans Farm for the land occupied by the houses referred to in article first, and any ground attached thereto for gardens or otherwise, and that yearly at the term of Martinmas; also to keep the whole of the houses to be erected by them as aforesaid insured against fire to the amount of two-thirds of the cost thereof, and to relieve the landlord of any assessments that may be imposed upon him for water supply or drainage for the houses referred to in article first hereof."

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The appellants stated;—"The payments which the appellants have to make in respect of the houses in question under the seventh head of the agreement are as follows:—

1. Farm tenant's claim for land occupied, . .	£2 16 10
2. Insurance, ...	1 17 6
3. There is no assessment for water, but the proportion of the cost of the water for all the houses is about, ...	3 0 0
	£7 14 4"

Argued for the company;—(1) The agreement under which the houses were built was nothing more than a modification of the lease. There was no distinction between houses built under it, and houses which had been on the ground at the beginning of the lease. Both sets of houses must be held to be included in the valuation of the colliery.[1] (2) There were no considerations other than the royalty bargained for. In the case of *Wm. Dixon*,[2] there was an independent consideration in respect of buildings which the stipulated royalties were not intended to cover.

Argued for the respondent;—The houses in question were not mere accessories to the working of the minerals, but formed separate lettable subjects. Assuming, however, that they were to be regarded as merely accessory,—(1) They were erected under the agreement, which was entirely distinct from the lease, and could not be held to fall under it. (2) Even although it were held that the lease and the agreement fell to be read together, the houses could not be regarded as mineral subjects, and accordingly, as the lease was for thirty-one years, they fell, in terms of section 5 of the Valuation Act, to be valued apart from all stipulated rent. (3) In any case there were stipulations under the agreement which amounted in terms of the Act to a "consideration other than the rent," and which excluded the houses from the subjects in respect of which a royalty was payable under the lease.[3] (*a*) There was an obligation upon the tenants to erect houses on their own land equal in value to those erected on the landlord's. No doubt the latter received a certain amount of benefit from their erection; but so long as there was an independent prestable obligation undertaken by the tenant, it did not matter that the landlord was also benefited.[4] The houses erected by the tenants on their own and on the landlord's property were in exactly the same position, the latter not having been nearly paid for, and the appellants had made no objection to the former being entered in the Valuation-roll. (*b*) There was an obligation to compensate the agricultural tenant.[5] (*c*) There were obligations to maintain and insure the buildings.[6] (*d*) There was a right of pre-emption to the landlord, and (*e*) an obligation on the tenants to relieve the landlord of certain assessments. It did not matter that the pecuniary value of

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[1] Coltness Iron Co., Limited, v. Assessor for Linlithgowshire, March 1, 1882, 10 R. 21; Leadhills Silver Lead Mining and Smelting Co., Limited, v. Assessor for Lanarkshire, March 19, 1886, 13 R. 827.

[2] Wm. Dixon, Limited, v. Assessor for Middle Ward of Lanarkshire, Feb. 6, 1885, 12 R. 639.

[3] Trustees of Dundee Harbour, &c. v. Assessor for Dundee, March 19, 1886, 13 R. 829, per Lord Fraser, pp. 831 and 832.

[4] Trustees of Dundee Harbour, &c. v. Assessor for Dundee, *vide supra*, note 3.

[5] Drumgray Coal Co., April 8, 1867, 11 Macph. 977; Dalmeny Oil Co., Limited, v. Assessor for Linlithgowshire, Feb. 9, 1884, 11 R. 566.

[6] Patrick v. Assessor for Renfrewshire, March 12, 1890, 17 R. 854.

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the obligations undertaken by the tenants was much less than the rent of the subjects.[1]

At advising,—

LORD KYLLACHY.—There are two questions which are involved in this appeal. The first is, whether the agreement of 3d March 1886, under which the houses in question were built and were possessed, is a separate and independent agreement, constituting in effect a lease of land for a period over twenty-one years; or whether, on the other hand, it is a mere supplement to the original mineral lease dated in 1881, and is to be read as if its provisions were incorporated with that lease, and had all along formed a part of its stipulations.

We heard a very able argument from Mr Constable in support of the first of those views, which is the view maintained by the Assessor; but I have come, although with some difficulty, to the conclusion that the second view is the sound one. I think on its fair construction that the agreement must be read as part of the original lease.

This, however, raises the second question, upon which we also heard argument, viz., whether reading the mineral lease and the agreement together, the landlord did not receive considerations in respect of these houses other than the rent and royalty payable under the lease. Reference was made to various provisions and stipulations which were said to confer benefits on the landlord, and to be equivalent to an increased rent. But on this matter I have come to be satisfied that neither the lease nor the agreement contains any provision in favour of the landlord which is of an unusual description, or goes beyond the fair and ordinary conditions of such a lease. The only exception is as to the insurance, which appears to be only £1, 17s. 6d. per annum, and which in strictness ought to be added to the *cumulo* royalty. It was suggested that the farm tenant's claim for land occupied and the proportion of the cost of the water were in the same position; but it seems to me that neither of these are payments which can be regarded as payments on behalf of the landlord, or as involving any separate consideration to him.

On the whole matter, therefore, I am of opinion that the determination of the Valuation Committee is wrong, and that the whole subjects are covered by the rent payable under the mineral lease, with the exception of the £1, 17s. 6d. of insurance to which I have referred.

LORD WELLWOOD.—I agree with Lord Kyllachy that under the agreement of 3d March 1886 the landlord does not get any further consideration in respect of the houses to be erected by the tenants, unless it be the trifling sum paid annually for insurance. The agreement is really supplementary to the original lease, and was entered into on the application of the tenants for the purpose of enabling them to develop the minerals let to them. Under the original lease the return to the landlord was a minimum rent of £1000, or, alternatively, certain lordships. If the erection of an additional number of workmen's houses leads to a larger output, the landlord will get the immediate benefit of that in the shape of increased return in royalties, and the annual value of his property will be increased in proportion. But, so far as I see, that will be all the additional consideration he will get.

[1] Wm. Dixon, Limited, v. Assessor for Lanarkshire, May 17, 1884, 11 R. 844, and Feb. 6, 1885, 12 R. 639; Trustees of Dundee Harbour, &c. v. Assessor for Dundee, *vide supra*, p. 946, note 3.

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The agreement is not, properly speaking, a lease at all. It gives liberty to the tenants to build additional houses, provided they can settle with the agricultural tenant, to whom apparently the surface of the land was already let. The agreement contains a variety of stipulations partly in favour of the tenants and partly in favour of the landlord; but I think they balance as nearly as possible, and that their object, so far as the landlord is concerned, is that he should be kept free from expense during the currency of the mineral lease. No doubt the buildings are to become his property if he chooses, but then he is to pay for them either out of the surplus royalties or at a valuation at the close of the lease. But he does not stipulate for any rent or other consideration which can fairly be held to come in place of rent.

In this respect the case, I think, differs from the case of *William Dixon, Limited*, 11 R. 844, and 12 R. 639. In that case the buildings in question were in existence at the beginning of the lease, and the Judges held, on a consideration of the terms of the lease, that the royalties stipulated for were not intended to cover the buildings, but that the landlord bargained for separate considerations in respect of them. In the present case the rent under the original lease undoubtedly covers the houses existing at its commencement, and I think, on a sound construction of the agreement of 3d March 1886, the landlord does not bargain for and will not receive any additional consideration beyond increased return in the shape of royalties.

THE COURT were of opinion that the determination of the Valuation Committee was wrong.

BOYD, JAMESON, & KELLY, W.S.—J. BROWN, Assessor for Fifeshire—Agents.

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THE COWDENBEATH COAL COMPANY, Appellants.—*Jameson—Salvesen.* ASSESSOR FOR COUNTY OF FIFE, Respondent.—*Constable.*

Valuation-roll—Sublease.—Where subjects are sublet, the only rent which ought to appear in the Valuation-roll under the heading "Yearly rent or value" is the rent paid by the principal tenant to the owner. The occupier's column may, however, contain in addition to the name of the principal tenant that of the subtenant, with the rent paid by him and the extent of his occupation.

Lands Valuation Appeal Court. Ld. Wellwood. Ld. Kyllachy.

Case 121.

THE COWDENBEATH COAL COMPANY appealed to the Valuation Committee of the County Council of Fifeshire against the following entry in the Valuation-roll:—

Description and Situation of Subject.	Proprietor.	Tenant.	Occupier.	Yearly Rent or Value.
Field of Lumphinnans Farm.	The Right Hon. Lawrence Dundas, Earl of Zetland.	Hugh Stewart, farmer.	Cowdenbeath Coal Company.	£36 10 ?

The field in question was a twenty-two acre field, which had been sublet to the company by Mr Stewart, the tenant of the farm of Lumphinnans, in order that they might erect miners' houses.

* Decided March 10, 1891.

No. 186.

June 13, 1891. Cowdenbeath Coal Co. v. Assessor for County of Fife.

The Assessor stated that the rent of the entire Lumphinnans farm, as leased by Mr Stewart, was £515, 10s. 6d. In respect that the field in question had been sublet to the company at a rent of £36, 10s. 2d., Stewart was entered in the roll at the sum of £479, 0s. 4d. and the company were entered as occupiers of the field at £36, 10s. 2d.

The Valuation Committee confirmed the entry, and the company craved a case, in which the above facts appeared.

Argued for the appellants;—The rent which ought to enter the roll was the rent in Stewart's lease. The appellants were subtenants only, and ought not to appear in the roll at all.[1]

Argued for the Assessor;—The purpose of the roll was to shew the actual circumstances existing. The statutory form of the roll contained a column shewing not only the "tenant," but the "occupier" of the various descriptions of property.

LORD KYLLACHY.—We are of opinion that the only rent which ought to appear in the Valuation-roll under the heading or column "yearly rent or value" is the rent paid by the principal tenant, that being the rent receivable by the owner, and the only rent which the Valuation Acts recognise.

It is, however, in our opinion quite proper that the whole subject being entered at its proper value, the occupier's column of the roll should contain the names both of the agricultural tenant and of the Cowdenbeath Coal Company, who now divide between them the occupation of the subject; and we see no harm in recording in the same column, if that is desired, the extent of the company's occupation and also the subrent which they pay.

For these reasons we are of opinion that the determination of the Valuation Committee is wrong.

LORD WELLWOOD.—I agree. I think the matter is settled by decision, in particular *Hay*, 11 Macph. 981, and *Lawson's Representatives* v. *Assessor for Edinburgh*, 10 R. 633.

THE COURT were of opinion that the determination of the Valuation Committee was wrong.

BOYD, JAMESON, & KELLY, W.S.—J. BROWN, Assessor for Fifeshire—Agents.

No. 187.

June 16, 1891. Middle Ward of Lanarkshire Trustees v. Lord Belhaven's Trustee.

ROAD TRUSTEES OF THE COUNTY OF THE MIDDLE WARD OF LANARK, Pursuers (Reclaimers).—*C. J. Guthrie—Dykes.*
GEORGE AULDJO JAMIESON (Lord Belhaven's Trustee), Defender (Respondent).—*Dickson—Dundas.*

Road—Road Trustees—Powers—Level-crossing—Removal.—Held that when road trustees have sanctioned the formation of a railway level-crossing over one of their roads they are not entitled arbitrarily to demand its removal or to impose unreasonable conditions upon its continuance.

1ST DIVISION. Ld. Kyllachy. C.

BY minute, dated 11th September 1841, the Statute Labour Road Trustees of the parish of Cambusnethan granted permission to Lord Belhaven to form a railway level-crossing over a road in the burgh of Wishaw known as the Manse Road, and the level-crossing was made accordingly.

On 26th November 1889 the County Road Trustees of the county of the Middle Ward of Lanarkshire, as in right of the Statute Labour Road

[1] Hay & Co., July 12, 1869, 11 Macph. 981; Lawson's Representatives v. Assessor for Edinburgh, Feb. 24, 1883, 10 R. 663; Riley v. Webster & Borland, Jan. 25, 1883, 20 S. L. R. 321.

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Trustees, brought an action against Mr George Auldjo Jamieson, the trustee under a trust-disposition granted by the late Lord Belhaven, for decree ordaining the defender to remove the level-crossing, or alternatively to grant a bond binding himself to observe certain conditions for the maintenance and protection of the road, and of the persons using it.*

The pursuers averred that since the formation of the crossing the volume of railway traffic over it had increased to such an extent that the safety of the public, for which the pursuers were responsible, was much endangered.

The defender denied that the safety of the public was to any extent endangered, and averred that his tenants used the crossing with every reasonable and suitable care and precaution, and that it was not dangerous.

The pursuers pleaded;—2. *Separatim*, The pursuers are entitled to have the crossing removed, as being in their opinion dangerous to the public safety. 3. The said level-crossing having been formed for the use and benefit of the defender upon a road under the control and management of the pursuers, and for the safety of which the pursuers are responsible, the pursuers are entitled to impose such regulations and conditions on the continued use thereof as they may deem reasonable and proper in the discharge of their duty.

The defender pleaded;—3. The defender being under no obligation to remove the said crossing or to grant the said bond, should be assoilzied.

* The following were the conditions and regulations contained in the bond:—(First) To maintain the level-crossing at his own expense, at the sight of and to the satisfaction of the said County Road Trustees or of their surveyor. . . . (Second) To erect and maintain sufficient gates in the line of the fences on each side of the road, which were to be kept constantly closed across the railway except during the time when trains passing along the railway should have to cross the road. "(Third) Not to allow at any time any train, carriage, or engine to stand across the road; and in shunting trains not to pass any train over the crossing. (Fourth) Not to permit any carriage to pass over the crossing unless the same is attached to a locomotive engine. (Fifth) The said level-crossing shall be used so as to cause the least possible interruption or delay to the traffic upon the road. (Sixth) Not to allow the crossing to be used by or on behalf of any person or persons other than the granter hereof, and his successors and their tenants, without the consent of the said board. (Seventh) To free, relieve, and skaithless keep the said County Road Board and the County Road Trustees and each of the said trustees individually, from all loss, damages, penalties, or others which the said board or the said trustees or any of them may suffer or incur by or through the use or existence of the said level-crossing: As also to free and relieve the said board and the said trustees or any of them from all claims which the public or any individual or individuals may make against the said board or trustees or trustee in consequence of any accident, injury, or loss which may arise or be sustained from the said level-crossing or the use thereof, or from any steam-engine or engines, or truck, waggon, or other carriage or carriages employed on the said level-crossing, or from steam emitted from engines, or from noise arising from the use or working of the said level-crossing, or from any cause whatever in connection with said level-crossing or the use thereof, and of all expenses which the said board or trustees or trustee may incur in defending themselves from such claims: As also, on intimation being made to him that notice of such a claim has been made against the said board or against the said trustees, or any of them, he shall be bound, as he hereby binds and obliges himself and his successors, to free and relieve the said board or trustees or trustee, not only of the claim itself and of its consequents, but also of the settlement or adjustment thereof, which he shall himself carry through. (Eighth) To warrant, as he hereby binds and obliges himself and his foresaids to warrant, these presents to the said County Road Board and to the said trustees, and each of them, at all hands and against all mortals, as law will."

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4. The defender being entitled at common law to cross the said road by the said railway or otherwise for the proper working of his said minerals and cultivation and management of his said lands, situated on both sides of said road, ought to be assoilzied. 5. The pursuers are barred from demanding the removal of the crossing—(1) In respect of the said minute dated 11th September 1841, and *rei interventus* following thereon; and (2) in respect that for more than the period of the long prescription the passage of the public over the defender's said lands has been subject to the use by his said tenants of the said level crossing. 6. The said crossing being necessary for the proper working of the defender's minerals and management of his lands, and not being dangerous to the public, ought not to be removed.

A proof before answer was allowed.

It was proved that the private railway which crossed the Manse Road was originally a horse-railway, but that since 1866 or 1867 the traction had been effected by locomotives. The existence of the crossing was proved to be essential to the working of the mineral traffic in the district. Although the pursuers led evidence to shew that it was essential to the public safety (1) that certain upstanding levers which regulated the points should be removed, and (2) that there should be gates which could be closed against public traffic when engines were passing over the crossing, it was proved that no accident had ever happened there. It was also proved that the traffic upon the road (which was not a main thoroughfare) was small, and was tending to grow less.

In the course of the proof the defender tendered the minute quoted below.*

On 20th February 1891 the Lord Ordinary (Kyllachy) dismissed the action.†

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* In the minute the defender stated that he "had all along been willing, and hereby offered—1. To erect suitable gates at the level-crossing mentioned on record, so that the said road may be closed to public traffic while engines or waggons are passing over the said crossing, and to remove from off the said road the lever and the points which are alleged to exist on the road at said crossing. 2. To grant a bond to the pursuers, undertaking to relieve them of all responsibility for or claims in regard to damage caused by the existence of the said crossing on the road, as distinguished from its use. 3. That the defender's tenants, or others making use of the rails upon said level-crossing, shall grant to the pursuers bonds binding them severally to relieve the pursuers of all responsibility for or claims in regard to damage caused by the working of traffic upon said crossing, the owner of the engine of any train causing such damage being liable therefor; and 4. That any future tenant or other person deriving right from the defender to use said crossing shall be taken bound to grant a bond or bonds in the terms specified in the preceding article."

† "OPINION.—The pursuers here seek to enforce the removal by the defender of a certain railway-crossing formed upon a road known as the 'Manse Road,' in the outskirts of Wishaw; or, alternatively, they seek to have the defender ordained to grant a certain bond, the terms of which are recited in the condescendence. The parties not being at one as to the history of the crossing and the circumstances which have led up to the dispute, I some time ago allowed a proof before answer; and that proof having now been taken, and the pursuers having declined to accept the terms offered by the defender in the course of the proof, and now embodied in the minute No. 93 of process, I have to decide the question at issue—a question which, as it seems to me, should never have arisen, and which is now at least reduced to a point so fine that (apart from the question of expenses) I can scarcely conceive how, as between two such parties, it comes to be litigated.

"The crossing in dispute was sanctioned, by minute of the Road Trustees of the day, on the application of the defender's author in the year 1841, and it

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The pursuers reclaimed, and argued;—1. They were entitled without reason assigned to order the removal of the level crossing when they

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has been in use ever since by the defender's tenants, forming part of a private line of railway which is the usual means of communication between various important works and the Caledonian Railway. This private railway, up to 1866 or 1867, was a horse-railway. Since then the traction has been by locomotives. The road is not a main thoroughfare and is not much used; and I think that as regards the amount of the road traffic passing along it, and as regards the amount of the railway traffic passing across it, the result of the evidence is that, while there has been a considerable increase as compared with 1841, there has been no material increase or other material change of circumstances for at least the last twenty or thirty years. The crossing is watched in the usual way by a watchman, who lives on the spot. It is admitted that there has never been any accident upon or in connection with it. There are numerous similar level-crossings all over the district and county, some of them upon roads more important and more largely used.

"In these circumstances it is, I think, clearly impossible to entertain the pursuers' demand for the removal of the crossing. It is not necessary to affirm that when a crossing of the kind has been once sanctioned the owner acquires a permanent right which the road authority can in no circumstances recall. But where the construction of such a crossing has been authorised, and the crossing has thereafter been used for a period of fifty years, it is at least safe to say that the road authority seeking its removal must make out a strong case of public danger or public inconvenience, and will, moreover, scarcely succeed in making out such a case if the alleged danger or inconvenience turns out to be nothing new, and is no greater and no worse than is common to other level crossings in the district. Now, as already indicated, it does not seem to be possible to make out such a case here, and therefore I rather gathered that the pursuers did not seriously press the first conclusion of their summons, their contention rather being that they are entitled to impose reasonable conditions, and that if these are not accepted the crossing must be removed.

"Now, I am disposed to the opinion that it is always an implied condition of a grant or licence of this description that the grantee shall submit to such reasonable conditions as the road authority may from time to time find it necessary to impose; and therefore I think the question really is, whether the difference between the bond which the pursuers require as a condition of the continuance of this crossing, and the bond which the defender tenders in his minute No. 93 of process, is a difference sufficiently material to justify the pursuers in requiring that the crossing shall be removed.

"In my opinion, the difference between the parties in this matter is no difference at all. The defender offers to comply with all the structural requirements of the pursuers, and he also offers to become responsible for all accidents which may occur in consequence of the condition of the crossing. He also tenders the obligation of his tenants using the crossing to be responsible each for his own use of the crossing—the proprietorship of the engine drawing the traffic determining the responsibility in any case of mixed use. The pursuers, however, insist that the defender shall become liable, or that his tenants shall become conjunctly and severally liable for all accidents occurring through the negligent use of the crossing, whoever may be the party to blame; and it is upon this point that the parties have differed.

"In my opinion the pursuers are here asking what is unreasonable; or, rather, the defender's offer meets, in my opinion, the full substance of the pursuers' demand. In the first place, I as yet fail to see how in any circumstances the pursuers could be sued (I mean successfully) for the fault of a person lawfully using the crossing, any more than for the fault of a person lawfully using the road. I do not therefore see the pursuers' interest to demand the special indemnity which they seek. But, in the next place (and assuming the contrary), the pursuers have failed to suggest any reasonable or practical ground for rejecting the obligation of the actual users of the crossing expressed in such manner

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came to be of opinion, as here, that the public safety was endangered by its existence.[1] 2. Granting that they had acquiesced in the existence of the crossing for a long term of years, the defender was only entitled to take advantage of their acquiescence so far as the past was concerned.[2] 3. Alternatively, the conditions in the bond referred to in the summons were eminently reasonable, and they were not satisfied adequately by the terms of the bond which the defender now offered to execute. Conditions 3, 4, 5, and 6 of the pursuers' bond were not to be found in the latter bond. The defender must become liable, or his tenants must become jointly and severally liable, for all accidents occurring through negligent use of the crossing. In short, the pursuers were entitled to have some one person to whom they could look in the event of an accident happening.

Argued for the defender;—1. Apart from the question of prescription, unless the Road Trustees could establish a distinct case of danger to the public, their acquiescence in the use of the level-crossing was a sufficient bar to the present demand.[3] The Lord President's *dicta* in the *Cowdenbeath*[4] case were (1) at best *obiter*, for the special agreement there under construction was very distinctly favourable to the trustees; (2) his Lordship only meant that statutory trustees could not legally bind themselves and their successors in all time coming to restrict their statutory rights and powers.[5] 2. In any view it fell upon the Road Trustees to make out a strong case of public danger through a change of circumstances since they originally sanctioned the use of the crossing. They had entirely failed to make out such a case. The only possible sources of danger suggested, viz., the upstanding levers and the absence of gates at the crossing, had been obviated by the defender's minute. The minute was further eminently reasonable. It was absurd to expect the defender to consent to become solely responsible for all accidents. He offered the bonds of all his tenants, new and old, using the crossing, each to become responsible for his own use of it.

LORD PRESIDENT.—I think the Lord Ordinary is right. The condition of this district is such that it is occupied almost entirely by works of a large description requiring a great deal of traffic by railway and by road, and it is not at all surprising that arrangements have to be made to supply engines to all the works.

An application was made to the Road Trustees by Lord Belhaven on behalf of the railway company, on 11th September 1841, for leave to carry a branch of railway over a carriage road in the burgh of Wishaw. The application was granted, and the crossing has been used ever since that date by Lord

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that each shall be responsible for his own engine. The whole argument in the Procedure-roll went on the difficulty of ascertaining who was to blame in the case of mixed or rather combined trains, and the offer latterly made of making the ownership of the engine the test appears to me quite to meet that difficulty. I shall therefore, in respect of the defender's minute, dismiss the action; but as the defender's offer on record did not come up to the offer in the minute, and was not in my opinion altogether satisfactory, I shall (although with hesitation) find no expenses due to or by either party."

[1] Fifeshire Road Trustees v. Cowdenbeath Coal Co., Oct. 19, 1883, 11 R. 18, per Lord President, p. 21; Matson v. Baird & Co., Nov. 9, 1877, 5 R. 87, affirmed July 5, 1878, 5 R. (H. L.) 211.

[2] Moir v. Alloa Coal Co., Nov. 15, 1849, 12 D. 77, per Lord President, p. 83, and per Lord Mackenzie, p. 84, 21 Scot. Jur. 450.

[3] Moir v. Alloa Coal Co., *vide supra*, note 2.

[4] Fifeshire Road Trustees v. Cowdenbeath Coal Co., *vide supra*, note 1.

[5] Ayr Harbour Trustees v. Oswald, Jan. 24, 1883, 10 R. 472, affd. July 23, 1883, 10 R. (H. L.) 85.

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Belhaven's trustees. It is in these circumstances that an action is brought to have the level-crossing removed. It is not proposed to limit the use of it, but to remove it altogether, and so to shut up an important access to the minerals. It would require, I think, cogent reasons to induce the Court to listen to such a proposal, and I have heard none such. I think the Lord Ordinary has very properly dismissed the action. It does not appear to me to be necessary to go into the circumstances further. I am for dismissing the action.

LORD ADAM.—I am of the same opinion. It appears that so long ago as September 1841 Lord Belhaven obtained leave from the Road Trustees to carry a branch of railway to his coal-works over a road called the "Manse Road." As I understand it, the railway was originally a horse-railway, and continued so till 1867, and if anything had happened in 1867 requiring a change I could understand such an action as we have here. But the railway has been used since 1867 as a steam-railway down to the present date, *i.e.*, for four-and-twenty years, and the proposal in this action is, as your Lordship has pointed out, that Lord Belhaven should be ordained at once to remove the railway across the road.

I agree with what was decided in *Moir* v. *Alloa Coal Co.*, that there is nothing to prevent road trustees granting leave to a railway company to cross one of their roads. It is often desirable for the convenience of the public, and I agree that if the permission is granted, and if in consequence large works have grown up in the district, the trustees are not entitled to remove the crossing arbitrarily. If that is so, it appears to me to follow that if a change is to be made there must be some arrangement as to the terms upon which it must be carried out. The Road Trustees have a duty to do all that is necessary for the safety of the public using the road, but, subject to that, I see no ground for the contention that they are entitled to insist on the crossing being removed.

It comes to be a question, I think, whether what is proposed is a matter of regulation and use. Now, as I understand, the only danger to the public suggested is that there are upstanding levers and no gates at the level-crossing. Lord Belhaven has however undertaken to supply them, and no doubt his obligation will be carried out. It appears to me, therefore, that all question of danger to the public is removed.

Then as to mere convenience to the public, it is not said that in the long tract of years which have elapsed since the crossing was made the public have complained or been inconvenienced by it.

As I understand from Mr Dickson, Lord Belhaven is perfectly ready to give an undertaking (and has given one in the minute) that he will be responsible for any accident due to the structural condition of the railway, but he declines to come under any obligation to be responsible for accidents which may occur from the use of the level-crossing; that is to say, he is perfectly ready to be responsible for his own acts in keeping the crossing in proper condition, but he declines to be responsible for the acts of others. That really is the whole subject of dispute between the parties, and it comes to be a very small matter indeed.

I agree with Lord Kinnear's remark made in the course of the debate, that the case does not involve any question of convenience and safety to the public, and that being so, and this being a matter of regulation, I think Lord Belhaven's offer a reasonable one. I agree with the Lord Ordinary that the action ought to be dismissed.

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LORD M'LAREN.—Your Lordships are all agreed that road trustees are not entitled to enter into agreements regarding the use of roads under their administration where the use is inconsistent with public convenience. On the other hand, it may sometimes be the best way of promoting the public convenience and facilitating traffic that the road trustees should empower mine-owners or persons willing to form private railways, to cross their roads under conditions consistent with the public safety. In the mining districts a vast number of these private railways have come into existence. They save the wear and tear of roads, and in many cases it would be impossible to carry on the mineral traffic of the district without them.

Now, the owners of the branch lines, if they went to Parliament, would undoubtedly obtain power to cross public roads by means of bridges or level crossings, according to the exigencies of the case, and I think we must recognise the power of road trustees to make such concessions without putting the owners to the expense of applying for parliamentary powers.

It may be that a right of crossing a public road which does not depend upon parliamentary powers, but on the permission of road trustees, is liable to be taken away if it can be shewn that its exercise is inconsistent with the primary use of the road, either in consequence of a change in the character of the locality or a great increase in the traffic of the road or the railway. Here no such case is made, and the question for our consideration is whether the Road Trustees, who in the fair and just exercise of their powers have given a right to the use of the crossing, are entitled to take it away without reason assigned, or (which is the same thing) to impose arbitrary and unreasonable conditions on the use of it.

I do not suppose that the trustees mean to be unreasonable, but your Lordships are of opinion that the right which they have given cannot be taken away without reference to the public or private convenience. We must therefore consider whether the conditions which they seek to impose are reasonable.

It seems to be reasonable that any person causing damage should be responsible for it, and Lord Belhaven has shewn his willingness to recognise this obligation; because he is willing to be responsible for such damage as may result from the defective state of the crossing. His tenants are to be taken responsible for damage resulting from the use of the crossing. To hold Lord Belhaven liable in all circumstances for all accidents which may occur would be an unreasonable condition, and one which the trustees are not entitled to impose as a condition of continuing the privilege.

LORD KINNEAR concurred.

THE COURT adhered.

E. A. & F. HUNTER & Co., W.S.—DUNDAS & WILSON, C.S.—Agents.

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Bennett v. Maclellan.

STEPHEN BENNETT AND OTHERS, Pursuers (Appellants).—*J. C. Thomson—Aitken.*

WILLIAM W. MACLELLAN, Defender (Respondent).—*Dickson—Ure.*

Ship—Liability of owners inter se—Contribution.—All the owners of a ship except A, who had one share, were resident in England, and in an action in the English Courts, in which A was not called, were found liable to owners of cargo in damages caused by its loss. A, who resided in Scotland, was informed of the action, but did not interfere. In an action in the Scottish Courts against A at the instance of the other owners of the ship to have him found liable to contribute his share of the ship's liabilities, *held* that the costs of the English

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action, at the instance of the cargo owners, fell to be included among these liabilities, and that the defender was liable for his share.

(Sequel of case reported *ante*, May 27, 1890, 17 R. 800.)

Stephen Bennett and others, all the owners of the ship "Austria" except one, William W. Maclellan, were resident in England. In an action in the English Courts against the owners resident in England (*Leduc & Co.* v. *Ward*), in which Maclellan was not called, the defenders were found liable to owners of cargo in damages caused by its loss. Mr Maclellan, who owned one share and resided in Scotland, was informed of the action, but did not interfere. In an action (originally brought in the Sheriff Court of Lanarkshire) at the instance of the owners who had paid the amount of the ship's liabilities, the First Division found Maclellan liable to pay his share of the liabilities—being a seventeenth part of the whole amount of the sums for which the owners were liable—(May 27, 1890, 17 R. 800).

A remit was made to the Sheriff "to ascertain the true amount of the pursuers' claim."

A statement of the amount claimed by the pursuers—being the principal sum with the deductions which they proposed to allow—was thereafter lodged, and these, with certain objections for the defender, were remitted to an accountant to report upon. Ultimately the Sheriff-substitute (Spens) sustained certain of the defender's objections, but in an appeal to the Court of Session the only findings to which the pursuers took exception were those relating to the costs of the original action at the instance of Leduc & Company, the cargo owners, for a share of which the Sheriff-substitute (Spens) had held that the defender was not liable.

The defender maintained that he had not been called in, and was no party to the English action; that he had received intimation of it, but had refused to take any share in it; and that accordingly there was no reason why he should be made to pay a share of the expenses. Looking to the merits of the action of *Leduc & Co.* v. *Ward*, the name under which the case was reported,[1] it was not a reasonable one to defend. The body of co-owners acted through the ship's-husband, and, unless he had an express mandate, he could not make the defender responsible for the expenses of the defence.[2] The only ground on which the defender could be held liable was that of recompense, and there was no such case here.[3]

Argued for the pursuers;—The defence of the action was a proper incident of the management of the ship; and that being so, the defender was liable. One or more of the co-owners might have defended the action, in which case all would have been liable. It was not a case in which the managing owner had to make up his mind whether he would defend the action or not.

Lord Adam.—The Sheriff-substitute has found that the defender is not liable for a share of the expenses in the English action by Leduc & Company, the cargo owners, against the owners of the "Austria," for which the latter have been found liable, but I cannot concur in his judgment. The specialties of the case are (1) that the pursuers are all resident in England, while the defender is resident in Scotland, and is not subject to the jurisdiction of the English Courts. The pursuers were clearly entitled to select one or more of the co-owners to defend the case, and were entitled to make them primarily responsible for the defence. This was a right which they exercised. It is clear that although the

[1] Leduc & Co. v. Ward, 1888, L. R., 20 Q. B. D. 475.
[2] Campbell v. Stein, March 1868, 6 Dow, 116.
[3] Buchanan v. Stewart, Nov. 10, 1874, 2 R. 78.

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decree of the English Courts might not be *res judicata* in Scotland, beyond doubt it would have settled the question of liability as regards the defender. The position of a joint owner in a matter of this nature is that it is his duty to say whether he will take part in the action or not. If the defence turns out to be successful, he would derive full benefit from that success. If it is unsuccessful, he, according to his contention, is entitled to have the action defended at the expense of his co-owners. A co-owner who is called upon to defend an action is not entitled to put his co-owners in that position. His duty is to say—I do not think this an action which ought to be defended, and I will therefore be no party to the defence. If he takes up that position he will be free. But he is not entitled to hold his hand, and allow his co-owners to conduct the defence, and then decline to admit liability for it. I see no evidence that this was not a *bona fide* defence. All the solvent owners concurred in it. It was no doubt unsuccessful, but, as I have said, that fact is not sufficient to free the defender from responsibility for his share of the expenses. I cannot therefore agree with the Sheriff-substitute.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced an interlocutor (dated 18th July 1891) recalling *hoc statu* the Sheriff-substitute's interlocutors; finding "that the defender is liable to the pursuers in one-seventeenth of the expenses of the said action *Leduc* against *Ward and Others*, with interest thereon," and that the balance brought out in the accountant's report fell to be altered in accordance therewith, &c.

WEBSTER, WILL, & RITCHIE, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

No. 189.
June 19, 1891.
Bank of Scotland v. Stewart.

THE GOVERNORS AND COMPANY OF THE BANK OF SCOTLAND, Pursuers (Reclaimers).—*Murray—Fleming.*
JAMES REID STEWART, Defender (Respondent).—*C. J. Guthrie—Dickson.*

Mines and Minerals—Conveyance of lands reserving the coal—Title—Construction—Extrinsic evidence—Singular successor—Acquiescence.—A disposition of lands reserved the coal to the disponer, with the exception of a specified portion underneath the mansion-house and another underneath the line of a proposed railway, and further reserved full power to the disponer "to work, win, and carry away the said coal, provided this be done without entering upon the surface of the said lands and estate." The disposition further provided that if it should be necessary for the support of the mansion-house or of the railway that a larger quantity of coal should be left unworked, the disponee should be entitled to purchase such larger quantity from the disponer at the rate of £1000 per acre.

A singular successor of the disponee brought an action for declarator that the disponer was bound to work the coal so as not to bring down the surface.

A proof was allowed. The evidence shewed that the coal could be worked to a profit only on the longwall system, the inevitable result of which was to bring down the surface; that it was being so worked at the date of the disposition, and that the disponee (who was himself a coalmaster) was aware that it was being so worked and that it could not otherwise be profitably worked; and that the injury to the surface would be small in comparison with the loss which would result from working the coal on another system.

Held, on a construction of the disposition read in the light of the circumstances as existing at its date, that the disponer must be held to have reserved the right to work the coal in the way in which it was being worked at the date of the disposition, although the result of the working should be to injure the surface, *altering* interlocutor of Lord Wellwood, Ordinary, who held that, upon the construction of the disposition, the defender was not entitled to work the

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minerals so as to bring down the surface, but on the proof that the pursuer had acquiesced in his doing so.

Opinions per curiam contra on the question of acquiescence.

Interdict.—It is not a ground for refusing to enforce an established right by interdict that the granting of interdict will cause inconvenience or pecuniary loss to the person resisting the granting of the interdict out of all proportion to the loss which would result to the other party from refusing interdict.

1st Division. Ld. Wellwood. C.

By disposition, dated 8th and 12th July 1875, James Reid Stewart, the proprietor of the lands of Calderpark, Lanarkshire, in consideration of the price of £35,000, conveyed these lands to John Hendrie, coalmaster, Glasgow, together with the mansion-house thereon, and also a statutory notice, served on the disponer by the Glasgow, Hamilton, Bothwell, and Coatbridge Railway, taking compulsorily a portion of the lands for the purposes of their railway, then in course of construction.

The deed contained a reservation of the coal in the following terms:—"But excepting and reserving from the lands, subjects, and others hereby conveyed the whole coal under the same other than (first) the portion thereof which is delineated and shaded with brown parallel lines on the plan annexed and subscribed by me as relative hereto, containing 2·856 acres or thereby, and (second) the portion thereof which is delineated and shaded with blue parallel lines on the said plan, and containing 3·144 acres or thereby, with full power to me and my foresaids or our tenants to work, win, and carry away the said coal, provided this can be done without entering upon the surface of the said lands and estate; but providing and declaring that my said disponee and his foresaids shall have right, should they find it necessary for the support of the said mansion-house and offices, or any of them, or for the support of the bridge or viaduct to be constructed on the said lands for carrying the authorised Glasgow, Bothwell, Hamilton, and Coatbridge Railway over the river Calder, or the works connected with the said bridge or viaduct, that a larger quantity of coal should be left unworked than is contained in the said two portions of land, to purchase from me or my heirs and successors such additional quantity of coal as they shall find necessary for such supports, the price of which shall be calculated at the rate of £1000 per acre of wholly unworked coal; also declaring that it shall be lawful to me, and my successors in the mines and minerals in each side of the said portions of land, containing respectively 2·856 acres and 3·144 acres, and to my and their lessees, in working the said mines and minerals, to cut and make such and so many airways, headways, roadways, gateways, and water-levels through the mines, minerals or strata in the said portions of land as may be requisite for ventilating, draining, or working the said mines and minerals; but no such airway, headway, roadway, gateway, or water-level shall be of greater dimensions or section than 8 feet wide and 6 feet high, nor shall the same be cut or made so as to injure the surface of the land, or the buildings, railway, or works thereon, or to impede the passage thereon." Hendrie was sequestrated in 1884.

By disposition dated 27th to 31st January 1888, John Graham, C.A., Glasgow, trustee upon Hendrie's sequestrated estates, conveyed the lands of Calderpark to the Bank of Scotland—who were creditors of Hendrie—for the price of £16,000. This disposition contained an exception of the minerals in terms *mutatis mutandis* identical with that in the disposition by Stewart to Hendrie, and further assigned, *inter alia* "(second), all claims competent to me, as trustee foresaid, for damages occasioned to the said lands by the workings of the mineral proprietors, or their authors or successors, or their tenants, and that whether the said damage was caused before or after the date of my said disponee's entry to the

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subjects hereby disponed under these presents, but in so far only as the same have not been already paid for or compensated by the said James Reid Stewart."

In September 1890 the Bank of Scotland brought an action against Stewart concluding for declarator, "that the defender is not entitled to work, win, interfere with, or carry away the coal, ironstone, and other metals and minerals in the pursuers' lands after mentioned in such a manner as not to leave sufficient support for the pursuers' said lands above and adjacent to the seam or seams worked by him, and that the defender, in working and winning any of the said minerals, is bound to do so in such a manner as not to break, injure, or alter the level of the surface of the pursuers' said lands, or so as to endanger the said surface being injured or altered in level, or to cause disturbance or subsidence of any part of the said lands"; for interdict against the defender "working, winning, interfering with, or away taking the said coal, ironstone, and other metals and minerals, or any part thereof, in any part of the pursuers' said lands, in such a manner as to break, injure, or alter the level of the surface of the pursuers' said lands, or any part thereof, or so as to endanger the said surface being injured or altered in level, or to cause disturbance or subsidence of any part of the pursuers' said lands"; and for payment of £5000 in name of damages.

The pursuers, after setting forth their titles, averred;—(Cond. 5) "There exist in the foresaid lands and others the following seams of coal,—viz., Pyotshaw, Main, Splint, and Virgin or Wee coal. These seams have all been and are being worked by the defender in the pursuers' lands aforesaid, and that since the year 1877, by the longwall system, which is a system of complete exhaustion by which the whole coal is completely excavated and removed without leaving in any stoops or pillars for the support of the lands above and adjacent to the said workings, and by which the natural levels of the said lands must be and is necessarily altered, and the buildings thereon necessarily broken and damaged. The said system was first adopted in the Clydesdale district about the year 1850." The defender "has further encroached upon the coal under Calderpark house and grounds."

The defender answered;—(Ans. 5) "Admitted that in the lands referred to the seams of coal mentioned exist, and that these seams have been worked by the defender by the longwall system, by which the whole coal is excavated without leaving in any stoops. *Quoad ultra* denied. Explained that for about seven years prior to the date when the defender conveyed to Mr Hendrie the surface of the said lands, the coal therein had been wrought by the defender by the longwall system, or other system of complete excavation. These systems secured complete excavation of the mineral, and the plans of the colliery, as Mr Hendrie well knew, were laid out with a view to the continuance of this mode of working. And since that date the same systems have been pursued without objection till the present time, and the defender has, in the full knowledge of the said John Hendrie and the pursuers, expended large sums of money for the purpose of continuing such working. The systems of complete excavation are the systems customarily pursued in the district, and are the only systems whereby the minerals can be wrought to profit, and they were fully in view of the parties at the time when the conveyance to Mr Hendrie—who was himself a coalmaster—was granted. These were the systems in use in the district, and they were in use specially throughout the Lanarkshire and Clydesdale coal basins, from time immemorial. And indeed at the date of the conveyance to Mr Hendrie, surface damage had, as both parties to that deed

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well knew, already been done to the lands conveyed in consequence of the ordinary working of the minerals. *Quoad ultra* denied."

The pursuers, after specifying injuries to the surface which they said had already been occasioned by the defender's workings, further averred; —(Cond. 8) "If the workings in the minerals belonging to the defender are allowed to proceed the damage already caused will be intensified, and the area of damage will be largely increased, with the result that the subjects belonging to the pursuers will be greatly deteriorated in value, and the beneficial use of them will be very seriously impeded, and for some purposes destroyed." The defender answered;—(Ans. 8) "Denied. In the seams of coal in the lands in question already opened up there are yet nearly a million tons of coal, and in the seams proposed to be wrought there is an even greater quantity. In order to work out this mineral the defender has erected extensive machinery and incurred considerable expenditure. This expenditure will all be rendered useless if the workings are now stopped. The only buildings on the lands are the mansion-house of Calderpark (now an old building) and offices, and a few miners' houses. The agricultural value of the land is only about 25s. per acre."

The pursuers pleaded;—(1) The pursuers being owners of the lands described in the summons, under exception of the coals and minerals belonging to the defender, are entitled to prevent these coals and minerals being worked in a way to cause subsidence to their lands. (2) The defender has no right to work the coal and minerals belonging to him so as to cause subsidence to the surface belonging to the pursuers. (3) The defender, or those for whom he is responsible, having illegally worked minerals in the said lands, and carried on operations which have caused subsidence and other injuries to the pursuers' lands, is liable in damages. (4) The pursuers having suffered loss and damage to the extent sued for, are entitled to decree of payment in terms of the petitory conclusions of the summons. (5) The pursuers are further entitled to decree of declarator and interdict as concluded for.

The defender pleaded;—(2) The defender's right to the minerals subjacent to the pursuers' lands being, under the titles of the parties, free from limitation of any kind, he ought to be assoilzied from the declaratory conclusions of the summons. (4) The defender is entitled to continue the working of the coal in the manner in use at the time of the sale of the surface, and which was the customary mode of working for upwards of the previous forty years. (5) The defender being willing to pay for any injury he may do to the surface (so far as not paid for), the pursuers are not entitled to interdict as craved. (6) The defender having in the full knowledge of the said John Hendrie and the pursuers expended large sums of money for working the coals by the said customary mode of working, the pursuers are not entitled to interdict.

On 19th November 1890 the Lord Ordinary (Wellwood) allowed a proof at large before answer.

The pursuers reclaimed, and argued;—A proof at large should not be allowed, as the rights of the parties were embodied in the titles, and it was not necessary to go beyond these. The proof should be restricted to the averments of damage.

After a hearing, on 7th January 1891,—

LORD PRESIDENT.—In a question of this kind, arising upon the construction of a contract, the Court are quite entitled to avail themselves of any light they may derive from such evidence as will place them in the same state of knowledge as was possessed by the parties at the time that the contract was entered into. Now, there are averments upon this record which if proved will exhibit the parties in a position towards one

another at the date of the contract that is calculated to throw a great deal of light upon the meaning of the titles. Upon that ground alone I am prepared to adhere to the Lord Ordinary's interlocutor. The proof is before answer, and it is not represented that that which the Lord Ordinary has allowed will greatly exceed in length the proof which it is admitted must be led. I think that the Lord Ordinary has exercised a wise discretion in not restricting it as the reclaimer proposes. The Court are always unwilling to interfere with the discretion of the Lord Ordinary in a matter of this kind.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT adhered.

The following was the import of the proof. At the date of the disposition to Hendrie the coal in question was being worked on the longwall system, by which the whole coal was excavated, with the necessary result of bringing down the surface more or less. This was the only system by which, at the prices current at the date of the proof, the pits in question could be wrought to a profit.* In 1882 Hendrie took a lease from the defender of 11½ acres of the coal in question. The terms of this lease are sufficiently quoted in the Lord Ordinary's note, *infra*. In 1884 Hendrie's trustee made a claim against the defender for damages in respect of injuries to the surface through the defender's working, and £1400 was awarded as damages by arbitration. The parties to the present action agreed by joint minute that £250 represented the amount of damage already occasioned and not compensated, and it appeared that the loss which would be caused to the defender from being obliged to work so as not to injure the surface—involving as that would practically do the stopping of the pits—would be out of all proportion to the loss which would be caused to the pursuers through injury to the surface. The defender had incurred a large expenditure in the erection of machinery, sinking of shafts, &c., in connection with the working of the coal, but the shafts were sunk in an adjoining property, with which either Hendrie nor the pursuers had anything to do. There was about million tons of unwrought coal in the three seams which had been opened, and there were two lower seams unopened, for the opening of which, however, preparations had been made. The pursuers had bought the estate at a public roup. Their manager deponed that he knew that the pits were being worked, but he did not know, and made no inquiry, as to the nature of the workings.

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* Hendrie deponed,—"At the time I acquired the property I knew there were coal workings going on underneath. I knew that these were being carried on upon the ordinary system of total excavation. This was in 1874. The mode of working minerals at that time in that district was either the longwall system or the room-and-rance system, in which the stoops were afterwards wrought. The system of complete excavation is the only one under which seams of that thickness can be commercially wrought. I knew that subsidence was being caused by these workings, and that consequent damage to the surface could be to some extent inevitable. I did not apprehend that the injury to the surface would be much as compared with the value of the coal. Between 1874 and 1884 the coal was worked out to a considerable extent, and the surface lowered in consequence. I made no objection to the mode in which the coal was being wrought."

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On 18th February 1891 the Lord Ordinary (Wellwood) pronounced this interlocutor:—"Finds in respect of the joint minute, No 99 of process, that damage has been caused to the surface of the pursuers' lands by the defender's workings to the extent of £250: Finds that in respect payment of the said sum of £250 has been made by the defender to the pursuers, it is unnecessary to pronounce decree therefor: *Quoad ultra* sustains the fifth and sixth pleas in law for the defender, and assoilzies the defender from the remaining conclusions of the summons as laid, reserving to the pursuers right to sue for damages in the event of the defender's future workings causing injury to the surface of the lands described in the summons," &c.*

* "OPINION.— . . . The deed does not contain any express reservation of right to work out the minerals so as to leave no support for the surface; the only question is whether such a right is reserved by clear implication. Having regard to the strict judicial construction of such documents in favour of the surface owner, especially in recent cases in this Court and in the House of Lords, I am not prepared to hold that such a right is to be implied. The defender's contention is that in this deed the disponee stipulated for all the support which he desired and required for the surface, and that it therefore must be inferred that he consented to the disponer exhausting the remainder of the coal. It may be that this was the real intention of parties, and the disponee's subsequent actings give colour to that view. But the terms of the deed will not support the implication contended for. I think that the stipulations in favour of the disponee in regard to the blocks of coal to be left unworked underneath the mansion-house and offices and viaduct, which are chiefly relied on by the defender, can be reasonably explained on the footing that the disponee found it necessary to make special provision for the support of those parts of the estate which were burdened, or were about to be burdened, with heavy buildings, and thus were, or were about to be, in a non-natural state. But it does not follow that he thereby abandoned his right to insist on support for the rest of the surface. Besides, the deed does not contain any compensation clause. In this respect the defender's case is even weaker than previous cases, in which it was unsuccessfully contended that the mine-owner was entitled to work out the minerals on payment of damages. In particular, in the case of *White* v. *Dixon*, 9 R. 375, affirmed 10 R. (H. of L.) 45, the deed on the terms of which the question depended provided that the mine-owner should indemnify the owner of the surface for the whole damage and injury occasioned by the operations which he was empowered to carry on. Yet, notwithstanding this stipulation, the Court held that the obligation to pay damages did not confer right to bring down the surface on paying damages. Again, to refer, by way of contrast, to those cases in which the mine-owner was held entitled to work out the minerals without leaving support for the surface, it will be found that the deed or deeds which were held to form the contract either contained express power to do so, or stipulations of such a character that the power was necessarily to be implied. Of the former class was *Buchanan* v. *Andrew*, 11 Macph. (H. of L.) 13, reversing the decision of the Court of Session, 9 Macph. 554; and of the latter the case of *Aspden* v. *Seddon*, 1875, where there was a stipulation for payment of money by way of compensation, 10 Chanc. App., L. R., 394.

"I therefore think that if regard is only to be had to the titles of the parties, the defender has not instructed a right to work out the minerals reserved without leaving support for the surface, whether he offers to pay damages or not. . . .

"But two serious questions remain, viz.:—(1) Whether the pursuers' authors did not by their actings surrender or lose the absolute right of support which they originally had; and (2) whether, even assuming that they did not do so, declarator and interdict should be granted as concluded for. As the defender is willing to pay damages if allowed to work out the minerals, it is immaterial, perhaps, to him which of those points is decided in his favour; but I shall consider them in their order.

"Although on the face of his title Hendrie was not (as I hold) deprived of

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The pursuers reclaimed, and argued;—On the construction of the titles, the Lord Ordinary had taken the sound view. There was no express and did not surrender, his absolute right at common law to have the surface supported and to refuse to accept damages in lieu thereof, there is no doubt that at the date of the purchase he was well aware that the defender had for some years been working out the minerals on the footing of total exhaustion; and being himself a coalmaster, he knew that this mode of excavation was the only one under which seams of the thickness of those in question could be wrought to commercial profit. He also knew that that mode of working had caused, and would in future cause, a certain amount of subsidence of the surface; but he says in his evidence,—'I did not apprehend that the injury to the surface would be much, as compared with the value of the coal.'

"In 1882 he shewed his faith in this belief in a very practical manner by taking a lease from the defender for 11½ acres of the coal in question, 'with full power to the said lessee, at his own expense, to search for, work, win, and carry away and dispose of the coal hereby let as fully and freely as the said James Reid Stewart could do himself.' The lease provided for total excavation by the lessee, and contains this provision,—'The second party (Hendrie) hereby expressly renounces and discharges all claims competent to him as proprietor of the surface of the said lands or otherwise in any manner of way against the first party (the defender) in respect of any damages which may have been or may be occasioned by his operations under this lease.'

"The lease was for the space of ten years from Martinmas 1879, that being the date apparently at which Hendrie began to work the coal let. Now, I cannot reconcile this contract and what followed on it with the view that Hendrie retained, or intended to retain, an absolute right to support for the surface *quoad* the rest of the mineral field underneath the lands of Calderpark. The terms of the lease should be closely examined. They shew complete knowledge and approval on Hendrie's part of the nature and extent of the defender's workings. Hendrie stipulates for power to work the coal let as fully and freely as the defender could do himself. He then binds himself under penalties to work out the coal exhaustively; and there are even provisions in the lease to the effect that where the coal is wrought in the pillar and stall mode, the lessee should leave in the first instance pillars of sufficient dimensions to secure of its being ultimately wrought out with the least possible loss of mineral. Where possible damage to the surface is referred to, money damages are indicated as being the appropriate and only remedy.

"But the evidence of acquiescence does not stop there. In 1884, Mr Hendrie's affairs having become embarrassed, his trustee made a claim against the defender for damages in respect of injuries to the surface caused by the mineral workings; and after a protracted arbitration a sum of £1400 of damages was awarded. Now, during the ten years between 1874 and 1884, and in the course of the proceedings in the arbitration,—in which the defender's working plans were, I understand, produced and examined,—Hendrie and his trustee must have been well aware of the nature of the defender's operations: that he had for years been working out the coal on the footing of total exhaustion, that he intended to work out the remainder of the minerals by the same process, and that for that purpose he had incurred large expenses in the erection of machinery and sinking of shafts, driving of levels, and otherwise. The three sets of plans produced in this process (being Nos. 78, 79, and 80 of process) shew at a glance the nature and extent of the defender's operations from 1869 to 1889, which were absolutely inconsistent with the idea that the surface was to be supported, and which a practical man could not see going on without knowing perfectly what the result of the operations would be.

"Now, it seems to me that the circumstances which I have just mentioned are such as to entitle the Court to presume an agreement on the part of Hendrie and his trustee to waive the absolute right which they have under their title, and to rest content with the payment of damages for such injuries as might be caused to the surface by the defender's workings. Mr Bell in his Principles,

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section 946, states the effect of acquiescence thus :—'Where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where under the eye and with the knowledge of him who has the adverse right something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right.' I may also refer to the Lord Chancellor, Lord Chelmsford's, opinion in the case of the *Bargaddie Coal Company* v. *Wark* (3 Macqueen, 467, 479, 480), in which he quotes with approval the passage from Bell's Principles which I have quoted. It has been said that the right of support cannot be lost except by express renunciation; but this is not established by authority; and although the proof of acquiescence must be full, I do not think that in this matter the right of support has any peculiar sanctity. It was once said by Lord Denman (*Hilton* v. *Granville*, 1844, 1 Craig and Philips, 283, 5 Q. B. 780), that even an express renunciation of it would be unavailing. But this dictum is now repudiated (*Andrew* v. *Buchanan*), and I think also that now the ordinary rules of law applicable to acquiescence would be equally applied in a question as to the right of support as in the case of any other contract. I do not think that the present pursuers are in a better position than their authors. In 1888 the pursuers, who were creditors of Hendrie, obtained from his then trustee, Mr John Graham, a conveyance of the lands, the consideration named being £16,000. In the deed of conveyance Graham assigned to the bank certain claims to which he had right as Hendrie's trustee, and amongst them, '(Second) All claims competent to me as trustee foresaid for damages occasioned to the said lands by the workings of the mineral proprietors, or their authors or *successors*, or their tenants, and that *whether the said damage was caused before or after the date of my said disponee's entry to the subjects hereby disponed* under these presents, but in so far only as the same have not been already paid for or compensated by the said James Reid Stewart.' The pursuers had thus full notice that their authors had been in use to accept damages for injuries caused to the surface by the defender's workings; and the words of the clause which I have underlined indicate that this practice was to continue, because the claims assigned were claims in respect of future as well as past damages.

"In *Davis* v. *Treharne*, 6 App. Ca., L. R. 460, Lord Blackburn says (p. 466), —'I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shewn—the burden lying upon those who wish to shew it—that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right to support from below, in which case, of course, the owner of the surface could be in no better position than the person who sold it to him.'

"On the grounds which I have stated I am inclined to think that the burden indicated by Lord Blackburn in the latter part of the passage quoted has been discharged by the defender, and that there is sufficient evidence that the owner of the surface surrendered his right to support on condition of payment of damages.

"I am further of opinion that even if the evidence falls short of complete proof of surrender of the right of support, interdict should not be granted in the circumstances of the case, because the loss which would result to the defender from the stoppage of his works would be out of all proportion to any advantage which the owner of the surface would obtain. In judging whether in such cases interdict should be granted or refused, the Courts of law both in this country and in England have been in use to exercise an equitable discretion; and if they are satisfied that the loss to the person sought to be interdicted would be greatly in excess of the benefit to the other party, they are in use to refuse interdict, and to compel the party seeking interdict to content himself with damages.

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ence to the evidence, bear that construction by implication. The cases shewed that, to deprive the owner of the surface of his common law right to have that surface preserved intact, the implication must be very clear,[1] which it was not in the present instance. The defender no doubt expressly excepted from his reservation of the coal the right to enter upon the surface, but it did not follow from that that he had reserved the right to bring down the surface. Nor did the stipulation as to payment of £1000 per acre in the event of more coal being required for the support of the mansion-house or the railway affect the question. What was there in view was the contingency of additional buildings being erected, which would require a non-natural support to the surface. Then it was incompetent to look at the evidence, for there was no such ambiguity in the titles as to require the aid of extrinsic evidence. But assuming the competency of the evidence, all it proved was that Hendrie was a coalmaster and knew the method of working. It was by no means a necessary consequence of that knowledge that he intended, in buying the surface, to exclude the common law right of support. The Lord Ordinary's judgment upon the ground of acquiescence was erroneous. If the pursuers' author had acquired the right to demand support to the surface, there was nothing to shew that he had surrendered that right. The lease of 1882 only shewed that he had given up his right to surface damage so far as related to the 11½ acres thereby let. Nor did the fact that

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They are the more ready to adopt this course if the party sought to be interdicted has, as here, been permitted or induced to continue his operations and incur large expense by the actings and apparent acquiescence of the person seeking interdict, or his authors.

"Now, I think it is proved that if the defender continues to work out the minerals as he is doing some subsidence of the surface will be caused. It is also proved that seams of the thickness of those in question cannot be worked to profit except on the footing of total exhaustion. If, then, the defender were interdicted from working the minerals 'in such a manner as to break, injure, or alter the level of the surface of the pursuers' said lands, or any part thereof, or so as to endanger the said surface being injured or altered in level, or to cause the disturbance or subsidence of any part of the said lands,' he would be obliged to abandon the working of those minerals altogether; and as there are still unworked nearly three million tons of coal, including the lower seams, the loss to the defender would necessarily be very large.

"Next, as to the pursuers' interest to obtain an interdict, one object in allowing a proof was to allow the pursuers to prove the damage which they had sustained, which they estimated at £5000. It now appears that the damage actually sustained is covered by a sum of £250, as against an estimated annual loss to the defender of £4000 to £6000 if he were obliged to abandon the mine. It may be that in future damage to a greater extent may be caused; but dealing with the question of interdict on the evidence before me, I do not think that there are sufficient grounds for subjecting the defender to such a penal prohibition for disturbance of the surface. So far as can be seen or anticipated, the pursuers will be sufficiently compensated by payment of damages should further subsidence take place.

"The result is, that I am not prepared to grant decree of declarator and interdict in the terms asked, because the effect of such a decree would be to prevent the defender from working the coal at all. I shall therefore grant decree for the sum of £250 agreed upon, and *quoad ultra* assoilzie the defender from the action as laid, reserving to the pursuers their right to claim damages from the defender should the defender's workings cause injury to the surface in the future."

[1] White v. Dixon, March 19, 1883, 10 R. (H. L.) 45; Buchanan v. Andrew, March 10, 1873, 11 Macph. (H. L.) 13, 45 Scot. Jur. 172; Aspden v. Seddon, 1875, L. R., 10 Ch. App. 394.

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Hendrie's trustee had accepted £1400 in name of damages in 1884 prove that for the future the right to surface support was surrendered. Then, none of the defender's pits were sunk on the lands in question, or on lands belonging to the pursuers or their authors. It was impossible to say therefore that the works erected by the defender had been erected on the faith of Hendrie's acquiescence, for Hendrie could not have prevented these works if he would. In any case the pursuers were singular successors, and were not bound by the acting of parties not appearing on the record. Lastly, the Lord Ordinary was in error in refusing interdict. The comparative interest of the parties was a relevant consideration in a question of interim interdict, but when the pursuers' right was established—as *ex hypothesi* it was here—it was irrelevant to say that the gain to him from granting interdict would be small in comparison with the loss which the defender would sustain.[1]

Argued for the defender;—If the titles were read in the light of the evidence as to the knowledge of the parties at the date of the contract,—and it was competent so to read the titles,—the only reasonable conclusion was that the parties did not intend that the right to surface support should be given to the disponee. Both parties were coalmasters, and were conversant with the methods of working coal, and they knew that the only practicable method of working this coal was by the longwall system. It was inconceivable therefore that they should not have intended that the defender should work on that system. Where they did not intend that the surface should be brought down they reserved the coal *in toto*, and they further provided that if any greater amount of absolute support should be necessary, the whole coal under the required surface should be bought and paid for at so much per acre. But assuming that the right to support had been reserved, the Lord Ordinary was right in holding that the pursuers' author must be held by his conduct to have surrendered that right.[2]

At advising,—

Lord Adam.—Prior to the year 1875 the defender was proprietor of the estate of Calderpark, in the parish of Old Monkland and county of Lanark. In that year he disponed the estate to Mr Hendrie, reserving the mines and minerals, and the pursuers, who are the Bank of Scotland, are now in right of Mr Hendrie, and their title exactly repeats the original title to Mr Hendrie. Now, I do not think there is any difficulty or dispute about the law where the rights to the surface and the rights to the mines and minerals become involved. I think the principle of law that comes into operation is *sic utere tuo ut alienum non lædas*—you shall so use your own property as not to injure that of your neighbour—and in conformity with that the result is that the proprietor of the mines and minerals cannot work them if the result of such working would be an injury to the surface—that is to say, if it would bring down the surface or injure buildings and erections upon the surface. If that is the result of the working the proprietor of the mines may be stopped from so working them. In other words, the proprietor of the surface is entitled to absolute security. I think that is the legal right where there is nothing peculiar and there is a separation of the right to the surface and the right to the mines and minerals. But then the titles of

[1] Hole v. Barlow, 1858, 4 C. B. (N. S.) 334; Bamford v. Turnley, 3 Best & Smith, 62.

[2] Authorities in the Lord Ordinary's note, and Moore v. Paterson, Dec. 16, 1881, 9 R. 337; Graham v. Magistrates of Kirkcaldy, July 26, 1882, 9 R. (H. L.) 91.

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the parties may shew that the rights reserved are not exactly those that would arise from the legal relations, and accordingly the first question in this case is, whether or not it appears from a construction of the titles that the defender when he reserved the rights to the mines and minerals reserved also a right to take them although the result of that might be that it would injure or let down the surface. The defender says that upon the construction of the titles that is the right he reserved—the right, namely, of working these minerals although the result should be to cause injury to the surface. That question then has to be solved, as it appears to me, from the construction of the disposition in favour of Mr Hendrie, or the disposition by Mr Hendrie to the Bank of Scotland, because they are both in the same terms, and in order to properly construe that title,—that deed,—I think we are entitled to look at the surrounding circumstances at its date to see what the parties really had in their mind when so contracting.

Now, there is no doubt that they were contracting with reference to the sale of a mineral estate in which, in point of fact, there were unworked minerals still subsisting of great value. I think it is also perfectly clear that at the time of the contract all the parties were aware that these mines of coal were actually being worked by pits belonging to the defender, who happened to be proprietor of the adjoining lands of Calderbank. I think it is also indisputable from the facts of the case, that they were aware that these minerals were, as might have been expected, to be continued to be worked. That appears clearly from the disposition in the pursuer's favour, because it makes provision for certain consequences which would be the necessary result of the continued working of the minerals. I think it is quite obvious too that the parties were aware that the coal was being worked by a system which exhausted the whole minerals under the ground, with the necessary and unavoidable result that the surface would be brought down. I think, further, it must have been quite within the view of parties that any loss which might arise from the working of the minerals in the way I have stated—any loss or injury to the surface—was not in point of pecuniary value of any comparison with the value of the minerals if it became impossible that these minerals should be worked. I think, as the Lord Ordinary says for a different purpose from that to which I propose to apply it, it is the fact that the damages claimed for injury to the surface amount to the small sum of £250, whereas the result of stopping the working of the minerals would be to cause a loss of many thousand pounds.

Now, these were the facts, and that was the situation and state of knowledge of the parties when this contract was entered into; and the question is, whether upon a construction of this disposition the defender, besides reserving the mines and minerals with full power to remove the minerals, reserved to himself the right to do so although it might result in injury to the surface. I quite agree that that must either be the result of direct expression in the disposition, or of clear implication to that effect. If there are clauses in the deed which clearly imply a reservation of power to that effect to the defender, I see no reason why effect should not be given to that just as in any other case. I do not see that the fact that the question is one between the proprietor of the surface and the proprietor of the coal should make any difference in the construction of the disposition, and I propose to construe this deed as I would construe any other.

Now, that brings me to consider the terms of the deed itself, and by it it will

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be observed that Mr Stewart, the defender, for the sum of £35,000 conveyed the lands in question—they are now called Calderpark—and the mansion-house and so on. Then comes the reservation—"But excepting and reserving from the lands, subjects, and others hereby conveyed the whole coal under the same." Then comes the exception, "other than (first) the portion thereof which is delineated and shaded with brown . . . containing 2·856 acres or thereby, and (second) the portion thereof which is delineated and shaded with blue . . . containing 3·144 acres or thereby." That is the exception to the grant. He excepts the coal from the grant, but then from the exception of the coal there is excepted again all the coal within two small areas of between two and three acres respectively. Then follows the power which the defender reserved—"With full power to me and my foresaids, or our tenants, to work, win, and carry away the said coal, provided this be done without entering upon the surface of the said lands and estate." Then there is a right to the purchaser, if he shall require it, to purchase part of the coal which Mr Stewart reserved to himself; it is in these terms,—"But providing and declaring that my said disponee and his foresaids shall have right, should they find it necessary for the support of the said mansion-house and offices, or any of them, or for the support of the bridge or viaduct to be constructed on the said lands" for carrying a certain railway "that a larger quantity of coal should be left unworked than is contained in the said two portions of land,"—that is, the two acres and the three acres—"to purchase from me or my heirs and successors such additional quantity of coal as they shall find necessary for such supports, the price of which shall be calculated at the rate of £1000 per acre of wholly unworked coal." Then there is a further power given to Mr Stewart—that is, that he should have power to make airways and roadways and so on through that coal underneath the railway viaduct and mansion-house which he had not reserved to himself, but had passed on to the pursuers as proprietors of the surface. He reserves power to make such airways, &c., with this limitation, that they are not to be "made so as to injure the surface of the lands, or the buildings, railway, or works thereon." These are all the provisions of the contract to which I need refer.

Now, the first clause which requires some attention is the one where after reserving the coal to himself the disponer, Mr Stewart, reserves this power—"With full power to me and my foresaids, or our tenants, to work, win, and carry away the said coal, provided this can be done without entering upon the surface of the said lands and estate." The first observation I have to make upon that clause is this, that that is not an expression of the legal right which would have been reserved to Mr Stewart as a consequence of his having reserved the mines and minerals. If that had been so, the legal right which he would, as a consequence of the reservation, have had would have been, as is said in a subsequent part of the deed,—full power to win and carry away the said coal, provided no injury shall be done to the surface of the ground. That would have been the clause if it had been intended merely to give expression to Mr Stewart's legal rights. Therefore this clause does not mean that, and the question arises, whether the true meaning and construction is not this, that the only restriction upon Mr Stewart's right—his full power to remove the coal—is that expressed, viz., provided this be done without entering upon the surface of the said lands. Now, if that is the only limitation, it comes to this, it would not exclude Mr Stewart from working the minerals, although it resulted in

injury to the surface. That would, perhaps, be a forced construction of the deed if the deed did not have special clauses dealing with the matter of injury to the surface as a separate subject-matter therein dealt with by the parties, and it is also to be considered that the principal thing which could be injured by the letting down of the surface, namely, the mansion-house and the railway viaduct, are separately provided for. It is consequently less difficult to suppose that the parties really meant what this clause in terms expresses, viz., you shall have full power to remove the coal, provided only you do not do it by entering upon the surface of the estate. And this clause does not stand alone, because when we come to the next clause it throws a very strong light upon this one: it is, that the "disponee and his foresaids shall have right, should they find it necessary for the support of the said mansion-house and offices, or any of them, or for the support of the bridge or viaduct to be constructed on the said lands . . . that a larger quantity of coal should be left unworked than is contained in the said two portions of land, to purchase from me or my heirs and successors such additional quantity of coal as they shall find necessary for such supports, the price of which shall be calculated at the rate of £1000 per acre of wholly unworked coal." Now, it appears to me that that reservation, followed by the stipulation giving this right to purchase, clearly involves and assumes certain things as being the rights of parties. It assumes in the first place that the defender is to work the minerals, because if he did not work the minerals, if he never came nearer the reserved coal, there would be no danger of injury to the mansion-house or viaduct. It also clearly implies that the probable or possible or expected result of his so working the minerals was the bringing down of the surface. If it was not so, there would have been no necessity for Mr Hendrie stipulating that in the event of their approaching nearer the mansion-house or viaduct it might result in injury and might require the purchase of additional support. Therefore it appears to me that this clause assumes, in the second place, that the working of the minerals will in all probability be attended with injury to the surface. It also appears to me to assume, and necessarily to assume, that in so working the minerals to the injury of the surface the defender was doing so as a matter of right; because it is very difficult to suppose that Mr Hendrie would agree to pay the defender for not doing an illegal act, and an act which he had no power to do. And yet the view of the pursuers in this case is that if the defender so works the minerals as to injure the surface, and to injure the support to the surface, he is doing a wrongful act which he has no right to do; and yet upon the face of this deed he is to be paid at the rate of £1000 an acre for additional unworked coal when this is necessary to prevent danger to the railway or mansion-house from his mineral workings. That clearly indicates to my mind that the parties knew quite well that that was a perfectly legal act on the part of Mr Stewart.

Now, if that be so, let us see how that would apply to the interdict which is asked. Declarator is asked in these terms,—"It should be found and declared that the defender is not entitled to work," and so on, "the coal in such a manner as not to leave sufficient support for the pursuers' said lands above and adjacent to the seam or seams worked by him, and that the defender in working and winning any of the said minerals is bound to do so in such a manner as not to break, injure, or alter the level of the surface of the pursuers' said lands, or to cause disturbance or subsidence of any part of the said lands." Now, suppose we were to grant the interdict sought, what would be the result? The result

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would be this, that Mr Stewart, for stopping the working of the minerals, would not be paid the thousand pounds which Mr Hendrie consented to pay for the stopping of them. In other words, it would just be that the clause in the disposition by which that stipulation had been made should receive no effect whatever. I do not see any other result that could follow from it; because the contention on the other side is that Mr Stewart reserved nothing but the mere power to remove the coal, the surface being kept safe. If that be so, then they are entitled to interdict; if that be not so, if it be clear upon the face of this deed that there was a further power reserved to Mr Stewart to work and remove the minerals although it should result in injury to the surface, then it is clear that there was by this deed reserved to Mr Stewart something more than the legal consequences which result from the mere reservation of the rights to mines and minerals. And I say that that clearly shews that the parties to this contract had it in view that Mr Stewart was to have the right to remove these minerals although the result of his exercising that right might be to bring down and injure the surface. I can put no other interpretation upon this clause except to meet that reserved power on the part of Mr Stewart.

Well, now, if that be so, it appears to me that the right cannot be limited, as the Lord Ordinary suggests, to any part of the lands, because it is a reservation of a right and nothing else. Accordingly, the result which I have come to upon a consideration of the construction of this disposition is that by clear implication there is a right and power reserved to Mr Stewart to remove the minerals, even although the result should be to bring down and injure the surface. If that be so, the result is that at which the Lord Ordinary has arrived, namely, that the defender is entitled to be assoilzied from this action. At the same time that is not the result of the construction of the deed which the Lord Ordinary has adopted. His Lordship has taken a different view from that which I have expressed as to the construction of this deed. But he has decided in favour of the defender upon grounds upon which, without going into them at any length, I regret to say I should not have been prepared to support the defender's case.

The first is that he holds that Mr Hendrie had discharged any right to support that he had by his acts and conduct in the matter. The Lord Ordinary puts very much stress upon this, that Mr Hendrie had himself taken a lease from Mr Stewart of a small part—some eleven acres—of the coals in question, by which he bound himself to work out the whole of that coal exhaustively, and with the necessary result of injury to the surface. But I think it would be very difficult to found any acquiescence on the part of Mr Hendrie from this. We cannot tell how the consideration for the lease which Mr Hendrie agreed to pay or Mr Stewart agreed to take may have influenced them in reserving rights in that matter, and I notice that while Mr Hendrie discharges all claims competent to him as proprietor of the surface of the said lands, it is only "in respect of any damages which may have been or may be occasioned by his operations under this lease." How, in the face of that reservation, which is a reservation only of damage caused by this lease, it could be said that there was any implied discharge of the right to support with reference to the whole other parts of the lands not touched by this lease, I have not been able to follow the Lord Ordinary. Then it is the fact that Mr Hendrie had allowed the defender to work the coal for some considerable period of years without stopping it, and had made a claim and recovered damages of considerable extent. I cannot see that because Mr Hendrie may have had

the right to stop these operations, but let them go on for a considerable time, it may be without any loss or injury to himself, he has therefore lost the right to object to future workings, and I should not put much reliance upon that fact as being evidence that the pursuer, Mr Hendrie, had discharged his right. And I do not think there is any evidence of such an expenditure of money by the defender as is suggested. It is to be noticed that the expense of sinking the pits was altogether on ground with which Mr Hendrie had nothing to do. They were sunk in Calderbank, which was Mr Stewart's own separate property, and how Mr Hendrie could have had any right or title to interfere with these proceedings, I am at a loss to see. Therefore, I do not think, with deference to the Lord Ordinary, that the case would be safely rested upon these acts as implying the discharge of Mr Hendrie's rights.

There is another and quite distinct ground on which the Lord Ordinary bases his decision for the defender; but I cannot be held as agreeing in regard to that either. It is this,—He says the pursuers are not entitled to interdict, because the loss which would result to defender by the stoppage of his works would be out of all proportion to any advantage which the owner of the surface could obtain. I confess it is new to me in the law of Scotland that a person's right, and in that view an undisputed right, is to be taken away because it would be for the pecuniary advantage of another person that he should lose it. It appears to me to be quite a novel thing in the law of Scotland, and I think the Lord Ordinary is under a misapprehension here. These considerations are most material, not when we are considering any matter of established right, but where the question is a question of interdict before the right is established. But the assumption on which the Lord Ordinary puts the case is that the right is established, and is to be taken away because it is more convenient for the defender and comparatively little pecuniary loss to the pursuers to lose their right.

LORD KINNEAR.—I am of the same opinion. I think the question depends entirely on the true construction and effect of the title now before us, and I am unable to agree with the view which appears to me to be suggested by the Lord Ordinary's observation, that that is a question which can be governed by previous decisions as to the construction of other deeds in different terms. We must ascertain for ourselves what is the true meaning and effect of this particular deed. Now, I entirely concur in the construction which Lord Adam puts upon it, and for the reasons he has given, and I think it unnecessary to repeat those reasons. I agree also with Lord Adam in thinking that if the title bore the construction which the Lord Ordinary puts upon it, it would not be possible to adopt the grounds upon which he holds that nevertheless the proprietor of the surface shall not be allowed to prohibit proceedings which will bring down the surface contrary to the right which he holds to be established in him. I agree with Lord Adam that the grounds upon which the Lord Ordinary proceeds are not satisfactory, but I think the result at which he has arrived is right.

LORD PRESIDENT.—I agree with your Lordships in adhering. With regard to the question which the Lord Ordinary discusses under the third branch of his note, it appears to me that there is no evidence of acquiescence at all, and that the view his Lordship takes upon the authority of Professor Bell in his Principles is not justified by the text of the section to which he refers. I also agree with Lord Adam in thinking that for the Court to abstain from enforcing

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a right because that enforcement would cause great inconvenience or pecuniary loss to somebody else is a doctrine which is quite unknown to the law of Scotland.

LORD M'LAREN was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and of new assoilzied the defender.

TODS, MURRAY, & JAMIESON, W.S.—DRUMMOND & REID, S.S.C.—Agents.

No. 190. June 19, 1891. W. N. White & Co., Limited, v. Dougherty.

W. N. WHITE & COMPANY, LIMITED, Pursuers (Appellants).—*Clyde.* JAMES DOUGHERTY, Defender (Respondent).—*Shaw.*

Sale—Auction—Exhibition of printed conditions of sale—Sale by sample or by bulk.—The purchaser of certain cases of apples, at a sale of apples by auction, having rejected the apples as being disconform to sample, the auctioneer brought an action against him for the price, denying that the sale was by sample, and founding on the following condition, which he averred was one of the conditions of the sale;—"3. Goods to be delivered to the purchaser as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quality, quantity, or condition, and intending buyers are requested to thoroughly inspect the bulk."

From a proof it appeared that printed conditions of sale, including that above quoted, were hung up in front of the auctioneer's rostrum, but the auctioneer neither read the conditions out to those attending the sale nor directed their attention to them. The defender deponed that he had not read the conditions, though in his evidence he did not dispute that he knew of them. The apples in bulk were stored in cases in a cellar underneath the auction-room, and the auctioneer's cellarman took six of these cases at random, and having opened them, placed them on a dais in the auction-room in sight of those attending the sale. The auctioneer referred to these six open cases as containing specimens of the apples for sale. The defender discovered on delivery that most of the apples he had bought were much decayed.

Held that the sale was not a sale by sample, that the condition above quoted applied, and imposed on the defender the duty of satisfying himself as to the condition of the apples in bulk, and therefore that decree fell to be granted as concluded for.

1ST DIVISION. Sheriff of Lanarkshire. C.

ON 30th August 1890 W. N. White & Company, Limited, fruit-brokers, Covent Garden, London, brought an action in the Sheriff Court at Glasgow under the Debts Recovery Act, against James Dougherty, fruit-merchant, Glasgow, for £39, 5s., as the price of certain cases of Tasmanian apples which the pursuers had sold to the defender by auction at the Covent Garden Market on 11th June 1890.

The defender maintained that he was entitled to reject, and had duly rejected, the apples as being disconform to sample.

The pursuers averred that the sale was a sale by bulk and not sample, and further, that it was conducted according to certain conditions which they stated had been exhibited in the saleroom, and in particular, according to the following condition,—"3. Goods to be delivered to the purchaser as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quality, quantity, or condition, and intending buyers are requested to thoroughly inspect the bulk."

A proof was allowed. The evidence was to the following effect,—A public sale of apples was held by the pursuers in Covent Garden Market on the day in question, and a large quantity of apples was sold on that occasion. Among the sales was the lot sold to the defender. The apples

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had arrived from Tasmania in steamers, which had refrigerators on board, so as to keep the apples fresh. According to the custom of trade in Covent Garden Market, the apples in bulk are placed in the cellar underneath the market, and a certain number of cases is placed on a dais in front of the intending purchasers. These cases are selected from the bulk by the auctioneer or his deputy, and they are open, and the apples are visible to the offerers. The auctioneer refers to them as being specimens of the apples to be sold. The sale is conducted under certain printed conditions, which are not read out, but which are hung up in front of the auctioneer's rostrum. They are known to be there, and to regulate the sale. At the auction on 11th June the sales to the defender were made in accordance with these customs. The steamer by which the apples are said to have arrived had discharged its cargo the day before the sale, and the bulk of the apples was placed in the cellar, and six open cases were placed on the dais as specimens of the apples in the cellar.* These cases contained good sound hard apples. The conditions of sale, which included the condition founded on by the pursuers, were not read out, nor did the defender read them for himself. He deponed, however, that the condition in question was a common one throughout the three kingdoms, and that he himself sold fruit every day on the same conditions. After the sale the defender received a delivery-order for the apples, and handed it to a carrier, and the carrier had them conveyed to Glasgow. On arrival in Glasgow, the greater part of the apples were found to be valueless as fruit, and the whole lot was sold judicially for £5, 1s. 2d.

On 4th December 1890 the Sheriff-substitute (Balfour) assoilzied the defender, holding that the pursuers, by exhibiting the six cases of apples, had converted the sale into a sale by sample, and had thus rendered condition 3, founded on by the pursuers, inapplicable.

On 12th March 1891 the Sheriff (Berry) adhered on the same ground.

The pursuers appealed, and argued;—There was no question that the conditions were exhibited in the saleroom, nor could it reasonably be disputed that the defender knew that they were so exhibited, and also what they contained—in substance at least. At all events, he took the risk of remaining in ignorance, for it was well settled that the exhibition of conditions of sale in an auction saleroom made these conditions part of the contracts of sale concluded there.[1] The only question of difficulty was as to whether the exhibition of the six open cases of apples constituted the sale a sale by sample so as to prevent the pursuers from taking advantage of the third condition. Now, the true meaning of shewing these six

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* George Gardiner, cellarman with the pursuers, deponed,—"The cases are never opened downstairs, and I cannot speak as to the state of the apples. They are never picked. I just send them up as they come."

W. N. White, the pursuer's managing director, deponed,—"My reason for getting up the specimens was to shew the kind of fruit for sale. I had every reason to believe that the bulk was according to the sample, and I knew nothing to the contrary. We are silent as to the guarantee. The buyers use their own judgment in buying the apples. . . . I never see them before the sale. So far as I can remember, I did not say the apples were in prime condition. I did not see them before they were opened. I always recommend my goods when selling them, as auctioneers generally do."

Elias Rosenberg, fruiterer, London, who attended the sale, deponed,—"When the six or eight cases of apples referred to were opened, Mr White said—'Here is a fine parcel of apples.'"

[1] Hain v. Laing, May 21, 1853, 15 D. 667, 25 Scot. Jur. 405; Macdonald & Fraser v. Henderson, Nov. 3, 1882, 10 R. 95; Byewater v. Richardson, May 24, 1834, 1 Ad. and Ellis, 508.

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cases was to give possible purchasers a convenient opportunity of judging of what was for sale without having to go down to the cellars to inspect the bulk; but they might do that if they pleased. In a popular sense these six cases might be called "samples" of the bulk, but a sale by sample was another matter. It was a sale on the express or implied warranty that the thing sold should correspond to a specimen or part of it exhibited; and such a warranty would not be implied from the mere exhibition of a specimen or part.[1] That was *a fortiori* true in the present case, where printed conditions of sale were exhibited, one of which was inconsistent with a sale by sample. Such a sale not being a written contract, it was not incompetent to prove by parole that the auctioneer had announced his intention to depart from his printed conditions, but the *onus* on anyone alleging such a departure was an exceedingly heavy one.[2] Here there was nothing in the proof to suggest that the pursuers so referred to the six cases as being in a legal sense samples of the rest.

Argued for the defender;—The mere exhibition of printed conditions of sale in an auction-room was not enough to incorporate them into the sales. The auctioneer must read them at the beginning of the auction, or at least refer to them, and he had done neither here. But even if the exhibition of the conditions would *per se* have made them part of the sales, it was otherwise where the auctioneer's conduct was inconsistent with the conditions. *Pro tanto* the conditions were not conditions of the sale. Here the pursuers by exhibiting what were in fact samples of the apples, had shewn that they did not intend to stand on the conditions,—on condition 3 at least.

LORD PRESIDENT.—In this case the pursuers are fruit-brokers in Covent Garden, London, and the defender is a fruit-merchant in Glasgow.

The subject of the contract between the parties was a number of cases of apples, and these were purchased by the defender from the pursuers at a public sale conducted by the pursuers in Covent Garden Market. Printed conditions of sale were posted up on the rostrum in the place of sale, and the third of these conditions ran thus,—"Goods to be delivered to the purchaser as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quality, quantity, or condition, and intending buyers are requested to thoroughly inspect the bulk."

The defender maintains that the sale did not take place under these conditions, but was a sale by sample, and that as the bulk was not conform to the sample, he is entitled to absolvitor. The Sheriff-substitute and the Sheriff have adopted this view, and have accordingly given judgment in favour of the defender, but I am unable to agree with them. It seems to me that this was not a sale by sample in any proper legal construction of the term, but on the contrary was a sale of goods in bulk, and that as regards the quality the purchaser was himself the judge, and must be held to have satisfied himself.

The doctrine of law on the subject is plain enough, and is thus stated by Professor Bell in the 98th section of his Principles, where, when dealing with the subject of implied warranty, he says, "In order to raise the implied warranty by sample, it is not sufficient that a part of the goods shall have been drawn and exhibited, unless it is expressly referred to in the bargain as such, and due precaution taken for identifying the sample." It appears to me that the facts of

[1] Bell's Princ. 98; Benjamin on Sale, 641.
[2] Christie v. Hunter, March 16, 1880, 7 R. 729.

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the case do not bring it within the definition of a sale by sample. I think that no due precaution was taken for identifying the sample, and it also appears that a part of the goods was "not drawn or accepted as a sample." The effect of the third condition, which I have already quoted, was to throw upon the intending buyer the duty of thoroughly inspecting the bulk. I do not think this can be viewed as a sale by sample, unless the pursuers had fraudulently exhibited samples knowing that they did not fairly represent the bulk; but no such case is suggested here. The doctrine has been somewhat silently, if I may say so, developed by Lord Ellenborough in the cases reported in 4 Campbell's Reports,[1] and his observations fully confirm the view of Professor Bell, who refers to these cases, and have been themselves confirmed and set up by subsequent decisions in the English Courts.

I am therefore of opinion that the interlocutor of the Sheriff is wrong, and that the pursuers are entitled to succeed.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT pronounced the following interlocutor:—"Find that the apples in question were purchased by the defender from the pursuers at a public sale conducted by the pursuers in Covent Garden Market; that the conditions of sale were posted up on the rostrum in such a way as to be patent to the defender and other buyers; that by the said conditions it was stipulated that 'the goods were to be delivered to the purchasers as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quantity, quality, or condition, and intending purchasers are requested thoroughly to inspect the bulk'; that samples of the apples in question were exhibited at the sale, but that the conditions of sale contain no reference to samples except such as may be implied in the said stipulation; and that the defender purchased and took delivery of the apples subject to the said conditions: Find in law that the defender is not entitled to reject the goods, and refuse payment of the price, on the ground that the bulk was disconform to the sample: Therefore sustain the appeal: Recall the interlocutor of the Sheriff-substitute dated 4th December 1890, and of the Sheriff dated 12th March 1891: Repel the defences, and ordain the defender to make payment to the pursuers of the sum of £39, 5s. as concluded for: Find the pursuers entitled to expenses," &c.

J. & A. HASTIE, Solicitors—JAMES SKINNER, S.S.C.—Agents.

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Bennett v. Inveresk Paper Co.

SAMUEL BENNETT, Pursuers (Respondents).—*J. C. Thomson—C. J. Guthrie.*

THE INVERESK PAPER COMPANY, Defenders (Reclaimers).—*Jameson—W. C. Smith.*

Foreign—Principal and Agent—Mercantile Agency—Title to sue—Foreign principal.—When a person enters into a contract in his own name for an undisclosed principal, the latter, on disclosing himself as principal, has a title to sue upon the contract, but is subject to all pleas which the defender could have maintained against the agent if the latter had raised the action.

Although there may be a general usage in the foreign trade which raises a

[1] See Meyer v. Everth, 1814, 4 Camp. 22; Gardiner v. Gray, 1815, 4 Camp. 44.

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presumption that a British commission-merchant contracts as a principal and not as agent for a foreign trader, the presumption will give way to evidence that the commission-merchant is acting as agent for a foreign trader, and when this is so, the law of principal and agent will apply.

In an action at the instance of an Australian merchant against manufacturers in this country for breach of contract the defenders pleaded "No title to sue," in respect that the contract was entered into by them with a commission-merchant in London as principal.

Held on a proof that the pursuer had appointed the commission-merchant to be his agent, and that on disclosing himself as principal he had a sufficient title to sue the action.

Per Lord M'Laren,—"When all the parties are in this country, a seller to the agent of an undisclosed principal, when he comes to know the name of the principal, may elect to sue the principal for the price. But if he takes advantage of this right, he is disabled from maintaining any plea that would alter the relations of the principal and the agent to the disadvantage of the principal."

"A corresponding rule exists that a principal, if he has occasion to sue for fulfilment of a contract, may come forward and disclose himself, and may sue the other party in his own name. But he also, if he elects to sue in his own name, will be affected by any counter claims that might have been pleaded against his agent."

"If the seller knew who the principal was from the beginning, the election is held to be made at the time of making the contract, because the seller is bound to elect whom he is to take as his debtor as soon as he comes to know who is the principal to whom the goods are sold."

1st Division. Ld. Wellwood. C.

THE firm of Samuel Bennett, newspaper proprietors in Sydney, New South Wales, raised an action against the Inveresk Paper Company, Musselburgh, for certain claims, damages, and expenses alleged to have been incurred in respect of the defenders' failure to pack sufficiently certain consignments of super-calendered printing paper shipped to the pursuers.

The pursuers averred that the defenders had entered into a contract with the pursuers' agents, Messrs Thomas Poulter & Sons, London, to supply the paper to the pursuers, and to put it free on board ship at London or Liverpool at 20s. 8d. per ream, less five per cent discount. The paper was duly paid for, but on arrival at Sydney was found, owing to bad packing, to be damaged and spoiled.

The defenders in answer averred;—"Explained that the defenders contracted with Messrs Poulter & Sons, who were paper-merchants in London, and knew nothing about the pursuers of this action or that the paper was to be used by the pursuers in Sydney or elsewhere. The defenders' contract was to put the paper f. o. b. at London or Liverpool." The defenders further denied that the paper was insufficiently packed.

They pleaded, *inter alia*;—(2) No title to sue on the contract libelled. (3) The pursuers' averments are irrelevant. (6) The goods having been well and sufficiently packed in terms of the defenders' contract, and, *separatim*, having been accepted by Messrs Poulter & Sons at London, the defenders should be assoilzied.

On 11th December 1890 the Lord Ordinary (Wellwood) before answer allowed the parties a proof of their respective averments "in regard to the constitution and nature of the contract founded on by the pursuers."

It appeared that the pursuers had appointed Poulter & Sons to be their sole agents and representatives in the United Kingdom by letter,* dated 10th December 1885.

* "To Thomas Poulter & Sons, 6 Arthur Street West, London Bridge, E.C.—I herewith appoint you my sole agents and representatives in the United King-

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Evidence was led upon the question whether the defenders were aware that Messrs Poulter & Sons had been acting as agents for the pursuers. The Lord Ordinary was of opinion that it was made out that the defenders, *through* Oldham, their London agent, knew that the paper was ordered for Samuel Bennett, and was to be sent to Sydney. The First Division held that it did not appear from the proof that the pursuers were known to be principals at the time when the first orders were given to the defenders, but it was proved that they came to know it afterwards.

On 30th March 1891 the Lord Ordinary repelled the second and third pleas in law for the defenders, and before further answer on the remaining pleas (upon the merits) allowed parties a proof of their respective averments except in so far as covered by the proof already allowed and led.*

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dom for the term of 5 (five) years from Jany. 1st, 1886, for the purchase and forwarding of all papers, machinery, type, and other merchandise of every description which I may require to be bought or shipped in or through the United Kingdom, and for the transaction of all my business generally, as per instructions which you may receive from me (or my firm) from time to time, at a commission of 1¼ % (one and a quarter per cent), free of all charge, said commission to be charged on the net amount of each invoice, and to be added to same, together with all disbursements. My impression is that the net amount of business will always exceed £40,000 (forty thousand pounds sterling) per annum, but at the same time I cannot guarantee this, and so you are to be at *liberty to* determine this agreement at any time by giving me 6 (six) months' notice of such your wish. It is an understood thing that you will always secure for me the lowest market prices and freights to the best of your ability, and that you will give me credit for all trade and cash discounts and commissions allowed by makers off purchases, and also the primage allowed off freights. In consideration of my appointing you for the term of five years, you agree to send me all makers' and shipbrokers' original documents and receipts, shewing discounts and deductions (if any), and also to keep me well posted up in all business matters coming under your notice, and which may in your opinion be useful to me or necessary for me to know. You will be at liberty to send me forward at any time sample lots (in each case as small as the makers can make to advantage) of anything which in your opinion will be to my advantage to see and try. You will also be at liberty to telegraph to me, at my cost, anything which you consider of necessary importance, at all times taking care not to make use of this permission without due and careful consideration. My bankers in London will have instructions to negotiate all documents which you may present to them on my behalf, and which are accompanied by the usual shipping and insurance documents customarily required by Colonial banks in London. I. BENNETT."

* "OPINION.— . . . The proof allowed was confined to evidence calculated to throw light upon the question of title to sue. I shall have to examine it somewhat in detail hereafter, but at present it is sufficient to state that the following facts are clearly proved or admitted. So far as appears on the face of the letters forming the contract, and the accounts, memoranda, invoices, and receipts, the pursuers' firm is not named, and the contract was entered into and payments were made thereunder by Poulter & Sons in their own name. On the other hand, it is proved that in the transaction Poulter & Sons acted merely as agents for the pursuers, under a letter of appointment, dated 10th December 1885. By that letter Samuel Bennett appointed Poulter & Sons to be his sole agents and representatives in the United Kingdom, for the term of five years, for the purchase and forwarding of all papers, machinery, type, and other merchandise, which he might require to be bought or shipped in the United Kingdom. Poulter & Sons were taken bound to secure the lowest market prices and freights, and to give Bennett credit for all trade and cash discounts and commissions allowed by makers off purchases, and also the primage allowed off freights.

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The defenders reclaimed, and argued;—By the law of England in contracts between a seller in England and a foreign undisclosed principal, who

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On the other hand, they were to receive a commission of 1½ per cent free of all charge, said commission to be charged on the net amount of each invoice and to be added to same, together with all disbursements; and Bennett undertook to instruct his bankers in London to negotiate all documents which his agents might present to them on his behalf, accompanied by the usual shipping and insurance documents customarily required by Colonial banks in London.

"If these were the whole of the material facts in the case, it would simply be one in which an agent contracts in his own name on behalf of an undisclosed principal, the principal being resident abroad.

"I. I shall first consider how the pursuers' title to sue would stand on that footing according to the law of Scotland.

"If all the parties had been resident in this country the law would have stood thus,—The pursuers, the undisclosed principals, would have been entitled to sue the defenders on their (the pursuers'), agents' contract, the defenders, however, being entitled to maintain in defence any pleas which they could competently have stated had the action been raised by the agent. On the other hand, the defenders, if they had had occasion to do so, as for instance on the bankruptcy of the pursuers' agent, might have sued the pursuers on the contract when disclosed, although when they entered into it they only knew of and gave credit to the agent. In such a case the agent binds himself, but does not free his principal. This shews that in some cases both principal and agent may be bound (subject always to the other contracting party electing which of the two he will sue to judgment), notwithstanding that there is not, and cannot be, what is called 'privity of contract' between the principal while undisclosed and the other contracting party when the contract is entered into. It also supports the view of those jurists who hold that the question of liability or title to sue on a contract cannot always be solved by considering to whom credit was given; but that it depends, at least in some cases, on the scope of the mandate.

"The defenders, however, maintain that the pursuers are not entitled to sue on the contract, because they are resident abroad. They maintain that this being so, Poulter & Sons had no authority to bind the credit of the pursuers, and that there was no privity of contract between the latter and the defenders.

"In considering this defence, it is material to see precisely what the question is and how it arises. The question simply is, whether the defenders are to be sued by the pursuers, or by their agents Poulter & Sons—the defences on the merits being precisely the same in either case. There is no question here as to the liability of the agents. The defenders have been paid the price of the paper, and have therefore no interest to hold Poulter & Sons liable. Again, they are being sued in the Courts of their own country, and the pursuers have been obliged to sist a mandatary. The defenders, therefore, have no interest on that ground to object to the pursuers' title. Lastly, it is not disputed that, if the true view of the evidence is that Poulter & Sons were acting for an undisclosed principal, the defenders will be entitled to all the defences which they could have used if Poulter & Sons had been pursuers of the action. They will, in any view, be entitled to maintain any defences which arise on the terms of their contract, such as that their responsibility ceased on their delivering the goods f.o.b. in London. It will thus be seen that the question is purely technical, viz., Whether the pursuers, for whom the contract was made, or their agents in whose names it was made, should stand pursuers in the action?

"It is true that certain modifications have been recognised in the law of Scotland of the rules which regulate the rights and liabilities of principal and agent to and against third parties in cases where the principal is resident abroad. But I think the import of the authorities, and especially of the opinions of the Judges in the leading case of *Millar* v. *Mitchell*, 22 D. 833, amounts only to this, that the fact that the principal is a foreigner is an element the weight to be given to which depends upon the circumstances of each case and the way in which the

had bought through the medium of a commission-agent in England, there was a general rule or strong presumption in fact and law that the latter question arises. There is no presumption of law by the law of Scotland that the home agent has no authority to bind, and does not bind his foreign principal. The majority of the consulted Judges in that case affirm the proposition that 'the natural rule in a contract of sale seems to be that the person whose goods are sold, and who is in the end to receive the price, shall be esteemed the seller; and that he by whose desire, and for whose benefit the goods are purchased, shall be esteemed the buyer, though both parties transact through agents.'

"After specifying certain exceptions, they decline to recognise as an additional exception the case where the disclosed principal is abroad. They say,—'It thus appears that the presumption arising from the fact of the principal being a foreigner is nothing more than a presumption of fact. It is a presumption which will constantly vary with the varying circumstances of each particular case. . . . The presumptions in all such cases, weaker or stronger, as the circumstances may be, are all mere presumptions of fact; and presumptions of fact are nothing else than pieces of evidence. The legal relations between the parties and the *onus* of proof remain in all cases the same. There is no presumption of law against the agent of a foreign principal more than against the agent of any other party.'—Opinion of consulted Judges, 22 D. 845.

"The reported cases in Scotland, including *Millar* v. *Mitchell*, in which the question has arisen, have been cases in which an attempt has been made to fix the home agent with personal liability. They were cases in which the agent contracted *factorio nomine* for a disclosed principal, and therefore would not have been personally liable if the principal had not been a foreigner. But the question has been treated as one of degree; and even in such cases it has been held that less weight is to be given to the fact where the agent is a selling and not a purchasing agent.

"Where, however, an agent contracts in his own name for an undisclosed principal it seems to me that there is no reason why the rights and liabilities of parties should not be the same whether the principal is a foreigner or not. In either case the party contracting with the agent is entitled to elect to sue the agent if he finds it for his advantage to do so.

"Again, if the undisclosed principal comes forward and sues on the contract the other party can plead any equitable defence which he could have maintained against the agent. Where there is no question as to the agent's liability, and where, as here, the one contracting party has been paid in full and no prejudice is averred, I see no room for any modification of the common law right of the principal, when disclosed, to sue on the contract made for him by his agent. As in a question between the pursuers and Poulter & Sons, there is no doubt that the latter were simply agents, and being so were bound to cede to their principals, without the necessity of a formal assignation, all contracts made on their behalf. This follows from the principles of the law of mandate which have been adopted in our law. Therefore, taking the simplest view of the pursuers' rights, they are entitled at least to the privileges of assignees, the defenders, on the other hand, being entitled, if they contracted with Poulter & Sons in ignorance of their true position, to state any equitable defences which they might have pleaded against the latter.

"It was strongly contended by the defenders that there is conclusive authority in the law of England to the effect that a foreign principal is not entitled to sue. For instance, in the fifth edition of Pollock's Principles of Contract (1889), p. 97, the import of recent decisions is stated thus:—'When the agent is dealing in goods for a merchant resident abroad it is held, on the ground of mercantile usage and convenience, that without evidence of express authority to that effect the commission-agent cannot pledge his foreign constituent's credit, and therefore contracts in person.' Again in the fourth edition of Benjamin on Sale (1888), p. 206, the import of the cases is stated by the editors to the same effect, and they add:—'This apparent exception to the rule arises from the peculiar character of the relationship existing between the commission-agent

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acted as an independent contracting party in the transaction. The great inconvenience which would result if there was privity of contract estab-

and his foreign constituent, a relationship which for some purposes is treated as one, or analogous to one, of vendor and vendee.'

"Now, in the first place, the law thus stated was not recognised by the Court in the case of *Millar* v. *Mitchell*, although they had fully before them all the English authorities at that date (1860) as to the presumption alleged to be drawn from custom or the usages of trade. On this point Lord Curriehill says (p. 850),—'Nor is it proved that the doctrine has been founded on the usage of Scotland. If there were such usage it would have manifested itself by a clear test, inasmuch as the commission on such agency business, when the agents guaranteed the fulfilment of the contracts, would of course be increased in proportion to the increase of the risk, for the same reason that a *del credere* commission is payable when an agent guarantees to his constituent the performance of the factorial contracts by the other contracting party. But it is not proved, nor even alleged, that there is such usage in Scotland.

"'Nor does it appear from the authorities in the law of England, if I rightly understand them, that there is now any such exception in that country to this general rule of the law of principal and agent.'

"I do not find either in that case, or in later Scotch cases, any countenance given to the view that for such purposes the home commission-agent stands in the position of vendor to his foreign principal. That question was incidentally referred to in the recent case of *Delaurier* v. *Wylie*, 17 R. 167, November 30, 1889. I refer particularly to Lord Kyllachy's opinion on p. 191. I agree in the views which he there expresses on that subject, although I differed from him in the result on the question (as to the cargo of iron) with which he is there dealing.

"But further, I find that the cases which are quoted as the authorities for those statements of the law, or at least as settling the law, are all of recent date, the judgment of the Court being pronounced in at least three cases by the same eminent Judge, Justice, afterwards Lord, Blackburn. The cases in question are as follows:—*Armstrong* v. *Stokes*, 1872, L. R., 7 Q. B. 598, 605, 41 L. J. Q. B. 253; *Elbinger Actien-Gesellschaft* v. *Claye*, 1873, L. R., 8 Q. B. 313; *Hutton* v. *Bullock*, 1873, *ib.* 331, affirmed 9 Q. B. 572; *New Zealand Land Company* v. *Watson*, 1881, 7 Q. B. D. 374, 50 L. J. Q. B. 433.

"I have not been referred to any case in which the House of Lords has endorsed the law thus broadly laid down; and there are indications in later cases and in text books on the law of principal and agent, that even in England that statement of the law is not universally accepted. For instance in Evans on Principal and Agent, 2d edition (1888), p. 524, the author says,—'Where the principal is a foreigner resident abroad there is no practical difference in the legal principles applicable. At one time it was contended that not only is the agent the person who is primarily liable, but that he is in general the only person liable. The true rule seems to be that although the agent does not *prima facie* pledge the principal's credit, evidence may be given to rebut this presumption.'

"Whatever may be the law of England on the subject, the case of *Millar* v. *Mitchell* has not been overruled, and is conclusive in this Court if it applies. While it decides that there may be cases in which to prevent prejudice to the home seller there will be held to be a presumption of fact that when the principal is a foreigner the agent pledges his own credit, it does not decide that there is any presumption against the foreign principal's right to sue on the contract when no prejudice is averred. In such a case the presumption, which is founded on equitable considerations, reaches a vanishing point, and no *onus* remains on the principal to establish his title to sue beyond proving the fact of agency.

"It may be that a change has taken place in the law of England since 1860, and it may be that the time has come for declaring and establishing in the law of Scotland that, on grounds of mercantile convenience and the usages of trade,

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lished between the undisclosed foreign constituent of a commission-agent and the home supplier of the goods had led in England to a course of business by which it was understood as settled that the commission-agent could not pledge his foreign constituent's credit to a third party.[1] There was no reason why the same principles of mercantile usage should not apply in Scotland. Indeed, Mr Guthrie in his edition of Bell's Principles[2] had incorporated the English law on the subject into the text. The case of *Millar* v. *Mitchell* cited by the Lord Ordinary[3] was inapplicable. In it the agent had contracted *factorio nomine*, and his principal had been disclosed from the beginning of the transaction, and the whole course of dealing of the parties went to shew that they had not contracted with the agent at all. In the present case the contract was with Poulter & Sons alone, and it was not proved that the defenders knew that Poulter & Sons were acting as the pursuers' agents. It was straining the construction of the letter of 10th December 1885 to describe it as a letter appointing Poulter & Sons as agents for the pursuers. That letter contained no authority to pledge the pursuers' credit, and the stipulation that credit was to be given for trade discounts was only intelligible in the view of Poulter & Sons making a contract as principal in this country. In these circumstances the pursuers had no title to sue the action.

Argued for the pursuers;—The law of Scotland upon the subject was not doubtful where the parties resided within the jurisdiction. The seller to the agent of an undisclosed principal might elect to sue the principal for the price of goods supplied as soon as the principal was disclosed to him. On the other hand, an undisclosed principal, where he had occasion

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there is a general legal presumption that a foreign principal has no title to sue on his agent's contract. But if this be so the alteration in the law must be established by decision of the whole Court or of the House of Lords.

"II. Even if *prima facie* the pursuers have no title to sue, I think there is sufficient evidence to overcome any presumption there may be against their title. I cannot within the limits of my opinion analyse the correspondence in detail, and I shall therefore merely select certain parts of it to illustrate the view which I take.

"[His Lordship then proceeded to review the correspondence, and concluded thus:]—On a consideration of the whole of the correspondence, to which I attach much more importance than to the parole evidence on either side, I think it is made out that the defenders, through Oldham, knew that the paper was ordered for Samuel Bennett, and was to be sent to Sydney; and further, that when the claims for damages emerged they shewed that they did not regard Poulter & Sons as the only parties with whom they had to deal, but, on the contrary, that they knew and admitted that the pursuers were the parties whom they had to satisfy as to the packing of the paper.

"In those circumstances, I think that the objection to title must be repelled, and a proof allowed."

[1] Armstrong v. Stokes and Others, 1872, L. R., 7 Q. B. 598, per Lord Blackburn, p. 605; Elbinger Actien-Gesellschaft v. Claye, 1873, L. R., 8 Q. B. 313, per Lord Blackburn, pp. 317 and 318; New Zealand and Australian Land Co. v. Watson, 1881, 7 Q. B. D. 374, L. J., 50 Q. B. 433; Paterson v. Gandasequi, 1812, 15 East, 62, 2 Smith's Leading Cases, 378; Addison v. Gandasequi, 1812, 4 Taunton, 574, 2 Smith's Leading Cases, 387; Hutton and Another v. Bullock and Others, 1873, 8 Q. B. 331, affd. June 13, 1874, 9 Q. B. 572; Kaltenbach v. Lewis, 1883, 24 Ch. Div. 54; Ireland v. Livingston, 1872, 5 Eng. and Ir. App. 395, per Lord Blackburn, p. 408; *Ex parte* Miles *in re* Isaacs, 1885, 15 Q. B. Div. 39, per Brett, M. R., 42; Benjamin on Sale (4th edn. 1888), p. 206; Pollock's Principles of Contract (1889), p. 97.

[2] Bell's Prins., 9th edn., p. 219.

[3] Millar v. Mitchell, &c., Feb. 17, 1860, 22 D. 833, 32 Scot. Jur. 346.

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to sue for fulfilment of a contract made by his agent, might disclose himself and sue in his own name; but he would be affected by any counter claims which might have been pleaded by the seller against his agent.[1] There was no warrant to be found either in our law or in the *dicta* of the English Judges in the cases cited by the defenders to justify the proposition that there was a difference in the law applicable to the relation of principal and agent depending upon whether the transaction was one in the home or in the foreign trade. The cases of *Paterson* and *Addison*[2] had reference merely to the application of the principle that a seller is bound to elect whom he intends to take as his debtor as soon as he comes to know who is the principal to whom the goods were sold. In *Elbinger's*[3] case the principal had been disclosed from the first, and there was room for saying that the election had been made and the principal rejected. The *dicta* of Lord Blackburn in such cases as *Armstrong* and *Ireland*[4] only went to this, that in the law of England there was a presumption of fact, founded on mercantile convenience, that in the absence of evidence to the contrary the commission-agent contracted as an independent party and not as agent of the foreign trader. But here, assuming the existence of such a presumption in Scotland, the letter of 10th December 1885 shewed beyond all doubt that Poulter & Son's relation to the pursuers was in the strictest sense that of an agent to a principal. The pursuers were then entitled to disclose themselves and to sue the defenders for breach of their contract.

At advising,—

Lord M'Laren.—This is an action at the instance of a commercial firm trading under the name of Bennett, whose domicile is in Sydney, and who sue the Inveresk Paper Company on a contract arising out of an order by Bennett for a large quantity—I think 3600 reams—of printing paper. This order was given to or through their correspondents in London, Messrs Poulter & Sons. Messrs Bennett sue the Inveresk Paper Company for breach of contract, in respect that the paper when it arrived in Australia was found to be damaged, as they allege, through insufficient packing. One of the defences to the action is that the pursuers have no title to sue; and this defence is founded on a legal proposition which I think may be expressed in this way—that in all transactions between a seller in the home country and a foreign purchaser effected through a middleman, it is a presumption of law that the middleman contracts as an independent contracting party with the seller and the ultimate purchaser respectively; that as matter of law the intermediary is not and cannot be the agent of either party; or, as it is otherwise put, that in the foreign trade there is and can be no privity of contract between the seller and the buyer, unless they are in direct communication.

The Lord Ordinary on considering this plea thought it expedient that the facts relating to the sale and purchase of the paper in question should be investigated with a view to the determination of the question of title, and by interlocutor of 11th December 1890 his Lordship allowed a proof. The interlocutor reclaimed against, dated 30th March 1891, proceeds upon a consideration

[1] 1 Bell's Com., pp. 526, 527, 528, and 540; Millar v. Mitchell, &c., *vide supra*, p. 981, note 3; Delaurier v. Wylie, Nov. 30, 1889, 17 R. 167, per Lord Kyllachy, p. 191; Athya v. Buchanan, Oct. 22, 1872, 45 Scot. Jur. 16.

[2] *Supra*, p. 981, note 1.

[3] *Supra*, p. 981, note 1.

[4] *Supra*, p. 981, note 1.

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of the proof taken under that order, and in it his Lordship repels the second and third pleas in law for the defenders, being the pleas to the title, and before answer allows the parties a proof of their respective averments on the merits of the cause.

Before considering whether there be such a rule of law regarding foreign transactions as the defenders maintain, it may be convenient in a few sentences to review the general rules of the law of principal and agent in relation to questions of title to sue and liability to be sued. Supposing the parties were within the jurisdiction, I apprehend there can be no doubt that a seller to the agent of an undisclosed principal, when he comes to know the name of the principal, may elect to sue the principal for the price. But, if he takes advantage of this right, he is disabled from maintaining any plea that would alter the relations of the principal and the agent to the disadvantage of the principal. That qualification of the right of election is recognised in one of the leading cases on the subject, *Thomson* v. *Davenport*. I may here quote what Lord Tenterden says on the subject, as reported in Smith's Leading Cases, vol. ii., p. 402,—"I take it to be a general rule that if a person sells goods (supposing at the time of the contract he is dealing with the principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but the agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal."

A corresponding rule exists that a principal, if he has occasion to sue for fulfilment of a contract, may come forward and disclose himself, and may sue the other party in his own name. But he also, if he elects to sue in his own name, will be affected by any counter claims that might have been pleaded against his agent. This qualification of the principal's right of action is very distinctly stated in Bell's Commentaries in a passage which was read in the course of the argument.

Now, the rule in question applies to cases where the principal at the time of the purchase is undisclosed; and it is plain enough in principle that, if the seller knew who the principal was from the beginning, the election is held to be made at the time of making the contract, because the seller is bound to elect whom he is to take as his debtor, as soon as he comes to know who is the principal to whom the goods are sold. That, I apprehend, was the chief point under consideration in the leading English cases of *Paterson* v. *Gandasequi* and *Addison* v. *Gandasequi*, also reported in Smith's Leading Cases. These cases were both concerning the same purchaser, and the claims arose out of the bankruptcy of his agent. Gandasequi was a foreign merchant who had come over to England to make purchases. Gandasequi accompanied his agent or commission-merchant to the wholesale houses in London, and assisted him in the selection of the goods. In the case of *Paterson*, the presiding Judge, on proof of the fact that Gandasequi was present at the time of the purchase and was made known to the seller, directed a non-suit, but on a motion for a new trial Lord Ellenborough (the presiding Judge) agreed with his colleagues that a new trial should be granted on the ground that it ought to have been left to the jury to determine on the evidence whether the London merchant had elected to take Gandasequi, or his agent in London, as the proper debtor in the account. In the other case, *Addison* v. *Gandasequi*, there was no doubt as to

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how the right of election was exercised, because Gandasequi's agent had been debited in the books of the seller from the beginning. The jury by their verdict affirmed that the agent was taken by Addison as his debtor, and the verdict was upheld. But, as I gather from the opinions of the learned Judges, these cases were not at all decided upon any theory that there is a difference in the law applicable to the relation of principal and agent, depending on whether the transaction is one in the home or in the foreign trade. In *Paterson's* case Lord Ellenborough, in stating the point, says,—"The question is, whether all this was done with a knowledge of the defendant being the principal. The law has been settled by a variety of cases that an unknown principal, when discovered, is liable on contracts which his agent makes for him, but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal and had elected to take Larrazabal & Company as their debtors, or I should not have non-suited the plaintiffs; but as there may perhaps be a doubt on the evidence whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it reconsidered."

Lord Ellenborough there states the law in relation to this, which was a foreign contract, in terms which are substantially identical with what has been laid down in the Courts of England and Scotland with reference to transactions in which all the parties—buyer, seller and agent—were domiciled in Great Britain. Therefore it cannot be inferred from the report that it was the intention of the Court of King's Bench to proceed there upon any ground peculiar to foreign contracts. It seems to me that the point of this case was, that the principal was from the beginning known to the seller to be the principal, and therefore that his election had to be made, or might be made, at the time of the sale.

But it is contended against the interlocutor that by more modern decisions a rule of law has been established, that in all foreign transactions the broker or commission-merchant is deemed to be an independent contracting party and not an agent; and reliance is placed on certain judicial observations—especially those of Lord Blackburn—in the series of cases that were cited. The most distinct and probably the most authoritative statement of Lord Blackburn's opinion on this question is contained in the report of the case of *Ireland* v. *Livingston* (1872), 5 English and Irish Appeal Cases, p. 408, where his Lordship suggests that some of his colleagues had fallen into error from not having adverted to the usage of the foreign trade, and he says,—"It is quite true that the agent, who, in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission-merchant sell them to him and not to his unknown foreign correspondent, and the commission-merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between persons supplying the goods to the commission-agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house and the owner of that house." Now, I can only read this passage, and those of a like nature which have been cited, as a statement by Lord Blackburn of what is known to be a general usage (not necessarily universal) in the foreign trade. For reasons of convenience, it is found better that the commission-merchant should, in such cases, contract as purchaser on his own account, and should resell to his correspondent abroad. The inconvenience resulting from entering into such transac-

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tions on the footing of agency is such that a practice has grown up under which the commission-merchant acts as an independent contracting party towards those from whom he buys, and to whom he sells. But Lord Blackburn never said, and I do not think he intended to say, that, if a foreign or colonial house chooses to appoint an agent in London for the management of its business, including the sale of its goods or the purchase of goods on its account, the law will not give effect to such an arrangement. To say so would be to place a restriction on the freedom of contract, which could not emanate from any authority other than the Legislature, and which is certainly not warranted by any legal principle that I have been able to discover in the judicial opinions to which I am referring. But I think perhaps this also may be inferred from Lord Blackburn's opinion, that, in the absence of evidence to the contrary, it is a reasonable presumption of fact that the commission-merchant contracts as an independent party and not as agent for the foreign trader. In the absence of evidence, so much would be presumed: though we know that in other cases this very question has been made matter of inquiry by a Court or jury. Accordingly, if there had been no documentary evidence in this case defining the position of the London house, I should have agreed with the Lord Ordinary in thinking that it was a proper subject for inquiry by proof whether the London house acted as Messrs Bennett's agents or as merchants. But it appears to me that this matter is really not open to dispute, because if we refer to the letter constituting Messrs Poulter the agents of Bennett I think its terms are very clear. They admit of no other construction than that Poulter's relation to Bennett was, in the strictest sense, that of an agent to a principal. The letter begins,—"I herewith appoint you my sole agents and representatives in the United Kingdom for the term of five years from January 1st, 1886, for the purchase and forwarding of all papers," &c., "and for the transaction of all my business generally, as per instructions." Then it proceeds to set out that the Poulters are to be paid a commission of 1¼ per cent; the probable amount of business is stated; and it is left open to either party to terminate the agreement by giving six months' notice. Then there are provisions under which the Poulters are to give credit for all trade and cash discounts, and, in order that the Bennetts may see that their agents are acting fairly towards them, they are to be bound to send "all makers' and shipbrokers' original documents and receipts." I do not think it can be disputed that, as matter of construction, this is an appointment of Messrs Poulter as agents for the Australian house, and that all orders given in execution of the mandate given by this letter, followed by this special instruction, are to be regarded as orders given by Messrs Bennett through their agents.

In these circumstances it appears to me that this must be treated as an exception to what we are told on high authority is the general usage of the foreign trade. Parties may make their own contracts and are not bound to conform to usage, and as in this case Messrs Bennett have chosen to act through agents in London, the relations of these agents with the manufacturers from whom the paper was purchased must be subject to the known and settled laws of principal and agent. For these reasons I am of opinion that Messrs Bennett are entitled to declare themselves, and to sue the Inveresk Paper Company for fulfilment of their contract. It does not appear from the proof that they were known to be principals at the time when the first orders were given, but they certainly came to be known afterwards. That is a circumstance more material to the election of the vendor when the option lies with him as to which party

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he will sue, and would not, in my judgment, amount to a limitation on the right of the purchaser, when he thinks proper, to declare himself, and to sue in his own name. As he will be affected by any counter claims or pleas pleadable against his agents, no possible injustice can be done to the Inveresk Paper Company. The objection is a purely technical one, and I am of opinion that it is not well founded in law.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

THE COURT adhered.

MACANDREW, WRIGHT, & MURRAY, W.S.—MENZIES, BLACK, & MENZIES, W.S.—Agents.

No. 192.
June 23, 1891.
Dowie & Co. v. Tennant.

PETER DOWIE & COMPANY, Pursuers (Respondents).—*Johnston—Sym.*
ROBERT GRAY TENNANT, Defender (Reclaimer).—*M'Kechnie—Constable.*

Jurisdiction—Ownership of heritage in Scotland—Sale—Posting of conveyance.—In a petitory action in the Court of Session against a domiciled American, whom the pursuers averred to be the proprietor of heritage in Scotland, the defender pleaded no jurisdiction, averring that although he had been at one time the proprietor of such heritage he had sold it before the raising of the action. It appeared that in October 1889 the defender became proprietor of certain heritable subjects in Scotland; that by improbative missives, dated November and December 1890, he sold these subjects; that on 9th January 1891 he executed and on 12th January dispatched by post from America a conveyance of the subjects in favour of the purchaser; and that this conveyance did not reach the purchaser till after the service of the summons, which took place on 21st January. *Held* that as the transference of the subjects had not been completed until after the service of the summons the plea of no jurisdiction fell to be repelled.

1ST DIVISION. Ld. Kyllachy. C.

ON 21st January 1891 Peter Dowie & Company, merchants, Leith, served a summons for payment of £150 upon Robert Gray Tennant, commission-merchant, Chicago, United States of America.

The defender pleaded;—(1) No jurisdiction.

The pursuers admitted that the defender, who was by origin a Scotsman, was at the date of the action domiciled in America, and the ground of jurisdiction averred by them was that he was proprietor of certain heritable subjects in Leith, to which he had succeeded in 1889.

The defender admitted that he had in October 1890 made up a title, by service as heir-at-law of his mother, to the heritable subjects in question, but he alleged that at the date of the action he had sold these subjects to a Captain John Parker; and he produced missives of sale between himself and Parker dated November and December 1890. These missives were improbative, in respect that one of the letters constituting Parker's acceptance was not holograph of or subscribed by him, but was subscribed by Agnes Parker, "for John Parker." The defender also stated (and the pursuers did not dispute) that he had, on 9th January 1891, executed a disposition of the subjects in favour of Parker. This disposition was posted in Chicago on 12th January to Dowie & Scott, S.S.C., Leith, who were acting for both seller and purchaser, but was not received by them until 23d January—two days after the service of the summons. Parker ultimately completed the purchase, and entered into possession of the subjects.

On 29th May 1891 the Lord Ordinary (Kyllachy) repelled the plea of no jurisdiction, and granted leave to reclaim.*

* "OPINION.—In this case I have come to be satisfied that the plea of no jurisdiction must be repelled.

"The question is, whether a defender, feudally vested in heritable property

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The defender reclaimed, and argued;—(1) If the missives had been probative, jurisdiction would not have been established against the defender, because by the contract to convey the right of the seller became a mere right to the price. The property could not have been attached by inhibition against the seller.[1] The Court would not arrogate to itself jurisdiction on this ground unless there was property attachable by inhibition, the foundation of the doctrine being that there was property which would be available to make the decree effectual.[2] Where there was a binding contract of sale, it would found jurisdiction against the purchaser, —bare apparency had been found sufficient,[3]—and there could not be jurisdiction both against the seller and the purchaser in respect of the same subject. Assuming, however, the informality of the missives, that did not affect the essence of the contract,[4] the right to take advantage of such an informality being personal to the party. (2) Apart from the missives there was the conveyance, which must be held to have been delivered before the raising of the action, having been posted on the 12th January.

The respondents were not called on.

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in Scotland, ceases to be subject to the jurisdiction upon the execution of missives of sale not probative and not followed by *rei interventus*, but followed by the execution, but not delivery, of a disposition in favour of the purchaser?

"I am not able to answer this question in the affirmative. I consider that to do so would be to affirm that if this action had been directed against the purchaser he would have been subject to the jurisdiction of the Scotch Courts simply in respect of his purchase. Now, although the decisions have gone a considerable way in sustaining the jurisdiction wherever there is substantial ownership of heritable estate in Scotland, no case was cited to me where such substantial ownership has been held constituted by mere purchase not followed by actual conveyance. Certainly no case has occurred in which the Court has recognised improbative missives, not followed by *rei interventus*, or a delivered disposition, as operating a transfer of property for the purposes of jurisdiction.

"I recognise in the case of a completed sale the force of Mr Constable's able argument, founded on the impossibility of inhibition after such completed contract of sale, and, on the other hand, on the possibility after such sale of an adjudication and implement. I quite recognise the force of that argument, and I by no means express an opinion adverse to it. All I say is that there is no decision which has as yet gone so far. But here I do not consider that the question suggested properly arises at all. This is not a case of a concluded and binding contract of sale. The missives are admittedly improbative. There was therefore *locus pœnitentiæ* until the disposition was executed and delivered, and there being *locus pœnitentiæ*, the result of course was that neither party was bound by the documents which had passed.

"It is said that the disposition having been executed by the defender and posted before the raising of the action, addressed to the joint agent of himself and the purchaser, that constituted delivery of the disposition, and amounted to divestiture. But I am unable to hold that, at all events until the deed reached the hands of the agent, it was beyond the power of the defender. He might, for example, I cannot doubt, have countermanded by telegram the completion of the transaction. That being so, the case is just where I put it as a case of an unconcluded contract of sale not binding upon the parties, and therefore not sufficient to operate in any sense a transfer of property. . . ."

[1] Livingstone v. Macfarlane, July 27, 1842, 5 D. 1, 15 Scot. Jur. 101.

[2] Ferrie v. Woodward, June 13, 1831, 9 S. 854; M'Arthur v. M'Arthur, Jan. 12, 1842, 4 D. 354, 14 Scot. Jur. 129; Fraser v. Fraser and Hibbert, Jan. 14, 1870, 8 Macph. 400, 42 Scot. Jur. 190; Bowman v. Wright, Jan. 24, 1877, 4 R. 322.

[3] M'Arthur v. M'Arthur, *supra*.

[4] Walker v. Flint, Feb. 20, 1863, 1 Macph. 417, 35 Scot. Jur. 253; Elmslie v. Duff, June 2, 1865, 3 Macph. 854, 37 Scot. Jur. 457.

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LORD PRESIDENT.—It appears that the defender was by origin a Scotsman but is now a domiciled American. After he became so domiciled he succeeded to certain heritable property in Scotland, to which he made up a title by service as heir to his mother. If he still holds that heritable property the question of jurisdiction is at an end, because he is then proprietor of heritage in this country, and is accordingly subject to the jurisdiction of this Court. But it is alleged by the defender that he immediately proceeded to sell the subjects to which he had succeeded, and certain missives are referred to to shew that the sale was completed in December 1890. But these missives are obviously improbative, and there is no allegation of anything of the nature of *rei interventus* having followed on them. They must therefore be thrown out of consideration. The defender, however, further alleges that the property passed from him to a person in Leith by force of the delivery of a disposition of the heritable subjects. The state of the facts on that matter seems to be this: A disposition of the subjects was sent to Chicago, where it was signed by the seller, and dispatched with the view of being delivered to and accepted by the purchaser in Leith, but when this action was raised it had not reached the purchaser, and there is nothing to shew that even if it had reached his hands he would have accepted delivery, and if he had refused to accept delivery the defender would have had nothing to fall back upon but the improbative documents to which I have referred. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ADAM.—The summons in this case was served upon 21st January 1891, and the question raised is, whether in point of fact the defender was at that date proprietor of heritable property in Scotland. That he had been so at one time is not disputed, but it is said that he had ceased to be so by virtue of certain missives of sale passing between him and the alleged purchaser in November and December 1890, followed by the preparation of a disposition which was sent out to America, where it was signed by him and despatched to his agents in this country, which, however, it did not reach until 23d January—two days after service of the summons. The question is, whether in that state of the facts the defender was still proprietor of heritable estate in Scotland at that date. I agree with your Lordship that the missives founded upon were entirely improbative, and I do not think they constituted any contract. No doubt they were followed by a disposition signed by the seller, but then it was never delivered, and until actually delivered into the hands of the purchaser it could have been recalled by the seller by telegram. Further, there was no obligation upon the grantee to take delivery unless he chose. I therefore entirely concur with your Lordship and with the Lord Ordinary.

LORD M'LAREN.—The question of jurisdiction depends upon the opinion we may form as to whether the defender continued to be a proprietor of heritage in Scotland, notwithstanding the missives of sale referred to followed by the disposition executed and posted, but which had not reached the grantee when the summons was served. I agree in thinking that the missives were informal and improbative, being neither holograph nor tested, and that they could not divest the defender of the property of the heritable subjects in question. The question of the posting of the disposition is a more delicate one. In all cases where something has to be delivered by one person to another in order to effect an alteration of legal rights, there is involved the consent of both parties as well as the

outward act which is symbolical of the transference. Thus, where heritable property is to be itself delivered, as it may still be (infeftment by registration of the disposition being only optional), it is necessary not only that the seller or his bailie should offer the symbols of earth and stone, but also that the purchaser or his procurator should accept delivery. It would not do for the seller's bailie merely to heave a clod at the purchaser's agent. The same principle applies in the case of the delivery of deeds. No doubt after posting the post-office is in most cases considered to hold for the grantee, yet until the grantee has accepted there is no transference of the property.

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LORD KINNEAR concurred.

THE COURT adhered.

JOHN LATTA, S.S.C.—ANDREW WALLACE, Solicitor—Agents.

No. 193.
June 26, 1891.
Millar's Trustees v. Rattray.

JAMES BURNESS AND ANOTHER (Mrs Millar's Trustees), First Parties.—*G. R. Gillespie.*
MRS JANE MILLAR OR RATTRAY AND OTHERS, Second Parties.—*M'Kechnie—Graham Stewart.*
ELIZABETH RATTRAY AND OTHERS, Third Parties.—*G. R. Gillespie.*

Succession—Testament—Construction—Legacy to children described as of a certain number—Postnati.—A testatrix directed her trustees to divide the free residue of her estate "equally among the children of my late brother A, of whom there are nine, the children of my brother B, of whom there are ten, and the children of my brother C, of whom there are seven, who may survive me."

At the date of the will B had ten children. Before the death of the testatrix three other children were born to him. All B's children survived the testatrix.

Held that all the children of B were entitled to share in the residue.

1ST DIVISION. C.

MRS MARY RATTRAY OR MILLAR died on 16th May 1889, leaving a trust-disposition and settlement, dated 29th December 1880, by the twelfth purpose of which she directed her trustees to realise and convert her whole estate into money, and to "divide the free residue equally among the children of my late brother Andrew Rattray, whose widow continues his farm at Portersize, County Kildare, Ireland, of whom there are nine; the children of my said brother John Rattray, of whom there are ten; and the children of my said brother James Rattray, of whom there are seven, who may survive me; and in the event of any of them dying leaving issue, such issue shall be entitled, equally among them, to the share which their parent would have received if alive; and in the event of any of the said children dying before payment without leaving issue, the division shall be made, as if they had not been born, among the survivors jointly with the issue of any who may have died leaving children, such issue always succeeding equally to the share which their parent would have received if alive, the original division to be in as many equal shares as there are children alive, or dead but leaving husband or wife or family, such husband or wife likewise representing the deceased member, either in their own right or for their children, and counting as one in the division: With power to my trustees to make such advances as they may deem suitable before the period of distribution (being the complete realisation and scheme of division of my whole estate, which shall be the period of vesting when not otherwise provided) to any of the said children, or to their father or mother respectively for behoof of all the members of a family jointly, if not stated in the receipt to be for anyone in particular, such advances to bear interest at the rate of five per cent per annum, so

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as to make all equal; but such advances to anyone who may die without leaving husband, wife, or family shall be held as vested at the time of payment and be regarded as special legacies."

At the date of the trust-disposition John Rattray, the brother of the testatrix mentioned above, had ten children in existence. Three other children—William, Jane Ann, and Richard—were subsequently born to him before the death of the testatrix, and these thirteen children of John Rattray all survived her.

After her death a special case was presented for the determination of the question,—"Are the said William Rattray, Jane Ann Rattray, and Richard Rattray entitled to participate in the division of residue?"

The trustees were the first parties; the second parties were the children of Andrew Rattray and James Rattray (brothers of the testatrix) or their representatives; and the third parties were the thirteen children of John Rattray (the remaining brother of the testatrix), together with their father, as tutor or curator for such of them as were pupils or minors.

The second parties maintained that William, Jane Ann, and Richard Rattray were not entitled to participate in the division of the residue; the third parties maintained that they were.

Argued for the second parties;—The gift to the children of John Rattray "of whom there are ten" was equivalent to a gift "to the ten children of John Rattray." Had the gift been so expressed a child born after the date of the will would not have been entitled.[1] Such a gift was equivalent to a gift to the children then in existence *nominatim*. The present case was *a fortiori* in favour of that construction, for it was not a gift to the children of a single family, but was virtually a direction to divide the residue into twenty-six equal shares, subject to the proviso that if any child or children predeceased the period of vesting without issue the number of shares was to be proportionately diminished; but the testatrix did not contemplate that the number of shares might be increased. This was not a case of *falsa demonstratio*, for the testatrix had accurately stated the number of her brother John's children in existence at the date of her will, hence such cases as *Bryce's Trustee*[2] did not apply; but even if the number had been inaccurately stated that would not have entitled after-born children to share.[3]

Argued for the third parties;—Where the gift was to children as a class, there was a strong presumption in favour of the admission of *postnati* children. Thus, where the testator contemplated an interim and also a final distribution of his estate, a child born after the interim, but before the final distribution, was held entitled to share in the final distribution though excluded from the interim distribution.[4] The period of payment was the period at which the number of the class was to be fixed. To exclude after-born children express words of exclusion, or at least words clearly implying an intention to exclude, were necessary. Here the parenthetical manner in which the reference to the number of each family was introduced shewed that mere description was intended. Assuming that the reference to number was not intended to limit the objects of the gift, a will was presumed to speak as at the death of the testator; hence the case was one of *falsa enumeratio* only, which could be set right by the Court.[5]

[1] Sherer v. Bishop, 1792, 4 Br. Ch. Ca. 54; Theobald on Wills, 3d edit. p. 228.

[2] Bryce's Trustee, March 2, 1878, 5 R. 722.

[3] Theobald, *supra*.

[4] Ross v. Dunlop, May 31, 1878, 5 R. 833.

[5] Bryce's Trustee, *supra*.

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LORD ADAM.—This special case raises a question on the construction of the trust-disposition and settlement of the late Mrs Rattray or Millar. The question is whether William Rattray, Jane Ann Rattray, and Richard Rattray are entitled to participate in the division of the residue of the trust-estate. These three persons are children of John Rattray, a brother of the testatrix, and the state of the facts in regard to them is, that they were not born at the date of the settlement but were born before the death of the testatrix, and the question is whether on a sound construction of the 12th clause of the settlement they are to be held as included in the gift to the children of John Rattray. The 12th clause after providing for the realisation and conversion of the whole estate into money, directs the trustees "to divide the free residue equally among the children of my late brother Andrew Rattray . . . of whom there are nine; the children of my said brother John Rattray, of whom there are ten; and the children of my said brother James Rattray, of whom there are seven, who may survive me," and then follows a clause of survivorship which I need not quote. Now, it is maintained on the one hand upon the construction of this clause, that the words "of whom there are ten" in the gift to John Rattray's children are limitative words; on the other hand, it is maintained that these words are merely words of description. It is clear that a very little change in the phraseology would have put the matter beyond doubt one way or other. If the words had been "equally among the ten children of my brother John," that, I rather think, would have limited the gift to the ten children who were in existence at the date of the will; if on the other hand the words had been "of whom there are at present ten," that I think would have shewn that the reference to the number of the children was merely by way of identification, and not for the purpose of limiting the gift to the number specified. The question is, which of these two interpretations is the proper interpretation of the words as we actually have them? I am disposed to think that the latter is the sound interpretation. I do not think that the testatrix intended the words in question to have a limitative effect, and in reaching this conclusion I think it is quite competent to construe the words by reference to other parts of the clause. Now, we find that the testatrix gives her trustees power to make such advances as they might deem suitable before the period of distribution "to any of the said children, or to their father or mother respectively, for behoof of all the members of a family jointly, if not stated in the receipt to be for anyone in particular." That seems to me to throw considerable light on the question we have here to consider, for it shews that the testatrix was making a family settlement, for the benefit of the families of the brothers whom she names, and it seems to me to follow that she intended to benefit the whole of the children of these families, and merely mentions incidentally the members of which they happen to consist at the date of the will.

On the whole therefore I am for answering the question in the affirmative.

LORD M'LAREN.—This case is one of some difficulty, but on the whole I am disposed to concur with Lord Adam. A legacy to the children of A *prima facie* includes all the children of A who are alive at the period of vesting, whether they were born at the date of the will or not. A legacy to the *n* children of A *prima facie* is limited to the children of A who were in existence at the date of

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the will, and that, speaking generally, even where the testator has made a mistake as to the number of the children who were then in existence. In such a case, the reason why the children born after the date of the will are not allowed to participate in the bequest is not that we suppose the testator meant to exclude them, but that the testator has failed to express his intention in appropriate words. But it is so likely that a testator should intend to include children born after the date of the will that a Court will always lean to a merely demonstrative construction, except where the words of the gift are such that the reference to number necessarily has a limiting effect.

LORD KINNEAR.—I am of the same opinion. The testatrix gives the residue of her estate to the children of her three brothers generally, and without naming any particular children. Now, where a legacy is given in general terms to a class of persons who are near relatives of the testator, it appears to me that such a gift is not to be narrowed so as to include only those persons of the favoured class who may be in existence at the date of the will, unless the testator has expressly, or at least by clear implication, disclosed his or her intention so to limit the gift. In the present case, the testatrix adds a statement of the number of which each family consists—"to the children of my brother John, of whom there are ten,"—and the question is whether from such a mere statement of the number we are to infer an intention to exclude children who may be born after the date of the will. Now, that does not appear to me to be a sufficient ground for limiting the otherwise plain words of gift to the children generally. I should have reached that conclusion even without the aid of the subsequent clause to which Lord Adam has referred, but that clause at all events seems to me to remove all ambiguity.

LORD PRESIDENT concurred.

THE COURT answered the question in the affirmative.

W. & J. BURNESS, W.S.—LYLE & WALLACE, Solicitors—Agents.

No. 194.
June 30, 1891.
Campbell's Trustees v. Campbell.

HEW CRICHTON AND OTHERS (Campbell's Trustees), Pursuers and Real Raisers (Reclaimers).—*Asher—Crole.*

LEVESON GRANVILLE ALEXANDER CAMPBELL, Defender (Claimant).—*D.-F. Balfour—Blair.*

LEVESON GRANVILLE CAMPBELL, Defender (Claimant).—*Dickson—Salvesen.*

ANN A. KENDRAY OR LAMBERT (Lambert's Executrix), Defender (Claimant).—*Macfarlane.*

CAROLINE D. M. JONES AND OTHERS, Defenders (Claimants).—*G. R. Gillespie—Cosens.*

Succession—Accumulation—Thellusson Act (39 *and* 40 *Geo. III. cap.* 98).—*Held* that the Thellusson Act prohibits any accumulation after the lapse of twenty-one years from the date of a testator's death, although the time specified for accumulation may not commence till long after his death.

Succession—Rents of Heritage—Thellusson Act (39 *and* 40 *Geo. III. cap.* 98).—In a trust-settlement the testator directed his trustees to pay to his widow the rents of certain lands during her life, and at her death to accumulate the rents for the purchase of additional lands till the death of the longest liver of certain nephews and nieces, and upon that event to execute an entail in favour of the heir of the body of his nephew L. C., whom failing, &c. The deed contained a declaration that notwithstanding the death of the testator's widow the

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trust should continue till all the trust purposes had been carried into effect, and "declaring also that the institute or heir of entail herein pointed out for the time being who but for the continued existence of the trust hereby created would be in possession of the said lands" "shall be entitled to provide and secure his wife and younger children who shall not succeed to the said lands" "in provisions of the like amount as if such institute or heir were actually in possession of my said lands."

The testator's widow survived him for thirty-two years. In an action of multiplepoinding brought by the trustees to determine the right to the rents accrued since the widow's death, held (1) that the Thellusson Act applied so as to prohibit accumulation; (2) that the failure of the trust purpose of accumulation did not accelerate the date for executing the entail, as until the death of the longest liver of the testator's nephews and nieces it was uncertain who should be the institute; (3) that in the meantime each term's rent as it accrued belonged to the person holding at that time the character of heir-at-law of the truster.

Lord Young dissented from (2) and (3), being of opinion (2) that the settlement shewed that the continuance of the trust after the widow's death was directed merely for the purpose of accumulation, and that as that purpose had failed the direction to execute the entail became operative upon that event in favour of "the institute or heir of entail pointed out for the time being" as the heir-male of the body of L. C.; (3) that if the direction to entail was not then operative, the accruing rents formed part of the truster's heritable estate undisposed of, and were held by the trustees in trust for the representative in heritage of the truster's brother, who was his heir-at-law at the time of his death.

2D DIVISION. Lord Kincairney. M.

THE trustees of the deceased William Gunning Campbell, of Fairfield, Ayrshire, who died in 1857, raised an action of multiplepoinding to determine questions as to the right to the rents of his heritable estate after the death of his widow on 16th January 1889.

William Gunning Campbell left a trust-disposition and settlement under which the pursuers were trustees. He left no children. By the settlement he conveyed his whole heritable and moveable estate to the trustees, directing them to allow a liferent of Fairfield to his wife.

The third purpose of the settlement provided,—"My said trustees, so soon as convenient after the decease of the said Mrs Maria Anna Menzies or Campbell, and after the decease of the longest liver of my nephews and nieces, sons and daughters of my late brothers Charles Hay Campbell and Napier Campbell, shall execute a deed of entail of the lands and others before disponed, . . . and the said deed of entail shall be made and granted to and in favour of the heirs whatsoever of my body, and the heirs of their bodies, the eldest daughter or heir-female always succeeding without division, and excluding heirs-portioners throughout the whole course of succession; whom failing, to and in favour of the heirs-male of the body of my nephew Leveson Granville Alexander Campbell, eldest son of the late Charles Hay Campbell, . . . and the heirs-male of their bodies; whom failing, to and in favour of the heirs-male of the body of my nephew George Gunning John Campbell, second son of the said Charles Hay Campbell, and the heirs-male of their bodies; whom failing, to and in favour of the persons, heirs, and substitutes specified and contained or pointed out in" a certain deed executed by the testator's father in 1817.

By the fourth purpose the testator directed that his moveable estate should be sold, excepting the furniture, &c., "in my house of Fairfield, which my said trustees may, if they shall deem it proper and expedient so to do, hand over to the institute or heir of entail for the time to be held and retained for the use and behoof of himself and the succeeding heirs of entail," and the proceeds laid out and invested at once or from

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time to time in the purchase of such heritage as the trustees should think suitable for the purpose of being entailed as after mentioned, or upon heritable security, "all to be held and retained by them during the lifetime of my said nephews and nieces, sons and daughters of my late brothers Charles and Napier Campbell, and during the lifetime of the longest liver of my said nephews and nieces."

The fifth purpose was as follows,—"In the fifth place, my said trustees are hereby appointed and enjoined, and they shall, from and after the decease of my said wife, and during the lifetime of my said nephews and nieces, sons and daughters of my said two brothers Charles Hay Campbell and Napier Campbell, and during the lifetime of the longest liver of my said nephews and nieces, retain and accumulate, according to their discretion, the free rents, interest, and annual produce that may arise during the period between the death of my said wife (or my own death, if she shall predecease me) and the death of the longest liver of my said nephews and nieces, from my said lands of Fairfield and others foresaid, herein specially described and hereby disponed, and also from the said lands and others hereby appointed to be purchased, and also from the said investments on securities of the monies arising from my personal or moveable estate, means, and effects appointed to be realised; and for the purpose of accumulation, my said trustees shall, if they see fit, and from time to time, according to their own discretion, lay out and invest the said free rents, interest, and annual produce arising during the said period between the death of my said wife (or my own death, if she shall predecease me) and the death of the longest liver of my said nephews and nieces, upon heritable securities, in their own names as trustees foresaid."

The sixth purpose was as follows:—"In the sixth place, upon the death of my said wife and of the longest liver of my said nephews and nieces, or as soon thereafter as conveniently may be, my said trustees shall call up and realise the monies invested on securities as aforesaid, in so far as not previously called up and realised, . . . and with the proceeds thereof, and with any accumulations of the rents and produce arising from my said lands of Fairfield and others, or from previous rents, interest, and annual produce as said is, my said trustees shall, as soon as they may deem it expedient and beneficial so to do, purchase in their own name, as trustees foresaid, such farther lands and heritages as they, in the exercise of a sound discretion, may deem suitable for being entailed, either along with my lands of Fairfield and others foresaid, or separately; and of which lands and other heritages so to be purchased by my said trustees with the monies arising from the produce of my said moveable estate, and from the various accumulations aforesaid, I hereby direct, appoint, and ordain my said surviving and accepting trustees, with all convenient speed, to execute a deed or deeds of entail, . . . and which foresaid deed or deeds of strict entail last hereby appointed to be executed by my said trustees shall be made and granted by them to and in favour of the heirs whatsoever of my body, and the heirs of their bodies, the eldest daughter or heir-female always succeeding without division, and excluding heirs-portioners throughout the whole course of succession; whom failing, to and in favour of the heirs-male of the body of my said nephew the said Leveson Granville Alexander Campbell, and the heirs-male of their bodies; whom failing, to and in favour of the heirs-male of the body of my said nephew the said George Gunning John Campbell, and the heirs-male of their bodies; whom failing, to and in favour of the persons, heirs, and substitutes specified and contained or pointed out in the aforesaid trust-disposition and settlement by my father, and thereby, and by the said disposition and deed of entail executed in implement thereof, appointed

to succeed to the lands thereby directed to be entailed, and entailed accordingly; . . . . and it is hereby always provided and declared that notwithstanding the death of the said Mrs Maria Anna Menzies or Campbell, my wife, at whatever time hereafter, the trust hereby created shall, in so far as the same may then be unfulfilled, subsist and remain in full force and effect in the persons of the other trustees foresaid, aye and until the whole ends, uses, and purposes foresaid shall have been in all points fulfilled and carried into effect; and that from and after the death of the said Mrs Maria Anna Menzies or Campbell, any two of the accepting and surviving trustees foresaid for the time, or any one of them when their number shall be reduced to one, shall form a quorum for fulfilling and carrying into complete effect the uses, ends, and purposes foresaid; and declaring also that the institute or heir of entail herein pointed out for the time being, who but for the continued existence of the trust hereby created would be in possession of the said lands and estate of Fairfield and others, particularly herein described and hereby disponed, shall be entitled to provide and secure his wife and younger children who shall not succeed to the said lands and estate of Fairfield and others last above mentioned in provisions of the like amount as if such institute or heir were actually in possession of my said lands and estate of Fairfield and others last above mentioned in virtue of the said deed of entail directed to be executed thereof."

The rents of the testator's heritable estate were uplifted by the trustees and paid to the widow till her death on 16th January 1889.

The testator's brothers Charles Hay Campbell and Napier Campbell both predeceased him. They both left issue. His brother Alexander also predeceased him leaving issue. His immediate younger brother George Gunning Campbell survived him, and was his heir-at-law. His two sisters survived him.

George Gunning Campbell died in 1858. He left no issue.

The questions to be decided were (1) whether the Thellusson Act applied to the rents of the heritable estate from and after the widow's death in 1889?* and (2) to whom, if it did apply, and if the direction to accumulate these rents after her death was thereby made ineffectual, these rents belonged?

The fund *in medio* consisted of the rents between the widow's death on 16th January 1889 and the institution of the action of multiplepoinding on 26th April 1890 and was £181, 11s. 2d.; but the question raised necessarily regarded all rents between 16th January 1889 and the death of the longest liver of the testator's nephews and nieces who still survived.

The first of the two questions was raised by the claim of the trustees. They claimed the whole fund *in medio* as being bound under the fifth

* The Thellusson Act (39 and 40 Geo. III. c. 98), enacts,—"Whereas it is expedient that all dispositions of real or personal estate, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof postponed, should be made subject to the restrictions hereinafter contained, . . . be it enacted that no person or persons shall, after the passing of this Act, . . . settle or dispose of any real or personal property so . . . that the rents . . . thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such granter or granters, settlor or settlors, or the term of twenty-one years from the death of any such granter, settlor, devisor, or testator," and "in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, proceeds, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

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purpose of the settlement to accumulate and invest the rents as directed by the truster.

Leveson Granville Alexander Campbell, of Fairfield, who was the eldest son of Charles Hay Campbell, the testator's brother, claimed the whole fund as being the testator's heir-at-law on the death of George Gunning Campbell, who died without issue and without having served, and alternatively as eldest nephew and heir-at-law of George Gunning Campbell, the immediate younger brother of the testator.

Leveson Granville Campbell, eldest son of the last mentioned claimant, also claimed the fund on the ground that there having been no heirs of the testator's body, he was "the institute in whose favour the said deed of entail falls to be made."

A claim was also lodged by Mrs Lambert, widow and executrix of Edwin Lambert, the last surviving executor of George Gunning Campbell, the heir of the testator at the time of his death. George Gunning Campbell had left a will in English form, which she maintained made Edwin Lambert, and herself as his executrix, representatives of the testator William Gunning Campbell both in his real and personal estate. She maintained that the fund *in medio* fell to be dealt with as heritable estate not effectually disposed of, and therefore becoming intestate succession to which she as in George Gunning Campbell's right was entitled. Alternatively she pleaded that if the fund fell to next of kin she was entitled to share therein as representing George Gunning Campbell in moveables. The other claimants maintained that George Gunning Campbell's will was ineffectual to convey heritage.

Claims were also lodged by Mrs Jones and others, the heirs *in mobilibus* of William Gunning Campbell the testator. They maintained that the fund *in medio* fell to be divided among them *per stirpes*, not as heirs in heritage, but as entitled to it on a plea of collation urged by them against Leveson Granville Alexander Campbell.

Certain claims were also lodged by persons claiming through several of the next of kin of the testator.

It appeared that after the lapse of twenty-one years from the death of the truster, and while his widow was still alive, his trustees brought a multiplepoinding with the view of obtaining a judgment as to the person in right of the interest of the personal estate after the lapse of that twenty-one years during which time these interests had been accumulated by the trustees.

In that action Lord Curriehill, by interlocutor dated 30th December 1879, decided that, in respect of the provisions of the Thellusson Act, it was illegal to continue the accumulations of such interest beyond the period of twenty-one years from the truster's death, and that the fund *in medio* was divisible among the persons who were the next of kin to the truster and his heirs *in mobilibus ab intestato* at the date of his death, or the representatives of these persons.

The interest of the moveable estate was paid in accordance with this judgment.

The Lord Ordinary (Kincairney) on 6th December 1890, pronounced this interlocutor:—"Finds . . . (3) that the truster directed that the rents of his said estate should be accumulated until the death of the longest liver of his nephews and nieces referred to in his trust-disposition and settlement, and after their death that the deed of entail therein directed should be executed; (4) that as at the widow's death more than twenty-one years had elapsed since the death of the truster, the direction to accumulate the rents has now become illegal and ineffectual in respect of the provisions of the Statute 39 and 40 Geo. III. cap. 98; (5) that the fund *in medio* consists of rents which have accrued since the

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widow's death; (6) that the truster has not effectually tested on the rents accruing between the widow's death and the death of the longest liver of the said nephews and nieces; (7) that the said rents are of the nature of heritable estate falling to the heir-at-law or his representative in heritage; (8) that the heir-at-law was the truster's brother George Gunning Campbell, who died on 3d May 1858; (9) that the right to the rents of the truster's estate illegally directed to be accumulated was an heritable right vested in George Gunning Campbell at the date of his death; (10) that said right was not effectually carried by his last will; (11) that his heir in heritage is primarily entitled to said rents and to the fund *in medio:* Therefore repels (1) the first claim of Hew Crichton and others, trustees of William Gunning Campbell; (2) the first claim of Mrs Ann Alderson Kendray or Lambert; (3) the claim of Leveson Granville Campbell; (4) the claims, so far as they are direct claims on the fund *in medio*, of the heirs *in mobilibus*, and of Mrs Mary Cuthbert, The Scottish Union and National Insurance Company, The Edinburgh Life Assurance Company, and Alexander Stewart, and decerns; and appoints the cause to be enrolled, that parties may be heard on the remaining parts of the case." *

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* "NOTE.— . . . The questions raised are perplexing and complicated.

"1. The first question is whether the Thellusson Act applies. The facts are (1) that more than twenty-one years have elapsed since the truster's death, and (2) that there has as yet been no accumulation of the rents at all, because they have been paid to the widow. . . .

"The trustees contended that what the Act prohibited was an accumulation of the rents for a longer term than the period allowed—twenty-one years; and that the statute was not infringed so long as the rents had not been accumulated above twenty-one years; and that, as in this case there had as yet been no accumulation at all, the provision of the statute was inapplicable.

"It was contended by the other parties that accumulations became illegal whenever twenty-one years had elapsed from the truster's death.

"I am in favour of the latter contention, and against that maintained for the trustees. The question is, no doubt, important, and has not, I think, been deliberately decided in the Scotch Courts, although it has been involved in more cases than one.

"The evil against which the Act was directed was not only accumulation of rents, but postponement of the beneficial enjoyment—a mode of expression pointing, I think, to postponement immediately after the granter's death. The period of accumulation prohibited is a period in excess of twenty-one years from the death of the granter, and any accumulation directed otherwise is declared null. The words seem to point to the death of the granter as the period from which twenty-one years should run, otherwise the words 'from the death of the granter' have no meaning or object, and a construction of the statute which disregards these words seems inadmissible.

"The trustees maintained that the point had been decided in their favour in the case of *Maxwell's Trustees* v. *Maxwell*, 24th November 1877, 5 R. 248. In that case a truster who died in 1841 directed payment of certain annuities, and appointed his trustees, after the death of the annuitants, to invest a certain sum as a fund for payment of bequests to certain religious and charitable institutions, and to accumulate and add to the fund one-fourth part of the interest payable on it. The last annuity was payable at Whitsunday 1856, and after that one-fourth part of the interest was accumulated until Whitsunday 1877—thirty-six years after the truster's death—when a special case was laid before the Court by the truster's representatives. It was decided that the direction to accumulate was null from the expiry of the period of twenty-one years from the term of Whitsunday 1856—that is to say, after the expiry of the term of twenty-one years from the death of the annuitants. But it is to be observed that prior accumulations were not challenged, and the question put to the Court was only whether the direction was void as from Whitsunday 1877. The Court could,

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The trustees reclaimed, and argued;—The Thellusson Act did not apply, for that Act struck at accumulation of income for a longer period and did, decide nothing else. Probably attention was not directed to the legality of prior accumulations, and I do not find that any of the Judges indicate any opinion on the point.

"The question was involved, and may have been decided, in the case of *Ogilvie's Trustees* v. *The Kirk-Session of Dundee*, 18th July 1846, 8 D. 1229. In that case Mr Ogilvie, who died in 1825, directed that a certain liferent should be paid to his widow, and he in effect committed to the charge of the kirk-session of Dundee at her death a sum estimated at £2000, with directions to accumulate the interest for one hundred years, and then to build and equip an hospital with the accumulated fund. There seems to have been a considerable amount of litigation in reference to this deed. The main question to which the report refers was whether the fund was heritable, and so not affected by the Thellusson Act, which did not at that date apply to heritable property in Scotland. The Court held that the fund was moveable, and found that the direction to accumulate was struck at by the Thellusson Act. It was also found that the rents struck at were carried by the trust-deed, and formed part of the trust-estate. There was no decision as to the time when the accumulation began to be illegal, but parties were appointed to be heard on the remaining points of the cause. Unfortunately, the case is not again reported. But I think it right to call attention to an observation of Lord Jeffrey, very favourable to the contention of the trustees in this case:—'To what extent,' his Lordship asks, 'are the accumulations good? They are said to be good only for twenty-one years after the death of the maker of the settlement. Here the maker of the settlement was old Mr Ogilvie, who died about twenty-one years ago. But I suspect that in this case the death from which the twenty-one years was to date was that of the survivor of the spouses, and that the widow's life thus came to be the rule.'

"These remarks were, however, I think, *obiter* at that stage of the cause.

"In *Lord* v. *Colvin*, 7th December 1860, 23 D. 111, the testator died on 18th June 1831, and, as I read the case, the whole accumulations of the personal estate were held illegal after 18th June 1852, and no one seems to have suggested that any part of the interest could have been legally accumulated beyond that date. But as considerable annual payments out of the revenue derived from the personal estate were directed or authorised to be paid to the truster's sons, one of whom survived until 1835, there must have been a considerable part of the revenue which had not at 18th June 1852 been accumulated for the full period of twenty-one years. But no question about such part of the rents seems to have been suggested either on the bench or from the bar.

"It has been expressly decided in England that the period of twenty-one years must be reckoned from the truster's death, and not from any later date, in the cases of *Webb* v. *Webb*, 1840, 2 Beavan, 493, and *Attorney-General* v. *Poulden*, 1843, 3 Hare, 555. It was objected that each of these cases was decided by a single Judge, and that the reasons of the judgment were not reported. But in *Webb* v. *Webb* the reasons of judgment appear sufficiently from the argument of the counsel (Bethel), which was overruled, and these cases seem to have been accepted as settling the law in England. The point was assumed in *Nettleton* v. *Stephenson*, 12th March 1849, 3 De Gex and S. 366, and the law is so stated in Hargreave on the Thellusson Act, pp. 113-158; Jarman on Wills, 4th ed. i. 304; and Lewin on Trusts, 91. M'Laren on Wills, i. 306, is to the same effect.

"On the whole, I am of opinion that the statute, according to its sound construction, renders illegal a direction to accumulate, such as to postpone the beneficial enjoyment beyond twenty-one years from the truster's death, and that, in this case, as the liferentrix has survived the truster for much more than twenty-one years, there can be no legal accumulations after her death.

"2. The next question is to whom do these rents, ineffectually directed to be accumulated, belong?

"That question does not regard only the rents which have already accrued, but the same principle must determine the right to future rents.

"On this question there have been two distinct classes of decisions,—in the

than twenty-one years. But there had been no such accumulation. The widow was given by the settlement, and had enjoyed, the income till

one class, where it has been held that there was a good gift of the estate, the revenue derived from which was directed to be accumulated, the direction to accumulate has been held to be a burden on the gift of the estate, and the person to whom the estate was destined has been held entitled to it, unaffected by the direction to accumulate so far as in excess of the period allowed; and in the other, where there has been no prior gift of the estate, the revenue directed to be accumulated has, so far as affected by the Act, been regarded as undisposed of, and as falling to the testator's heir in heritage or in moveables. To the former class of cases belong *Ogilvie's Trustees* v. *The Kirk-Session of Dundee*, 18th July 1846, 8 D. 1229; *Mackenzie* v. *Mackenzie's Trustees*, 29th June 1877, 4 R. 962; *Maxwell's Trustees* v. *Maxwell*, 24th November 1877, 5 R. 248. To the latter, *Keith's Trustees*, 17th July 1857, 19 D. 1040; *Lord* v. *Colvin*, 1860, 23 D. 111; and *Cathcart's Trustees* v. *Heneage's Trustees*, 13th July 1883, 10 R. 1205.

"I have no doubt that this case falls under the latter class, and that the rents ineffectually directed to be accumulated fall, not to the heir first in the destination in the deed of entail directed to be executed, but to the representative of the truster, as estate undisposed of.

"This point arose and was decided by Lord Curriehill in the previous multiplepoinding brought by Mr Campbell's trustees in reference to the interest of the personal estate. In that case his Lordship repelled the claim of the presumptive institute of entail. I have been furnished with a copy of his Lordship's opinion, and I adopt his reasoning. His Lordship observes,—'If the only obstacle to making the entail had been the direction to accumulate the rents, and if it had been now absolutely certain that this claimant must be the institute in the deed of entail, his claim must have been sustained, on the authority of the case of *Mackenzie* v. *Mackenzie's Trustees*.' 'But this claimant is not in that predicament; the direction to accumulate is not the obstacle to the execution of the entail, and the entail cannot be executed until after the death of the longest liver of the truster's widow, nephews, and nieces. It is uncertain whether this claimant will be alive when that event occurs, and it is therefore uncertain whether he will ever be the institute of entail. The decision in the case of *Keith's Trustees*, 19 D. 1040, appears to me to meet the present question, and to negative this claim.'

"It was not, I think, maintained that the rents thus thrown into intestacy were of the nature of moveable estate. It was, on the contrary, assumed that the rents were heritable estate, and, as it appears to me, rightly so, because they really formed a part of the heritable estate of which the truster had not disposed, except by the conveyance of the whole estate to his trustees. It appears to me that they fall to the truster's heir-at-law, or his representative, and that the trustees must uplift them for his behoof. The heir-at-law is necessarily the person who held that character at the death of the truster,—that is to say, George Gunning Campbell, the truster's brother. He died on 3d May 1858, surviving the truster for only half a year. At that time the trustees held the estate for behoof of the widow in liferent, and it was impossible to tell whether this intestate heritable estate would ever exist. It would never have existed if the widow and the nephews and nieces had all died within twenty-one years after the truster's death.

"I did not understand it to be disputed that George Gunning Campbell was, when alive, the person in right of the undisposed portion of the heritage. But it was contended on behalf of Leveson Granville Alexander Campbell that his right had wholly lapsed, because he had made up no title to the truster, and had not possessed for three years on apparency, and that he, Leveson Granville Alexander Campbell, was entitled to pass him by, and to take up this part of the heritable estate by serving heir in general to the truster.

"I do not think that this argument was supported by any of the authorities quoted. The point is not, perhaps, in my view of the case, of much practical

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1889. The expression of the Act, "the term of twenty-one years from the death of any such granter . . . or testator," did not mean that the twenty-one years must of necessity be reckoned from his death. It meant that after his death there was not to be accumulation for over twenty-one years. In short, there being no common law rule against postponement, it fell to the other claimants to shew that the Act forbade any accumulation at all, beginning after an interval and not immediately on the testator's death. That was not a true construction of its words. There was no authority binding the Court to take a particular view. The English cases were judgments of single Judges.

On this point the other claimants argued;—On the construction of the statute it appeared that the twenty-one years must start from the testator's death, not from a period at a long interval beyond it. He was not to have power to tie up beneficial enjoyment for a long period after he died. The reasoning of the Lord Ordinary was sound, and was supported by the English cases cited by him. It would be unfortunate if the Courts of Scotland took a different view from that which the Courts of England had adopted on this point. These English cases had been accepted as settling the law by text writers.[1]

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consequence, but I am unable to concur in the argument. Of course, George Gunning Campbell did not, and could not, possess on apparency, because the trustees held the feudal title, and the widow enjoyed the rents; and I do not see how the heir could have been expected to expede a service in order to take up an heritable estate which had no apparent existence. The trustees held the whole estate, and, so far as it was not effectually destined to anyone, they held it as trustees for the heir-at-law, and he had a *jus crediti* in the estate so far as held by them for his behoof, which I consider vested in him without service—*Gordon* v. *Harper*, December 4, 1821, 1 S. and D. 185, more fully reported in Ross's Leading Cases, Land Rights, i. 499.

"Now, if this right to rents ineffectually directed to be accumulated was heritable estate to which George Gunning Campbell had a complete and vested right, I see nothing at all which converted that right to which he was entitled as heritable estate into moveable estate in his person. He took it as heritable estate, and I think it was an heritable right vested in him when he died.

"It appears to follow that the person primarily entitled to the fund *in medio*, and to the rents which may subsequently accrue until the entail falls to be executed, is the representative in heritage of George Gunning Campbell.

"On the pleadings, as amended, there are two parties who claim this character—(1) Mrs Lambert, and (2) Leveson Granville Alexander Campbell. Mrs Lambert claims in virtue of John Gunning Campbell's settlement, under which it is said that Edward Lambert, the claimant's husband, was the last surviving executor, and Edward Lambert's will in favour of the claimant Mrs Lambert. I have some hesitation in deciding as to the effect of these deeds, because there was not much argument on the point. But it appears to me that Mrs Lambert's title fails at its first step, for the reason that George Gunning Campbell's settlement is not conceived in terms which, at its date, were apt to carry Scotch heritable estate—*Kirkpatrick's Trustees* v. *Kirkpatrick*, March 19, 1873, 11 Macph. 551, June 23, 1874, 1 R. 37—and I am therefore of opinion that Mrs Lambert has instructed no right to this heritable estate, which therefore remained *in hæreditate jacente* of George Gunning Campbell.

"Mr Leveson Granville Alexander Campbell has now averred that he is the heir-at-law of George Gunning Campbell. I presume that is the case, but he has made up no title as his heir, and his averment that he is heir has not been in terms admitted.

"But assuming that he is heir of George Gunning Campbell, then I am of opinion that he is the person immediately in right of the rents as such heir, and not as heir of the truster. . . ."

[1] Theobald on Wills, p. 414; Jarman and Lewin as cited by the Lord Ordinary.

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On the other questions, and assuming the first question to be decided, as the Lord Ordinary had done, it was argued for the testator's next of kin;—The Lord Ordinary dealt with the claim to these rents as a claim under the trust. But it was intestate, undisposed of heritable succession. That distinguished the case from *Gordon* v. *Harper*, cited by the Lord Ordinary. It was a real right to the estate itself, passing directly from the deceased to the heir, and never vesting in the trustees or passing through them at all. The heir did not require to make any claim against the trustees. Hence his right was not a *jus crediti*. All that had not been given to the trustees remained in the truster and passed on his death to his heir,[1] who would be bound to collate with the heirs *in mobilibus*, as he had already taken a share of the moveables.

Argued for Leveson Granville Alexander Campbell (the truster's nephew);—The estate in question was heritable. Under the directions of the trust it was still impossible to say who would be the institute. The rents, of which the testator could not debar beneficial enjoyment, must therefore go to this claimant as existing heir-at-law of the testator, or, at all events, as the Lord Ordinary had found, as heir of George Gunning Campbell, who was the truster's heir when he died. George Gunning Campbell's settlement could not convey them, because it was not habile to carry heritage. Leveson Granville Campbell had no vested right.

Argued for Leveson Granville Campbell;—The rents in question fell to him as institute of the entail if it were now made. The question was not one as to vested right, but of the application of the Act to the circumstance of the trust. The institute of the entail took the rents, defeating only the heir *ab intestato*. The principle of the case of *Combe* v. *Hughes* applied.[2] *Smyth's Trustees*,[3] must be admitted to be somewhat inconsistent with that case, but *Combe's* case was approved in *Mackenzie's* case.[4]

Argued for Mrs Lambert;—The Lord Ordinary was right in holding that George Gunning Campbell had a *jus crediti* in the rents in question, which vested in him as heritage. But that being so it became moveable estate in his person, because the rents were moveable in the hands of the owner of land. It was unnecessary for George Gunning Campbell to serve heir. The whole estate was given to the testator's trustees. No radical right could be said to remain in the truster to take rents which happened subsequently to accrue.[5]

At advising,—

LORD YOUNG.—The truster was survived by his widow for thirty-two years, and therefore, on the assumption that the Thellusson Act annuls any direction to accumulate beyond the term of twenty-one years from his death (in the meaning of the word "from" adopted by the Lord Ordinary), the direction to accumulate rents of land subsequent to the widow's death (and we are here concerned with no other) must be regarded as void. The rents received by the trustees from the widow's death on 16th January 1889 to the date of the action (26th April 1890), amounting to £181, 11s. 2d., constitute the fund *in medio*. It will be convenient, and conduce to clearness, to consider the legal questions raised in the competition with reference to this as the fund *in medio* now com-

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[1] Campbell v. Edderline, 1801, M. App., Adjudication, No. 13; Lord President in Stuart v. Jackson, Nov. 15, 1889, 17 R. p. 97.
[2] May 3, 1865, 34 L. J. Ch. 344.
[3] 7 R. 1176.
[4] Mackenzie v. Mackenzie's Trustees, June 29, 1877, 4 R. 962.
[5] Gilmour v. Gilmours, July 3, 1873, 11 Macph. 853, 45 Scot. Jur. 521.

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peted for. It has since grown a little, and may continue to grow for a while, although the growth may stop at any moment.

Reading the trust-deed without regard, in the first instance, to any operation or effect upon it of the Thellusson Act, the trustees are directed to "retain and accumulate" the rents that may arise during the period between the death of the truster's widow and the death of the longest liver of his nephews and nieces, being sons and daughters of his two brothers Charles and Napier, and with the accumulated fund to purchase lands to be entailed along with the lands which he had himself conveyed to them—that is, to increase the landed property to be entailed as directed in the deed. This is the only direction to accumulate with which we are now concerned, and it is annulled by the Thellusson Act. There is no dubiety about the direction, or about the absolute nullity of it by the Act. The statute enacts that the rents, the accumulation of which it prohibits, shall go to and be received by such person (or persons) as would have been entitled thereto if such accumulation had not been directed. If such person can be ascertained from the provisions of the will, legitimately construed with reference to the event,—that the provision directing accumulation has become inoperative,—the will must of course have effect, and if not, recourse must be had to the law of intestacy.

Accordingly the question which I propose first to consider is, whether or not the trust-deed expresses the testator's will with reference to the event which has happened, viz., that the provision thereof which directs accumulation has become incapable of execution. The truster did not contemplate this event and so made no express provision for it. But a will may satisfactorily disclose and manifest the testator's intention in an event which he did not contemplate. The cases illustrative of this are numerous and various. The question here therefore is, not whether the will before us contains an express declaration of the testator's intention in the event which has occurred, contrary to his expectation,—which it certainly does not,—but whether it enables us, not to conjecture, but to collect the testator's intention in that event with such reasonable judicial certainty as the Court may, and does familiarly, act upon in directing the execution of wills.

It is urged, on the one hand, that the direction to entail must be obeyed according to the very words of the trust-deed, and that the entail is therefore to be executed "after the decease of the longest liver" of the children of the testator's brothers Charles and Napier, and in no event before; and that the trustees must till then retain possession of the lands and draw the rents, but without any direction, express or implied, as to the disposal of them. If this be so, it follows that the institute of entail by the will cannot be known till the death of the longest liver of the children of these two brothers—that till then there can be no entail, and that the rents meanwhile must go according to the law of intestacy.

On the other hand, it is maintained that the direction to defer the execution of the entail till the death of the longest liver of the children of Charles and Napier was given with reference, and manifestly only with reference, to the direction to accumulate the rents, which is annulled by the statute; and that the testator's only reason and motive for ordering the execution of the entail to be deferred being inapplicable in the event which has occurred, his intention will not be frustrated but fulfilled by its immediate execution.

In deciding between these conflicting contentions the first point to be considered is, whether there is any reasonably conceivable reason or motive for the

order to defer the execution of the entail till the death of all the children of Charles and Napier besides the accumulation of the rents with a view to increase the lands to be entailed. That alone is certainly an intelligible, obvious, and sufficient reason, and I can imagine no other. The lifetime of any of the children of two brothers (none of whom were or could be benefited by the will) was a whimsical enough mode of limiting a period of accumulation—just as the lifetime of the Pope or of the Sovereign of this or any other country, or of any other mortal, would have been. But the accumulation itself, however uncertain the period of it, was quite intelligible. I cannot predicate the rationality or even intelligibility of the suggestion that there is thus manifested a preference to one rather than another heir of his own body, or to one rather than another heir of the body of Leveson Granville Alexander Campbell, or of George Gunning John Campbell, or of the heirs specified in his (the truster's) father's settlement—these being the heirs last called.

I must therefore conclude that the only purpose of deferring the execution of the entail after the widow's death was the accumulation which the statute annuls. But if so, the case seems, *prima facie* at least, to come within the rule applicable where the enjoyment of an estate given by will is deferred for a purpose, and only for a purpose, which has failed because it is illegal or otherwise. That rule is that the enjoyment shall have immediate effect. The most obvious and familiar illustration of the rule is when the gift and enjoyment of a fee given through the medium of trustees or executors is deferred till the death of a person to whom the income is directed to be paid during his or her life, and such person renounces and discharges the liferent provision. In such a case the only questions are (1st) whether the liferent provision was the only purpose of deferring the gift and enjoyment of the fee; and (2d) whether the renunciation is attributable to any indirect or oblique motive. Should the first question be answered in the affirmative and the second in the negative, it is, I think, not doubtful that the renunciation will operate immediately in favour of the donee of the fee ascertained as at the date of it. I venture to think the case even stronger for giving immediate enjoyment when the purpose for which alone it was deferred has failed, not by the voluntary act of a third party, such as a liferenter's renunciation, but by its inherent illegality. Such is the case under the will we are considering, as I regard it, and I am therefore of opinion that the time has arrived for giving the enjoyment of the testator's lands to the heirs specified by him by executing an entail in their favour as directed. And this is in harmony with the Thellusson Act. For the true view, in my opinion, is that the postponement of the enjoyment of these heirs by deferring the execution of the entail till the termination of the lives which the testator, however whimsically, selected as the measure of the accumulation which he desired, in order to augment the estate to be entailed, is merely incidental to the direction to accumulate, and so is annulled along with the direction of which it is an incident. The enjoyment of the income will thus go exactly as it would have done had the accumulation annulled by the Act not been directed. If the only obstruction to the immediate execution of an entail in the very terms and on the very heirs directed is that the period of accumulation has not expired, then that obstruction is removed by the annulling of the direction to accumulate.

But another obstacle is urged, and I proceed to consider it. The testator having left no heirs of his body, the first heirs directed to be called by the entail are the heirs-male of the body of Leveson Campbell, who being alive,

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although he has living sons, has no heir-male of his body, for *nemo est hæres viventis*. Now, I have to point out that this difficulty, whatever its value, concerns only the eldest son, and also, it may be, the male descendants generally of Leveson Campbell. For if on the more general aspect of the case which I have hitherto dealt with the opinion which I have expressed shall be rejected, the necessary result is that the execution of the entail must be deferred and beneficial enjoyment under the will postponed till all the children of the truster's brother Charles (of whom Leveson is one) are dead, and in this view of the larger and more general question the difficulty now suggested is manifestly immaterial, and indeed cannot arise. I propose therefore to consider it upon its own merits, and with reference to the only view of the case in which it can present itself as of any practical significance. For clearness and succinctness I put it thus,—the truster has directed his trustees to hold the land and accumulate the rental during the lifetime of Leveson Campbell, and on his death to entail on the heirs-male of his body, whom failing, on the heirs-male of George Campbell's body, and with other "whom failings" as in the deed. The statute annuls the direction to accumulate, and declares that the rights under the deed shall be taken to be as "if such accumulation had not been directed." My opinion is that the time for executing the entail has come. But then it is pointed out, and truly, that Leveson Campbell is alive, and urged as the necessary consequence that, although he has living sons, there are no heirs-male of his body. George Campbell is dead, but there is a host of other heirs called on the failure of Leveson's heirs. Are we to direct the trustees to act on the footing that the heirs of Leveson have failed? I could not assent to this as the result of any reasonable application of the maxim *nemo est hæres viventis*. We are dealing not with a deed of conveyance but with a will, and the duty of trustees to carry it out by executing a conveyance which will fulfil the testator's intentions. Now, in collecting the intentions of a testator to be fulfilled by his trustees in executing his instructions, we are not hampered by such technical considerations as may occur in the construction of a deed of conveyance. I have no difficulty in holding that the testator here preferred the sons and male descendants of Leveson to those of George, notwithstanding the use of the term "heirs," and that we should not follow but violate his intention by ordering his trustees to prefer the heirs of George to those of Leveson, because Leveson being alive the term "heirs" did not technically fit them. I should indeed be prepared, if necessary, to go further, and hold that under the destination of the most formal conveyance to the heirs-male of the body of A B (A B himself being clearly excluded) his sons would take although A B should himself happen to be in life when the succession opened and that his survivance would not be either a hindrance to its opening or favourable in any way to heirs subsequently called.

Put the case that the truster here had directed his trustees on the death of the survivor of himself and his wife to divest themselves by a conveyance to the heir-male of the body of Leveson Campbell (Leveson himself being distinctly excluded). Would the divestiture and conveyance in favour of the eldest living son of Leveson have been hindered or delayed by the circumstance of Leveson's own survivance whereby the term heir did not technically fit his son, or on the consideration that it was proper, in deference to the truster's intention, to wait till Leveson's death in order to see the state of his family then, and that the rental meanwhile ought to be regarded as intestate succession?

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The opinion which I have formed implies the possibility of ascertaining the institute or heir of entail "pointed out" by the will, as at or with reference to any time subsequent to the commencement of the trust, however long prior to the period appointed by the testator for its termination and the divestiture of the trustees; while the contrary opinion adopted by the Lord Ordinary (following Lord Curriehill) assumes, as distinctly, the impossibility of doing so. Now, it is instructive to observe that the testator himself assumed this very possibility which my opinion implies and the adverse view negatives, for his will contains this declaration,—"that the institute or heir of entail herein pointed out for the time being, who but for the continued existence of the trust hereby created would be in possession of the said lands and estate of Fairfield and others particularly herein described and hereby disponed, shall be entitled to provide and secure his wife and younger children who shall not succeed to the said lands and estate of Fairfield and others last above mentioned in provisions of the like amount as if such institute or heir were actually in possession of my said lands and estate of Fairfield and others last above mentioned, in virtue of the said deed of entail directed to be executed thereof."

If you apply to this declaration the reasoning of Lord Curriehill, which the Lord Ordinary adopts and on which he rests his judgment, you make it inoperative and indeed unmeaning: for according to that reasoning "the institute or heir of entail herein pointed out" cannot possibly be discovered, as Lord Curriehill expresses it, "until after the death of the longest liver of the truster's widow, nephews, and nieces," which is plainly not "the time being" referred to by the testator in the declaration which I have just cited. It is, I think, manifest that the testator himself intended that his will should, and believed that it did, "point out" the institute or heir of entail "for the time being," meaning any time whatever during the subsistence of the trust and prior to the time appointed by him for its termination, viz., the death of the longest liver of certain persons; and that on a reasonable construction of his will such institute or heir could be ascertained.

Suppose it to be clear and matter of judgment that the trust in the event that happened terminated at the widow's death, and that it only remained to close it by a divestiture of the trustees, the question would remain in whose favour the divestiture was to be made. Now, on this question is it reasonably conceivable that it ought to be made in favour of the truster's heir *ab intestato*, inasmuch as the trust-deed did not "point out," that is to say, enable the Court to ascertain, the institute or heir of entail "for the time being," viz., the death of the widow? But if not, then you must of necessity determine who is the institute or heir "pointed out" by the will, and I have stated my opinion and the reasons of it that the institute so pointed out is the eldest son of Leveson Campbell, notwithstanding that by reason of his father's survivance the term "heir" of his father is not for the moment technically applicable to him or any other. The only alternative is to defer the divestiture of the trustees till the father's death, or for a longer period, viz., the death of all Charles and Napier's children, and decree intestacy with respect to the rental meanwhile, for if the heirs "pointed out" by the will are in succession to have the rental till the execution of the entail, no good or even rational purpose will be served by deferring the execution and maintaining the trust.

The declaration which I have cited supports, I think, very strikingly the proposition on which my opinion is based, viz., that the continuance of the trust

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during the survivance of the widow was directed solely for her benefit, and after her death solely for the accumulation of the rental in order to enlarge the property. The language of it is indeed inconsistent with the notion that the truster intended that this desired continuance should, in the event that these the manifest purposes of it failed, be taken as affording a rule or criterion for determining who was "the institute or heir of entail herein pointed out for the time being." He contemplated no doubt that such institute or heir for the time being should go without the rents, first, while the widow enjoyed them, and, second, while they were being accumulated to buy more land. But at the same time he says in words that he is "pointed out," and that he shall have certain not unimportant rights as if he were "actually in possession" as such institute or heir. To ignore this, and on a subtle and, I think, captious argument to hold that the heir for the time is not pointed out and cannot be ascertained is, in my opinion, unwarrantable. With such a will as we are dealing with intestacy is, if reasonably possible, to be avoided.

In the view, contrary to my opinion, that the trust is to be prolonged till the death of all the children of Charles and Napier, and that the law of intestacy applies to the beneficial right to the rental meanwhile accruing, I concur with the Lord Ordinary. I think, in this view, that the beneficial interest in the rental is heritable estate, or, in other words, that the law of primogeniture applies to it—that it goes to the *hæres* or person favoured by that law. There is no other distinction that I know of between heritable and moveable estate. To what kind of estate the law of primogeniture applies, and to what it does not, is necessarily *positivi juris*. And here the Thellusson Act is of no significance whatever, although the law of resulting trust is. The case in hand, in the view of it I am now assuming, is that the owner of land has conveyed it to trustees without any direction, express or implied, as to the use or application of the rental for a certain or uncertain, longer or shorter period. The trustees are not, of course, entitled themselves to appropriate such rental, and this is only avoided by the doctrine of resulting trust, the only possible question being to whom does the trust result. It would of course result to the truster himself if in life, and being dead it must result to his successor by the law of primogeniture, or otherwise according to the quality of the estate. By our positive law, as I understand it, the law of primogeniture applies to land as at the time of the ancestor's decease in so far, but only in so far, as not alienated by him. Now, here certain lands have been alienated to a certain extent, but not so far as regards the beneficial interest in the rental thereof, or return therefor during a limited period. That rental is to be drawn by trustees on a trust resulting to the truster, or (he being dead) his heir therein, viz., his heir determined by the law of primogeniture. This seems to me to be the simple case of an heir taking the beneficial interest in his ancestor's land in so far as such beneficial interest has not been alienated. Why the heir should not be ascertained as at the death of the ancestor, or why he should take subject to any restriction whatever, I fail to comprehend. The trust-settlement of the ancestor may of course exclude his heir with respect to all or any part of the estate, and if it does then there is no intestacy with respect to such estate. But in so far as he is not excluded —which is exactly in so far as the estate is not given to another—the administrative legal title in the trustees cannot affect the question who is the heir, or the character of his right to what he takes, *i.e.*, to what has not been given to another. Here the (*ex hypothesi*) unalienated estate is the rent of land for an

uncertain period, which may be long or short as it happens. It would have been exactly the same had it been for a certain term of say fifty years. The ancestor has not alienated his land with respect to the beneficial interest in the return therefrom for fifty years, although he has made provision for the administration and management of the land itself. This, as heritable estate unalienated by the deceased owner, goes to his heir-at-law to be ascertained by the rules of the common law, unaffected by the trust-deed or the Thellusson Act, and with his rights therein equally subject to the rules of the common law only.

LORD RUTHERFURD CLARK.—I need not resume the facts of this case. They are very fully and accurately stated by the Lord Ordinary.

The first question is, whether the Thellusson Act applies so as to prevent accumulations after the death of the widow, or whether the accumulation may go on for twenty-one years after that event?

In my opinion the answer of the Lord Ordinary is right. We have no decisions in Scotland. But those of the English Courts are directly in point, and I think that we ought to follow them. I do not say that the question is free from difficulty, but in view of a series of judgments of the highest authority I cannot look upon it as being any longer open. It is true that these judgments are not formally binding on us, but I should be very slow to establish in Scotland a construction of an imperial statute different from that which is settled in England.

The next question relates to the disposal of the rents which have accrued since the death of the widow.

They are claimed by Mr Leveson Granville Campbell as institute of entail. I agree with the Lord Ordinary in thinking that his claim cannot be sustained.

It is to my mind a sufficient ground of judgment that Mr Campbell does not possess the character in which he makes his claim. Passing over those parts of the destination which have failed, I find that the truster directs that on the decease of the longest liver of his nephews and nieces, children of his late brothers Charles and Napier, the entail is to be made on the heirs-male of the body of his nephew, Leveson G. A. Campbell, the eldest son of Charles, and a series of other heirs. Mr Leveson G. Campbell is the eldest son of Mr Leveson G. A. Campbell, and there is no doubt that if he be alive at the time when the entail is directed to be made he will be the institute of entail.

But, although he is the eldest son of his father, Mr Leveson G. Campbell is not and may never be his heir. So long as his father lives it can never be known who shall be the heir of his body, and until his death the person in whose favour the entail is to be made cannot be ascertained. The claimant therefore is not, and may never be, the institute of entail, and I cannot see how we can sustain his claim when he does not possess the character in which it is made. We are not dealing with a case where by reason of the direction to accumulate the enjoyment of a gift is postponed. The right is in suspense.

It was maintained that in consequence of the failure of the direction to accumulate the time had arrived for the execution of the entail. The reason is that the truster had no purpose for postponing its execution other than to enable the accumulations to be made. I cannot so read the trust-deed or hold that the entail is to be executed at an earlier date than that which the truster prescribed. I do not think that the truster had in his view the possibility of the direction

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to accumulate ceasing to be effectual. It is certain that he has made no provision for the occurrence of that event. In my opinion I am not entitled to conjecture what his views would have been if he had been aware of the operation of the Thellusson Act. He has expressed none, and I think that the only legitimate inference which we can draw is that he formed none.

I think that I am bound to give effect to the intentions of the truster according to the language in which they are expressed. The direction to accumulate was made because the truster had to dispose of the rents which accrued due before the entail could be executed. The failure was an event which did not enter into his mind, and cannot, I think, afford a warrant for altering the whole scheme of the trust-deed.

As matters now stand, there is the further difficulty to which I have already adverted, that no one can at present claim the character of institute of entail. This to my mind is sufficient to dispose of the point which I am now considering. But if by reason of the death of Mr L. G. A. Campbell the heir of his body were ascertained, I do not think that such heir would be institute of entail so long as any of the nephews or nieces of the truster are alive. The institute of entail must be looked for at the time when the entail is to be executed, and cannot be ascertained until that time arrives.

To whom, then, are the rents to be given? The Lord Ordinary has held that they belong to Mr L. G. A. Campbell, as the representative in heritage of George Gunning Campbell, who was the heir of the truster *ab intestato*. I agree with his Lordship in thinking that Mr Campbell is entitled to be preferred to the rents, but I do not agree with the reasoning which has led him to that result.

We must keep in view that we are dealing, not with capital but income. The fund *in medio* consists of rents only. None of the claimants pretend or can pretend to have any right to the estate which yields the rents. That estate is vested in the trustees, who hold it for the purpose of entailing it at a future date.

Again, the rents are not in themselves heritable estate, in respect that they consist of money. They are the produce of heritable estate becoming due after January 1889. The owner of the estate has not disposed of them. Since his death there has been no owner other than his trustees, and as a consequence there could be no alteration of the legal order of succession other than that effected by the trust-deed itself. The trustees have a good and indeed the only title to ingather the rents, but they have no directions with regard to their disposal.

As I have said, the Lord Ordinary sustains the claim of the representative in heritage of George Gunning Campbell, the heir-at-law of the truster, as at his death. But this assumes that the rents belonged to George Gunning Campbell. If they did not, they could not be taken up by his representative. He died in 1858. To my mind it is clear that rents which did not become due till 1889 could not belong to a person who died before that date. I should think it a self-evident proposition that the interest of money or the rent of lands cannot belong to one who dies before they accrue. If the truster had died intestate, and George Gunning Campbell had succeeded as his heir, the latter would have been entitled to the rents which accrued due up to his death, and to no more. It can make no difference that we are dealing with a case where the rents are set free by the operation of the Thellusson Act. That circumstance can never

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enlarge the rights or estate of the heir *ab intestato*. I am therefore of opinion that the rents cannot be claimed by anyone as the representative of George Gunning Campbell.

For precisely similar reasons, I have no difficulty in repelling the claim of the next of kin of the truster as at the date of his death, or the representatives of such next of kin. The next of kin can have no claim except to the moveable estate of the truster, and the rents in question never formed a part of his moveable estate. It is impossible that they could, for the simple reason that they were not in existence at the time of his death.

As I read the record, no claim has been put forward on the part of the next of kin of the truster as at the date of the widow's death. If it had been made I should have repelled it. For the reasons already assigned, they cannot claim in a representative character, nor do I see any principle on which they could claim in their own right the produce of an estate when they can have no possible claim to or interest in the estate itself.

There remains the claim of the heir-at-law as at the time when the rents accrued, and in my opinion his claim ought to be sustained. It is perhaps not enough to say that it is the only other possible claim. But it seems to me well founded in principle. If the truster had died intestate, and the law of intestate succession had run its ordinary course, he would have been entitled to the estate itself and to the rents. The legal succession has been so far excluded by the fact that the estate has been conveyed to trustees in order that they may execute an entail at a future time, but to no further extent. It is a plain principle of law that the rights of the heir cannot be defeated except by a conveyance in favour of another, and whatever is not so conveyed remains with the heir. It follows, I think, that until the time arrives at which the trustees are directed to entail, they hold for the benefit of the successive heirs-at-law, who are therefore entitled to the rents as they become due. They will take them—not in a representative capacity—but in their own right.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred with Lord Rutherfurd Clark.

THIS interlocutor was pronounced:—"Recall the 7th, 8th, 9th, 10th, and 11th findings of the Lord Ordinary, and in lieu thereof find that the fund *in medio* belongs to the heir-at-law of the truster as at the date when the rents of which it is composed became due: *Quoad ultra* affirm the interlocutor of the Lord Ordinary."

TAIT & CRICHTON, W.S.—BLAIR & FINLAY, W.S.—A. & A. CAMPBELL, W.S.—E. A. & F. HUNTER, & Co., W.S.—Agents.

No. 195.

June 30, 1891.
Harris v. North British Railway Co.

JACOB HARRIS, Pursuer (Respondent).—*Young—Craigie.*
NORTH BRITISH RAILWAY COMPANY, Defenders (Reclaimers).—*Asher—Cooper—Hunter.*

Railway—Carriage of passengers—Expulsion of passenger.—The servant of a railway company who has, without taking any objection, accepted from one of the passengers in a railway carriage tickets as for all the occupants of that carriage, is not entitled, on discovering that one of these tickets is defective, to remove from the carriage the person from whom he had so accepted the tickets and treat him as if he had been the holder of the defective ticket.

Opinions that the person who so collects the tickets from his fellow-passengers and hands them to the official does not thereby incur responsibility of any kind.

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June 30, 1891. Harris v. North British Railway Co.

2D DIVISION. Lord Kincairney.

I.

ON 13th November 1890, Jacob Harris, a Polish Jew, was travelling with five other Jews, all of whom, like himself, spoke German, in a third class railway carriage, which had come from Fife, and stopped for collection of the passengers' tickets at the Haymarket Station, Edinburgh. Before the train had stopped Harris had collected the tickets of his fellow-travellers and handed the bundle of tickets to the collector who came for them. He took them from Harris, who was known to him and the other officials at the station, as a person who frequently travelled on the line, without making any objection, and left the carriage. He returned in two or three minutes, having discovered among the six tickets one from Leven to Kirkcaldy, and demanded payment from Harris, who refused to pay. Thereupon Harris was with some force taken out of the carriage, and taken along the platform to the ticket-collector's office, from which he was dismissed after giving his name and address.

Harris now raised an action of damages against the railway company for £50.

He pleaded;—(1) The pursuer having been illegally compelled to leave the defenders' train, and subjected to unwarrantable abuse and defamation, is entitled to reparation. (2) The defenders are answerable for the unfounded charge which they persist in making against the pursuer, and ought, in respect thereof, to be found liable in damages.

The railway company defended. They denied on record a statement made by the pursuer that he was travelling on the day in question with a return ticket from Kirkcaldy to the Waverley Station.

The defenders pleaded;—(2) The pursuer having tendered to the defenders' collector at Edinburgh a ticket not available for the journey he was then making, and having refused to pay the fare for the said journey, the defenders' collector was entitled to expel the pursuer from the said carriage. (3) The defenders' servants not having acted illegally in the premises, decree of absolvitor should be pronounced. (4) The defenders' servants having properly exercised the powers conferred upon them by 96th, 97th, and 102d sections of the Railways Clauses Consolidation (Scotland) Act, 1845, the defenders should be assoilzied.*

On a proof it was established on the evidence of the company's own servants that the pursuer's statement as to his own ticket was true, and that he had been travelling on the day in question with a valid ticket which was the only return-ticket of the six. The defective ticket belonged to one Levi, who had been travelling in the same compartment. He did not speak English, and in the opinion of the Lord Ordinary might have been travelling innocently on the defective ticket.

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* Sec. 96 provides,—"If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings."

Sec. 97 provides,—"If any person be discovered either in or after committing or attempting to commit any such offence, all officers and servants and other persons on behalf of the company . . . may lawfully apprehend and detain such person until he can conveniently be taken before some Justice, or until he be otherwise discharged by due course of law."

Sec. 102 provides for making bye-laws.

Lord Kincairney (Ordinary) found "that on the date libelled the pursuer was illegally and wrongfully and forcibly removed by the defenders from the railway carriage in which he was seated, and was prevented from completing the journey for which he had purchased a railway ticket from the defenders, and that the defenders are liable in damages therefor," and assessed the damages at £25."*

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* "OPINION.— . . . Now the pursuer was certainly in the position of a passenger with a proper ticket. He had *prima facie* right under his contract with the defenders to be in their carriage, and to be conveyed by it to the Waverley Station, and that being so, it lies on the defenders to establish their right, either at common law or under statute, to remove him from their train before the end of his journey. The only statutory powers which were referred to are contained in the 96th and 97th sections of the Railways Clauses Act; but these do not directly apply, because they, in their terms, apply only to the case of passengers who attempt to travel without payment of their fare, which the pursuer was not doing.

"It was argued for the defenders that the pursuer, by collecting the other tickets, became the agent of the other passengers for the purpose of delivering their tickets, and of so fulfilling their obligations to the railway company. Assuming that it was part of their contract to deliver their tickets, and that he thereby became liable to fulfil all the obligations of the other passengers, it was said that he entered into a new contract with the railway company to that effect. I do not see how such a contract could be inferred, because it does not appear to me that the ticket-collector was capable of representing the railway company in any such contract. But, however that may be, the utmost that the defenders can make out of that argument seems to be that the pursuer might be liable for all the obligations of the other passengers, and so might be liable to pay the unpaid fare between Kirkcaldy and Edinburgh. But, assuming that to be so, it could only entitle the defenders to enforce that obligation by the ordinary legal methods. That could not, so far as I see, entitle them to remove the pursuer from the carriage, or to prevent the completion of his journey. They remained liable, whatever his obligation might be, to fulfil their contract with him, and to convey him in safety to the Waverley Station.

"But it was maintained, as I understood the argument, that the collector was entitled to attribute all the unexceptionable tickets to the other passengers and to treat the pursuer, contrary to the actual fact, as the holder of the wrong ticket. I do not say that there might not be cases where a right of that kind might arise to a railway company; for example, if one passenger should hand five tickets to the collector when there were six passengers in the compartment there might be circumstances in which the company might be entitled to deal with him as being himself without a ticket. But in this case the means were at hand for identifying the pursuer's ticket. It was the only return-ticket, and, so far as I can see, it was certain and undisputed that that ticket was his. I do not see that in these circumstances the defenders could disregard that fact.

"The proceedings of the defenders, or those who acted for them, and whose actings they adopt, could only, so far as I see, be justified on the view that they were entitled to regard the pursuer as being without a ticket, and as endeavouring to travel without payment of his fare. But they could not, I hold, regard him in either light, because he had a ticket, and they knew or had the means of knowing that he had. No regulation was pointed out by which it was made the duty of the ticket-collector or of the stationmaster to remove a passenger in such circumstances. Both collector and stationmaster seem to have reached the conclusion that there was a conspiracy to defraud them, or that the pursuer was trying to defraud them, with a rapidity which amounts to rashness; and I hold that in acting on their suspicion, without clear legal warrant, they took the risk of finding themselves in the wrong. Even if it were true that the pursuer had been engaged in a felonious conspiracy for the purpose of palming off on the company the false ticket of another passenger, I cannot find any warrant in the Railway Act for holding that the stationmaster and collector were entitled

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The defenders reclaimed, and repeated the arguments dealt with by the Lord Ordinary; they excused their servants in the first place by pointing out how easy it was for these foreigners, who all understood each other, to concoct the plot to be carried out by the collection of the tickets by one of their number, and they urged that the pursuer by his conduct had barred himself from founding on the fact, which they now admitted, that he himself had a good ticket. They were entitled to remove one of the six men; which of the six the collector could not say, because the pursuer by his act had destroyed all means of knowledge. Having so destroyed the means of knowledge, and therewith his own defence, he must suffer. The authority of *Butler's* case,[1] cited on the other side, could not prevail against that of *Apthorpe*,[2] a case decided in this Court.

The pursuer argued;—His own right to be in the carriage was now admitted. Even if he had constituted himself an agent, that did not involve the criminal consequences of ignominious extrusion and the rogue's march along the platform. The responsibilities of an agent were civil responsibilities. But it was an absurdity to speak of the doctrine of agency. If the collector had asked the pursuer to re-assign the tickets to the individual passengers, and he had refused or failed in doing so, the plea of bar might have arisen against him. But no such request was made, and hence it was the collector who, by his homologation of the pursuer's conduct as amateur collector, was barred. In any event the remedy was only that which had been decided to be the remedy where a man had lost his ticket,[1] viz., to take his name and sue him for the price.

LORD JUSTICE-CLERK.—The pursuer was a traveller in a train from Fife to Edinburgh, and was in possession of a ticket entitling him to continue his journey to Waverley Station. On arriving at Haymarket—the station for collecting tickets—his fellow-travellers in the compartment handed their tickets to him, he being next the platform. On the ticket-collector coming to the compartment the pursuer handed him the tickets of the other passengers along with his own, and the ticket-collector left the compartment. He returned after a short interval. How long it was is not clear from the evidence, but I shall take it that his return was almost immediate. He demanded payment of 1s. from the pursuer on the ground that one of the tickets delivered up by the pursuer was a ticket from

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to take the law in their own hands, and to punish the pursuer by removing him from the carriage.

"Lastly, it was said that in any case the pursuer had brought all that had happened to him upon himself, and could not complain if the railway company had acted on the suspicions which his conduct had excited.

"But I am not of opinion that the conduct of the pursuer warranted the defenders in acting on their suspicions in the way they did.

"No doubt it is true that railway companies may be liable to be defrauded in this way, when passengers choose to collect their tickets and deliver them at once. But I think there is no great danger if the collector takes care to examine the tickets immediately and before leaving the carriage, and there may be courses open to them, in such circumstances, by which they may protect themselves. At all events the railway companies have no security except what the Railway Act and their bye-laws afford, and if these do not cover the case, they must be content with the rights and remedies of ordinary creditors. . . ."

[1] Butler v. Manchester, Sheffield, and Lincolnshire Railway Co., 1886, L. R. 21 Q. B. D. 207.

[2] Apthorpe v. Edinburgh Street Tramways Co., Dec. 13, 1882, 10 R. 344.

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Leven to Kirkcaldy, and that therefore the fare of 1s. from Kirkcaldy to Edinburgh must be paid by him. The pursuer declined to pay and was compelled to leave the train. Whether force was used or not is disputed, but the Lord Ordinary has found that he was forcibly removed, and upon the evidence I concur with the finding, specially looking to the fact that the defenders' own case upon record is that no unnecessary force was used. It is clear upon the evidence that the pursuer was made to understand that he would not be allowed to proceed by the train, and left it on compulsion, justly feeling that he could not resist the officials who ordered him to come out. He was taken along the platform to the stationmaster's office, and was there for the first time asked to give his name and address. The train in the meantime went on, and he was compelled to wait for a later train. For the indignity and detention to which he was subjected he has raised the present action against the railway company.

The defenders do not now—upon the facts ascertained by the proof—deny the pursuer's averments that he was a lawful passenger, and that they had contracted with him that he should be entitled to travel in their train to Waverley Station. But they justify their action upon a different ground, which is nowhere stated upon the record, viz., that the pursuer by taking the tickets of his fellow-travellers into his hands and handing them on to the ticket-collector made himself responsible for any defect that there might be in any of the other tickets, which might entitle the officials of the company to demand a money payment, on the ground that the ticket did not cover the whole of the journey. This is a somewhat startling proposition, and I confess it would have been more satisfactory to have seen it formulated in distinct terms in the record. The contention must either be that where a traveller passes on the ticket of another traveller to the company's collector and that ticket is unsatisfactory, the passenger who does this act of every day courtesy is in the legal position of being held to have delivered the unsatisfactory ticket as his own, whatever may be the actual fact, or that he has become an agent, and as such responsible for any defect in his fellow-passenger's ticket, and liable to lose the benefit of his own contract of carriage unless he at once makes the defect good, or that, although it be the undoubted fact that his own ticket is good, the fact that he has handed on a bad one for another *ipso facto* cancels his own contract of carriage with the railway company, and debars him from continuing his journey for which he has paid in full unless he will make a further payment of money for the privilege. This latter view may be expressed in other words—that he is barred by passing the bad ticket to the collector from maintaining his right under his own contract.

But, whatever be the mode in which the proposition may be formulated, I concur with the Lord Ordinary in the view that the defenders' contention is unsound in itself, and that even if it were sound, it would not justify their removing the pursuer from a train in which he had by contract a right to travel. If the handing of the tickets of others could be held to constitute any new relation between the pursuer and the company in regard to the contracts of others with the company, I am unable to see how it could affect his own, or how it could confer upon the company a right practically to take him into custody in the train without any warrant, and to remove him from it. The idea of there being some sort of agency established, whereby he became responsible as an agent to the company for any deficiency of payment by other passengers as

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indicated by their tickets, even if it were plausible, which I do not think it is, would be no justification for personal detention. No agent is liable to be taken by force out of train in order to make him fulfil his agency obligation. But I hold further that there is no ground for maintaining any such agency. The proposition that a passenger, by giving up the tickets handed to him by fellow-passengers, becomes an agent to the effect of his having to answer as an agent any demand made upon him for a payment of money by a ticket-collector, under penalty of the company being entitled to break a contract made with him previously, and to subject him to violence in order to effect the breach, seems to carry its own absurdity upon its face. The defenders found upon certain sections of the Railways Clauses Consolidation Act, but these clauses, instead of helping them in this case, are important against their contention. For they are the only clauses under which they are entitled *brevi manu* to remove a passenger from a train, and the pursuer does not fall under any of them, and if his case does not fall under any one of them, then whatever claim they may pretend to assert against the pursuer, they must make it good by ordinary process of law, and cannot use the compulsitor of expulsion from their train of a passenger lawfully travelling under an onerous contract.

An attempt was made to maintain that if railway companies could not act as the defenders did in this case, they would be exposed to serious difficulties in the conduct of their business. Even if this were so, their remedy would not be in taking the law into their own hands, but in applying to Parliament for the aid which they might require. But I see no ground for thinking that there is any difficulty in their way, such as their counsel endeavoured to magnify in argument. There is no doubt that it has become a very common practice for passengers to hand on their tickets to a fellow-passenger, and for the collectors to receive them from one hand. The very fact that this known practice has grown and become a thing of every day occurrence is proof that it does not tend to create such difficulties as the defenders conjure up. But one thing is certain, that railway companies have the remedy in their own hands. They are quite entitled to insist on each passenger delivering up his own ticket if they please, and to decline to accept them in bulk from one passenger. But their present practice being to accept tickets handed up in this manner, I cannot hold that they are entitled to turn round upon that passenger and without any inquiry, and at their own hand, to treat him as having forfeited his right to travel with a ticket for which he has paid.

There is a specialty in this case, apart from the general question, which it may be advisable to notice here, although in the view I take of the matter, and which I have already expressed, it is a specialty which need only be noticed. The ticket-collector, after receiving from the pursuer the tickets of the whole passengers, left the carriage without taking any exception to any of the tickets. It is admitted that it was his duty to examine the tickets in the compartment at the time of collection. According to his own evidence that is what he is "expected and directed to do." The importance of such a rule is obvious. It is analogous to the converse rule that at the issue of tickets passengers must check their change before leaving the ticket-window, otherwise mistakes cannot be corrected afterwards. The proposition of the defenders, startling as it is in itself, becomes still more startling when there is added to it the further proposition which is made essential by the facts of this case, that a ticket-collector who has left the compartment is entitled to come back, and to proceed to force a passenger out of the

train, unless he will hand over at once a sum of money, upon the bare assertion that after leaving the carriage without challenging any passenger with regard to his ticket, and outwith the presence of the passengers, he had found that someone must have handed up an invalid ticket. If the case depended upon the view to be taken of that proposition, I should be inclined to hold that whatever right of summary ejection the company might have, if it were discovered at the collection of the tickets in the compartment that a ticket was invalid, and the matter were then and there taken up and dealt with, no such right can exist where the officials leave the carriage without making any challenge, and only return after an interval, however short, and assert that on an examination of the tickets outwith the presence of the passengers something has been discovered to be wrong. They may have, and probably have, a remedy, if they can prove their case, but I should have great difficulty in holding that in such circumstances they could exercise their special statutory remedy of ejection. The ticket-collector, by leaving the compartment without examining the tickets, deprives the traveller of his only check on the ticket-collector's proceedings and thus puts the traveller absolutely in his power, if the company retain their right of ejection under their statutory bye-law. This would in my opinion, be unjust and oppressive. But as I said before it is not necessary to decide this point in the present case.

I have only to say in conclusion that I do not think the case of *Apthorpe* has any application to the question before us. There the pursuer was travelling practically without a ticket, for the ticket he possessed did not warrant him in being on the car on which he was until it was stamped at the Tramway Company's office. Until stamped it was not a ticket for that journey. When this was pointed out he insisted on continuing to travel, and refused to comply with the regulation. He therefore was personally and wilfully acting in defiance of competent regulations, and the company's officials had a duty to prevent his doing so. Here there is no such case. The defenders cannot dispute the contract, or the right of the pursuer under it. Their only case now is that certain circumstances occurring in reference to someone else's contract with the company, and with which the pursuer has got mixed up, entitle them notwithstanding his unexceptionable contract, to prevent by force his travelling under it.

I have on these grounds to move your Lordships to adhere to the Lord Ordinary's interlocutor.

LORD YOUNG.—I am of opinion that the expulsion of the pursuer from the railway carriage cannot be justified.

It might have been justified if it had been shewn that he was attempting to defraud the company, or if he had so conducted himself as to expose himself to just suspicion of having done so. Now, he is travelling with the proper ticket; there is no attempt to defraud; but it is said that by his conduct he exposed himself to just suspicion, although that turns out to be altogether groundless, because he handed the tickets of the other passengers with his own to the collector, and there is something defective in one of them. The importance which the railway company attach to this case is that it enables them to present for consideration the question whether a person is exposed to just suspicion by collecting and passing on the tickets of the other passengers, if there turns out to be anything wrong with any of them.

A subordinate view was argued to the Lord Ordinary, and to us, and I read

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his statement of the argument with wonder that anyone should have stated it. It was that by doing what he did the pursuer constituted himself the agent of the other passengers. I do not think it ever occurred to anyone before that one by passing on something quite honestly—it might be the bottles at a dinner table—raised the law of principal and agent, and made one's self an agent.

But as to the practice, which is referred to here as misconduct, it is so familiar that the Court may take judicial cognisance of it. It is as old as railway travelling, and takes place more often than not when you have several people in a carriage. To attribute misconduct to the person who collects the tickets in the way in which they were collected here, misconduct which shall give rise to civil consequences of any kind whatsoever, is an absurdity.

It is said that the practice may facilitate fraud, enabling a passenger to travel without a ticket and avoid detection. There is no reason to suppose that it does. I am led to the conclusion that it does not, for the practice is followed on all railways without let or hindrance. If the company have an objection to it they would require to give some notice of their objection to passengers. So long as it is pursued without a word of remonstrance from the company it is extravagant to say that it tends to fraud. I am confident that no company would venture to issue a general notice to prohibit the practice, and I am certain that any collector who insisted on walking up each carriage and collecting a ticket from each individual would find his conduct commented on in a way that would be very disagreeable to him.

I agree with your Lordship, my only doubt being whether the amount of damages is sufficient.

Lord Rutherfurd Clark.—I agree in thinking that the interlocutor of the Lord Ordinary should be affirmed.

Lord Trayner.—It has been clearly ascertained, and is not now disputed, that when the pursuer was removed at Haymarket from the carriage in which he was travelling on the occasion in question, he was travelling in respect of a ticket which he had bought from the defenders, and which entitled him to travel to the Waverley Station. By the act of the defenders or their servants the pursuer was wrongfully prevented from completing his journey. The defenders therefore were guilty of a breach of contract. For this breach of contract, aggravated as I think it was by the circumstances under which it was committed, as well as by the fact that the pursuer was distinctly charged with an attempt to defraud the defenders (of which there is no proof), the Lord Ordinary has found the pursuer entitled to £25 in name of damages. I concur in this finding of the Lord Ordinary. The pursuer was in my opinion entitled to an award of damages against the defenders, and the amount which has been awarded is not excessive. I should have contented myself with simply stating my concurrence with the judgment of the Lord Ordinary had it not been for the argument offered by the defenders in defence of their servants' proceedings, which raises a question of some general interest. It is said that as the pursuer collected the tickets of his fellow-passengers, or received those tickets from his fellow-passengers before the defenders' ticket-collector reached the carriage, and handed them over, so to speak, in lump to the ticket-collector, he thereby constituted himself, in a question with the defenders, the agent of his fellow-passengers, and became liable to the defenders for any defect or deficiency in the tickets so received and

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delivered by him. Even assuming this to be so, I think the proceedings of the defenders' servants were unwarranted. Any responsibility which the pursuer incurred by acting as he did was at the most a civil—a pecuniary—responsibility to answer to the defenders for the amount of the fares which were due to the defenders for the journey performed in excess of that represented by the tickets delivered. There being no fraud on the part of the pursuer, it was an illogical and illegal view of his responsibility and of the defenders' rights to treat the pursuer as if he individually was travelling without a ticket, or a proper ticket, and in consequence to remove him from the carriage. But I demur entirely to the defenders' contention. It appears to me that if the defenders' ticket-collector accepted delivery of the tickets in lump from the pursuer he thereby homologated the pursuer's actings in collecting the tickets, and that the pursuer thereafter could not be held responsible for any defect or deficiency which a subsequent examination of the tickets disclosed. It was the ticket-collector's right to have a ticket from each passenger, but by taking the whole tickets together from one passenger he waived that right, and if loss arose from his doing so, he, or his employers, must bear it. He could have declined to receive from the pursuer more than his own ticket, allowing each passenger to recover his own, and deliver it himself. If any dispute arose among the passengers as to which ticket belonged to each respectively, the ticket-collector would not be interested therein, as each passenger is bound to deliver to him a ticket for the journey performed; the passenger, if any, who could not produce such a ticket would be the person responsible to the ticket-collector. But that one passenger to whom, for convenience, the other passengers have handed their tickets for delivery to the ticket-collector should thereby incur any responsibility whatever (except that of handing them over as he received them to the ticket-collector) is a view which is not only novel, but, to my mind, unsound. The ticket-collector may, in my view, act strictly according to his right, and exact delivery of a ticket from each passenger, but failing his doing so, any consequence resulting from such failure must be borne by himself and not by the passenger from whom he consented to receive the tickets of the whole passengers together.

THE COURT adhered.

GEORGE JACK, S.S.C.—MILLAR, ROBSON, & Co., S.S.C.—Agents.

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Partick, Hillhead, and Maryhill Gas Co., Limited, v. Taylor.

THE PARTICK, HILLHEAD, AND MARYHILL GAS COMPANY, Limited, First Parties.—*Lorimer—Younger.*
ROBERT TAYLOR, Second Party.—*C. J. Guthrie—M. J. Davidson.*

Company—Reserve and depreciation fund—Distribution among shareholders on sale of undertaking.—The directors of a gas company, as authorised by the articles of association, from time to time carried parts of the company's profits to a reserve fund and a depreciation fund. The directors paid repairs of the works out of revenue, and applied the whole of the reserve and depreciation funds to the extension of works and other capital purposes of the company. The company's undertaking having been sold, a question arose between the preference shareholders, who had always received their full dividend, and the ordinary shareholders, as to the mode in which these funds should be dealt with.

Held that the ordinary shareholders were entitled to both funds, and that they fell to be deducted from the price of the works before a distribution among all the shareholders was made.

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2D DIVISION. C.

Company—Sale of undertaking—Parliamentary proceedings.—Held that the expenses incurred by a gas company in parliamentary proceedings, which resulted in an arrangement under which the company's undertaking was sold, should not be charged against the revenue of the year preceding the sale, but against the price obtained for the undertaking.

THE PARTICK, HILLHEAD, AND MARYHILL GAS COMPANY, LIMITED, was incorporated under the Companies Acts, 1862 and 1867, on the 2d of May 1871, with a capital of £50,000.

By article 6 of the company's articles of association power was given "to increase the capital of the company by the creation of new shares, whether ordinary or preferential or special, and on such terms and conditions as the meeting" of shareholders "determine."

By resolution passed on 29th October 1872 the ordinary share capital was increased to £100,000.

On 22d August 1873 the shareholders resolved to further increase the capital of the company "by the sum of £30,000, to be issued in 6000 preference shares of £5 each, these shares to be entitled to a preferential dividend of £5, 10s. per centum per annum." These preference shares were duly issued, and from the date of issue till 30th June 1890 the dividend of 5½ per cent was paid on the preference shares, and an average dividend of from 3½ to 4 per cent was paid on the ordinary shares during the same period.

Under the articles of association the directors were authorised to set aside a reserve fund and also a depreciation fund, the clauses authorising this being as follows:—"13. Any part of the profits of the company may, at the discretion of the directors, be set apart as a reserved fund to be applied at their discretion—(*a*) For paying off debts of the company. (*b*) For equalising dividends. (*c*) For meeting contingencies. (*d*) For any other purposes of the company. 14. The reserved fund shall not at any time exceed in the whole £10,000. 15. Any part of the profits of the company may, at the discretion of the directors, be set apart as a depreciation fund, to be at their discretion applied to the repair and renewal of buildings, erections, vessels, plant, works, and other property of the company. 16. The depreciation fund shall not at any one time exceed 25 per cent of the original cost to the company of the property, buildings, and machinery in respect of which that fund is formed. 17. The moneys carried to the reserved fund and the depreciation fund respectively shall be invested in the company's name on such securities as the directors think proper, and the income arising from each fund shall be added thereto until it reaches its limit, and shall thereafter be deemed earnings of the company."

Clause 18 dealt with the application of the earnings. "18. All the earnings of the company, including all their receipts properly carried to the account of revenue, shall every year be applied as follows—1st. In payment of all taxes, rates, and rents, and other preferable charges payable in respect of the company's landed property and works, and all arrears, if any, thereof. 2d. In payment of all management, working, and other current expenses of the company, and all arrears, if any, thereof. 3d. In payments to the reserved fund and the depreciation fund. 4th. In payment to the preferential shareholders, if any, of their dividends, according to their respective priority. 5th. In payment of a dividend on the ordinary shares."

In 1890 the corporation of Glasgow promoted a bill for the extension of their boundaries so as to include a considerable portion of the area supplied by the company. The directors of the company, thinking that the passing of the bill would have a fatal effect upon the prosperity of the

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company, with the approval of the shareholders, opposed the bill and also promoted a bill of their own. The preamble of both bills was found to be not proven, and both parties resumed the proceedings in the following year.

On 24th March 1891, in accordance with resolutions passed by the shareholders, an agreement was entered into between the company and the corporation for the sale to the latter of the company's undertaking at the price of £202,500, with entry at 1st July 1891.

Questions thereafter arose between the company and its preference shareholders as to the sums available for distribution when the sale of the company's undertaking should be completed.

A special case was accordingly presented to the Court by (1) the company, and (2) Robert Taylor, Partick, Glasgow, as representing the preference shareholders, to obtain the opinion of the Court upon, *inter alia*, the following questions:—"3. Are the ordinary shareholders entitled to the reserve and depreciation funds, and must these funds be taken out of the price of the works before a distribution is made, or do these funds, in whole or in part, fall to be included in the capital fund available for distribution among all the shareholders? 4. Should the parliamentary expenses referred to, so far as these have not been already charged to revenue, be charged in whole or in part against the revenue of the year 1890-91 before paying a dividend to the preference and ordinary shareholders, or should they be charged against the capital fund to be distributed among all the shareholders?"

It appeared from the statements in the case that at 30th June 1890 the amount of the reserve fund was £205, 15s. 9d., and of the depreciation fund £14,228, 9s. 5d.; that the whole of the latter sum would, had not the directors applied the same to form a depreciation fund, have been available for payment of increased dividends to the ordinary shareholders, and might have been so applied; that the depreciation fund was not invested separately, but was used for extension of works and other capital purposes of the company; that no part of it had been used for repairs or renewals, all such being charged to revenue account; and that the works were then in a good and effective condition.

It further appeared from the case that in the course of the parliamentary proceedings in 1890 and 1891 expenses to the amount of £5000 had been incurred by the company, of which £1000 had been charged against the revenue of 1890; that in addition to the capital raised by the issue of shares the company had raised money by the issue of debenture stock and terminable debentures, and were due to the holders thereof £80,000; the revenue of the year ending 30th June 1891, after meeting all charges for interest on debenture stock and borrowed money, would shew a considerable surplus; and that the price of £202,500 adjusted with the corporation would not be sufficient, after payment of the parliamentary expenses and of the company's other debts, to repay to the shareholders the whole par value of the share capital, it being anticipated that the deficiency, if spread rateably over the whole share capital, would amount to about ten per cent thereof.

The case contained no statement to the effect that the shareholders had authorised the application of the reserve and depreciation funds to capital purposes.

Argued for the first parties;—(1) The depreciation and reserve funds were funds which, had they not been applied to extension of works and other capital purposes of the company, would have been available for the payment of dividends to the ordinary shareholders. They were, in short,

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funds lent by revenue to capital[1] (without authority given to the directors by the shareholders), and the ordinary shareholders were entitled to receive them back. (2) The parliamentary expenses were incurred in defence of the whole property of the company, and fell, therefore, to be charged against the capital of the company.

Argued for the second party;—(1) The depreciation fund was intended for the purpose of keeping up the capital value of the works, and had been spent upon capital purposes, and fell to be included in the capital fund available for distribution.[2] (2) The parliamentary expenses, so far as not charged, fell to be charged against the revenue of the year 1890-91. But for the sale to the corporation, these expenses must have been dealt with as current expenses. In the schedule to the Gas-Works Clauses Act, 1871 (34 and 35 Vict. c. 41), such expenses were treated in the manner proposed.

LORD JUSTICE-CLERK.—The third question is one of importance and requires careful attention.

It appears that the directors of this gas company took a course which is unusual and quite beyond their ordinary duties. They put aside money which they represented to the shareholders as forming a reserve and depreciation fund, and from time to time spent these funds upon the erection of new works. It was admitted by counsel, as I understood him, that they did this without consulting the shareholders. At all events, it is not stated in the case that they obtained any such consent when they appropriated these funds to the construction of new works. Mr Guthrie felt compelled to admit that that money could only be held to have been borrowed by them for that purpose, and that they would need to restore it. The question the ordinary shareholders ask is, whether they are entitled to the amount of these reserve and depreciation funds in so far as they existed in the accounts at the time when the company came to an end. I am of opinion that they are.

It is to be kept in view that, as regards the capital price of the works, it must be held to have been increased by the amount of the value of those new works upon which the reserve and depreciation funds were spent. There is therefore no loss to anybody else in taking the amount necessary to replace those funds and dividing it, as what it really was—profits put aside to meet contingencies which, in the circumstances which have occurred, viz., the expiry of the company on the 30th of June 1891, those funds cannot now be spent in meeting. Therefore I think that the first alternative of this question must be answered in the affirmative.

The next question is more difficult. It relates to a matter about which there is very little authority, and it is peculiar in this respect that it is entirely exceptional. It relates to the expenses of parliamentary proceedings.

Now, in so far as such expenses were charged to revenue in 1890 I understand that no question is raised. The question relates to a sum of about £4000 which was expended in connection with the proceedings both in 1890 and in 1891, and which proceedings have resulted in the arrangement by which this company is bought up and paid for by the Glasgow Corporation.

We have no question to consider as to whether the bargain had been a good

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[1] Mill v. Northern Railway of Buenos Ayres Co., June 29, 1870, L. R., 5 Ch. App. 621; *In re* Bridgewater Navigation Co., March 9, 1891, L. R., 2 Ch. Div. 317.

[2] *In re* Bridgewater Navigation Co., 1891, L. R., 1 Ch. Div. 155.

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one or a bad one. We have only to deal with the question whether the expenses of obtaining that arrangement are expenses properly chargeable against capital—whether they ought to be deducted from the amount obtained from the corporation for the works.

I think that they do form a charge against the amount obtained from the corporation, and that we must therefore answer the first part of this question in the negative.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

THE COURT answered the first alternative of the third question in the affirmative, and the first alternative of the fourth question in the negative, and found and declared accordingly.

MORTON, SMART, & MACDONALD, W.S.—BRUCE & KERR, W.S.—Agents.

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July 1, 1891. North British Railway Co. v. Moore.

THE NORTH BRITISH RAILWAY COMPANY, Petitioners (Appellants).—*J. C. Thomson—Dickson.*
SAMUEL JOHNSTON MOORE AND OTHERS, Objectors (Respondents).—*Jameson—Aitken.*

Superior and Vassal—Feu-contract—Building restrictions—Jus quæsitum—Rights of feuars inter se—Nuisance—Dean of Guild.—A piece of ground in a residential district in Glasgow was feued to different persons by feu-contracts which were practically identical in terms. The feuars were taken bound to erect houses, and were prohibited from carrying on certain enumerated kinds of business on the ground feued, "or to carry on any other business though not above enumerated which may be nauseous or hurtful to the neighbouring feuars . . . . . in whose favour it is hereby declared that this provision shall operate as a servitude upon the lands hereby feued." The contracts further contained stipulations limiting the height of buildings to be erected, and as to the making of sewers, and it was declared that these provisions should be inserted in all subsequent dispositions of the lands "until complete fulfilment thereof, otherwise the same shall be void and null."

The North British Railway Company, who had acquired one of the feus, applied to the Dean of Guild of Glasgow for authority to erect a shaft on their feu for the ventilation of a tunnel in an underground railway. The superior did not oppose, but objections were lodged by some of the co-feuars. The Dean refused the petition. On appeal the Court *recalled* his deliverance, *holding* (1) with regard to the prohibitions which were declared to be a servitude that there was no contravention unless the proposed erection could be regarded as the carrying on of a nauseous or hurtful business, and that it was premature to decide that the shaft would be nauseous or hurtful; and (2) with regard to the other prohibitions (following *Hislop* v. *MacRitchie's Trustees*, 8 R., H. L. 95), that there was no such mutuality of rights and obligations between the feuars established either expressly or by implication as to give the objectors a *jus quæsitum* which would entitle them to enforce the building restrictions contained in the feu-contracts.

Opinion (*per* Lord Trayner) that it was beyond the jurisdiction of the Dean of Guild to decide whether the proposed erection would be a nuisance.

2D DIVISION. Dean of Guild at Glasgow. M.

IN 1887 the Glasgow City and District Railway Company was amalgamated with the North British Railway Company.

By the Act of 1882 incorporating the former company (45 and 46 Vict. cap. ccxvi.), they were bound to make all necessary provision for ventilating the railway to the satisfaction of the Corporation of Glasgow.

The corporation having required the North British Railway Company

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to provide ventilation for the tunnel under West Regent Street, the railway company proposed to erect a ventilating-shaft on a feu on Blythswood estate, which the Glasgow City and District Railway Company had acquired in 1884 by private bargain from the trustees of Free St David's Church at the back of the houses on the east side of Blythswood Square.

On 7th February 1891 the railway company presented a petition of lining in the Dean of Guild Court of Glasgow against John Whyte, Master of Works, for the public interest, for authority to construct the shaft. The Master of Works did not oppose the petition, but objections were lodged by Dr Samuel Johnston Moore and others, neighbouring feuars upon the Blythswood estate, whose feu-contracts were admitted to be in terms *mutatis mutandis* practically identical with that of the railway company. The superior made no opposition.

The objector, Dr Moore, averred;—(Stat. 11) "The erection and use of the said ventilating-shaft and the erection and use of the said steam-engine are in contravention of the conditions in the petitioners' titles." (Stat. 12) "The erection and use of said shaft will be extremely nauseous and hurtful, and will occasion disturbance to the respondents, who are neighbouring feuars and disponees on the estate of Blythswood to the petitioners." (Stat. 13) "The erection and use of the ventilating-shaft, as aforesaid, will be extremely hurtful to the respondents. The smoke, steam, and gas extracted from the said tunnel, and emitted close to the respondents' properties, will cause them serious damage, both as owners whose property will be depreciated in value thereby, and as occupiers whose occupancy of the houses in the square will thereby be rendered practically impossible."

Dr Moore pleaded;—(1) The proposed erections being unlawful, the petition should be refused, with expenses. (2) The proposed erections being a contravention of the conditions in the petitioners' titles, the petition should be refused, with expenses. (2A) The proposed erections and works not being authorised by Act of Parliament, special or general, and being in contravention of the conditions of the title of said subjects referred to in the petition, the petition should be refused. (3) The proposed erections being injurious to the respondents and the petitioners having no right to make the same, the petition should be refused.

The piece of ground in West Regent Street upon which the church stood originally formed part of the Blythswood estate, and was feued out by the parliamentary trustees on that estate in 1814. It was outside the limits of deviation marked upon the railway plans.

The feu-contract in favour of the original trustees of the church was executed by Miss Mary Campbell of Blythswood in 1846. It contained the following clauses:—"Declaring that the said second party and their foresaids shall be bound and obliged immediately, in so far as not already done, to erect and thereafter to uphold and maintain upon the area of ground above described houses or other buildings of stone and lime and covered with slates, yielding a yearly rent at least equal to double of the feu-duty hereinafter mentioned payable by them. As also declaring that the foresaid lands are disponed by the said first party to the second party and their foresaids allenarly, with and under, and without prejudice, in any manner of way, to the conditions, qualifications, and provisions following, videlicet, That the said second party and their foresaids shall make no use of the subjects above described except what is consistent with and agreeable to the system adopted by the said parliamentary trustees (on the estate of Blythswood) for the uses of the adjoining property so far as the same is rendered obligatory on the feuars thereof by

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the terms of the titles granted to them, and in so far as the said parliamentary trustees or their successors in office or the heirs of entail of Blythswood may be answerable that nothing be authorised inconsistent with or derogatory from that system; and more particularly, but without prejudice to this general qualification of the grant, it is hereby expressly stipulated that the said second party and their foresaids shall make no alienations except either of lots to be held feu in similar terms to those which have been made by the said trustees or under the most explicit obligations to employ the subjects in that manner; and specially declaring that it shall not be in the power of the said second party or their foresaids to make use of any part of the said ground for depositing dung or rubbish except such as are produced within the lands above described, or carry on any business of brewing, distilling, tanning of leather, making of soap or candle, glue, cudbear, vitriol, or to erect glassworks, foundries of brass, iron, or other metals, and steam-engines, or to carry on any other business though not above enumerated which may be nauseous or hurtful, or occasion disturbance to the neighbouring feuars and disponees upon the estate of Blythswood, in whose favour it is hereby declared that this provision shall operate as a servitude upon the lands hereby feued: Declaring also that all sales, dispositions, or conveyances of the whole or parts or portions of the said lands upon terms in violation of or inconsistent with the above provisions shall be *ipso facto* void and null with all that had followed or may follow thereon to the disponees thereof, which conditions and provisions hereinbefore written are appointed to be engrossed in the infeftment to follow hereon, and in all the subsequent dispositions, charters, and infeftments of the whole or of parts of the said lands, otherwise the same shall be void and null."

The lands were further disponed under conditions (1) as to the observance of a scheme of laying out streets, (2) as to the upkeep of common sewers and a right to use them for the purposes of drainage, (3) as to keeping the pavement on a street to be built upon the lands feued in good repair in all time coming. "Quarto, Declaring that the houses or other buildings to be erected on the lands hereby feued shall not exceed three square storeys, either in front or behind, besides a sunk storey, and the walls thereof shall be no more than 52 feet high above the level of the street, and the front walls of the said buildings shall be built of smooth stone ashlar of a white pile, and the office houses (if any be) behind the same shall be built of stone, and shall not exceed 21 feet in height from the level of the ground to the ridge of the roof thereof; . . . and there shall be no vents or chimney heads in or on the roof of the said houses or buildings fronting Regent Street, but liberty is hereby given to carry up in the wall fronting said street pediment vents, or ornamented stalk vents, with pedestals, provided they are all of the said smooth stone ashlar, and there shall be no dormer windows, . . . which last-mentioned conditions and provisions are appointed to be engrossed in the infeftment to follow hereupon, and in all the subsequent dispositions, charters, and infeftments of the whole or part of the lands hereby feued ay and until complete fulfilment thereof, otherwise the same shall be void and null."

The objectors founded on these clauses.

On 30th April 1891, the Dean of Guild (Ure) pronounced this interlocutor:—"Finds that, under the Glasgow City and District Railway Act, 1882, now vested in the petitioners, under the North British Railway Act, 1887, the powers and provisions therein as to the erection of ventilating-shafts are confined to lands or property required for the purposes and

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under the powers of the said Act, and do not extend to lands and subjects otherwise acquired, and situated beyond the lines and limits of deviation of the said railway: Finds that the subjects referred to in the petition, and upon which it is proposed to erect the ventilating-shaft in question, are situated beyond and outside the limits of deviation of the said Act, and were not acquired under the powers of said Act: Finds that, although it were held that the petitioners were proprietors of and duly vested in the subjects referred to in the petition (which is very doubtful), they nevertheless have no other or higher powers than those of any other proprietor, and are bound to conform to the conditions, restrictions, and obligations imposed in the original feu-contract of said subjects: Finds that the ventilating-shaft proposed to be erected by the petitioners is in contravention of the conditions imposed in said feu-contract, in respect (1) of being greatly in excess of the height of buildings allowed to be erected on the ground so feued, (2) as proposed to be built of brick instead of stone, and (3) for a purpose that cannot but be nauseous and hurtful to the neighbouring feuars in a district which is almost entirely residential: Therefore refuses the lining craved, and dismisses the petition."

The railway company appealed, and argued;—(1) They were proprietors by purchase of the ground whereon they proposed to erect the ventilating-shaft. They did not therefore require statutory authority to erect it, even although the ground was outside the limit of deviation of property which they were entitled under their Act compulsorily to take. (2) The restrictions in their feu-contract, which fell to be strictly construed,[1] were restrictions as to the height and the nature of houses and buildings and upkeep of sewers; and in the list of businesses "which may be nauseous or hurtful," there was no word of such a chimney as the railway company proposed to erect. (3) It was quite settled[2] that the fact of the same conditions appearing in feu-charters derived from a common superior, coupled with a substantial interest in their observance, was not sufficient to give each feuar a *jus quæsitum*, and to entitle him to enforce them against any single feuar. There must be mutuality and community of rights and obligations otherwise established between them, either (*a*) expressed in the feu-contract, or (*b*) to be reasonably implied from a reference in all the feu-contracts to a common plan or scheme of building adopted by the superior, or (*c*) by mutual agreement among the feuars themselves. In the present case there might be identity of conditions, but there was nothing more, and further, the superior was not an objecting party. The reference in the feu-charters to the system of the parliamentary trustees could not avail the respondents, because it was admitted that that had been in many cases departed from. In *M'Gibbon* v. *Rankin*,[3] where an implied right to enforce a common condition was held to exist in each member of a class of feuars, the superior had feued out his land in separate lots for the erection of houses in streets or squares upon a uniform plan. In *Robertson* v. *North British Railway Co.*,[4] again, the superior had feued out a large area without any plan, but imposing certain general restrictions which the feuar was taken bound to insert in all

[1] Banks & Co. v. Walker, June 5, 1874, 1 R. 981; Rankine on Landownership, p. 398; Naismith v. Cairnduff, June 21, 1876, 3 R. 863; Buchanan, &c. v. Marr, June 7, 1883, 10 R. 936; Moir's Trustees v. M'Ewan, July 15, 1880, 7 R. 1141.

[2] Hislop v. MacRitchie's Trustees, Dec. 17, 1879, 7 R. 384, revd. June 23, 1881, 8 R. (H. L.) 95.

[3] M'Gibbon v. Rankin, Jan. 19, 1871, 9 Macph. 423, 43 Scot. Jur. 205.

[4] Robertson v. North British Railway Co., July 18, 1874, 1 R. 1218.

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dispositions granted by him. The clause prohibiting the feuars from carrying on any business of a nauseous nature was made a servitude upon the lands conveyed, whereas the other restrictions were not. It was a fair inference that the right of one feuar to object to the operations of another was confined solely to the operations prohibited by that clause. (4) It was premature to consider whether the shaft would form a nuisance, and in any view, that was not a question for the Dean of Guild to decide.

Argued for the respondents;—The power given to the petitioners to erect ventilating shafts was given to them by the City and District Railway Act, 1882, and was necessarily confined to a power to erect them upon lands compulsorily acquired under the Act, and within the limits of deviation. But (2) assuming that in respect of their purchase of the church they were outside the statute altogether, they were not entitled to violate the conditions in their feu-contract. Where a proprietor had feued out a piece of ground in lots for building on a plan prescribed, it was reasonable to imply that each feuar contracted with reference to and in reliance on the conditions imposed on the others to observe the plan. Mutual servitudes enforceable *inter se* among the feuars were thereby constituted.[1] It was obvious from an examination of the charters, whose conditions and restrictions were practically identical, that the Blythswood estate was feued out as a *unum quid* upon a common plan. The objectors had a good title then to prevent the proposed erection. (3) It was so obvious that the chimney would form a nuisance that the Court were entitled to say at once that it was a contravention of the feu-contract. *Banks'*[2] case was very special, and had no bearing upon the present question.

At advising,—

LORD JUSTICE-CLERK.—The North British Railway, who have a line which runs below a considerable part of the city of Glasgow, are under an obligation, enforceable by the Town-Council of Glasgow, to have the underground part ventilated, and in their endeavours to carry out that obligation they have purchased property not very far from Blythswood Square in Glasgow, and they propose to make a ventilating-shaft from the top of their tunnel running at right angles to the street, but some distance off the street, and then to erect a brick shaft for the purpose of carrying off the foul vapours from the inside of the tunnel. They are doing this by a separate purchase. There is no question whatever of the railway company's right in the matter; it is not disputed that they have a right to acquire this ground, and the right to use it except in so far as they may be restricted by contract—they coming into the position of the original feuar.

All question between the superior and the feuar is out of the case, because the superior does not object to what the railway company propose to do, and the sole question which is before us is whether neighbouring feuars have the right to prevent the railway company's action. Now, their right to interfere with one of the Blythswood feuars in doing what he thinks proper to do upon his own ground in the matter of building, must be something of the nature of a servitude of a dominant over a servient tenement. There is no contract whatever between the feuars who are objecting to this being done and the railway company, and

[1] Hislop v. MacRitchie's Trustees, *vide supra*, p. 1024, note 2, per Lord Young at 7 R. 393, Lord Blackburn and Lord Watson, at pp. 99 and 103 of 8 R.

[2] Banks & Co. v. Walker, *vide supra*, p. 1024, note 1.

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therefore a servitude must be found, if it exists, to be imposed on the railway company by the conditions of the feu-contract, to which they have got a right by purchasing the property from the previous proprietor.

Now, it has been, I think, very clearly and distinctly decided by the House of Lords in the case of *Hislop* that where a feu-charter from a common superior contains the same conditions as regards the different feuars in a particular street say, or district, and where all the feuars have an interest in the observance of the conditions which are set forth in these corresponding contracts, notwithstanding that, a feuar may have no right whatever to enforce the conditions against the other feuars, unless he has by direct stipulation in the titles or by implication a right to do so. The case of *Hislop* was certainly one of the strongest cases that could be conceived in favour of the feuar if he had any right in law at all. It was a case in Gayfield Square here, where the feuars were taken bound by the superior to build houses of a particular style, of a particular height, and at a particular distance back from the street, and to maintain the ground in front of the houses free from buildings, and to maintain a particular style of railing next the street. Now, Mr Hislop proceeded to build up the whole front garden up to the street, and in fact completely to change the whole aspect of the place, and necessarily to place a dead wall next the neighbouring feuar. If ever there was a case in which there might be said to be an implied right on the part of one feuar—in consequence of there being conditions imposed on all the feuars by the superior that they are to build in a particular way—to interfere with a neighbouring feuar, it would have been in that case; but it was held by the House of Lords, and it was the opinion of one of your Lordships in the case here in the Court of Session, that the feuar, apart from express stipulation of right by his title, had no such right.

Now, it really comes to a question here of what is the state of the titles of the feuars of this district, and whether they have by their titles any right as against neighbouring feuars to prevent them from doing such a piece of work as is proposed to be done by the North British Railway. Now, in the particular titles which are before us, it is remarkable that there are certain stipulations made by the superior to which he attaches absolutely the condition that there shall be a servitude in favour of other feuars, and these are with regard to certain businesses which are not to be carried on upon the feu. It is declared "that it shall not be in the power of the said second party or their foresaids to make use of any part of the said ground for depositing dung or rubbish, except such as are produced within the lands above described, or to carry on any business of brewing, distilling, tanning of leather, making of soap or candle, glue, cudbear, vitriol, or to erect glassworks, foundries of brass, iron, or other metals, and steam-engines, or to carry on any other business though not above enumerated which may be nauseous or hurtful, or occasion disturbance to the neighbouring feuars and disponees upon the estate of Blythswood, in whose favour it is hereby declared that this provision shall operate as a servitude upon the lands hereby feued." Therefore it is quite plain that careful consideration was given to those matters in the interest of the feuing of this part of Blythswood estate, and it was thought advisable to give each feuar a servitude right against the remaining feuars; but most certainly, beyond what is there specified, there is nothing at all touching the proposed erection by the North British Railway, unless it be suggested that it was the carrying on of a nauseous or hurtful business. The erection of a shaft to carry off vapours cannot in itself be so held.

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It is of course a totally different question, and one independent altogether of the titles of these parties, whether if, after this erection is made, and it turns out a nauseous business, or hurtful to the neighbouring feuars, it cannot be put down as a nuisance; but I do not think that can possibly be decided except upon the facts as they arise. It would be anticipating what the railway company may do if they are allowed to put up this shaft, which they would do at their own risk.

Now, that stipulation being in the titles of the feuars of this district, I find that there are other stipulations made in reference to such matters as the height of houses, the making of sewers, and so on,—the usual clauses which are to be found in the titles relating to a residential neighbourhood; but these, I take it, must be held, under the case of *Hislop*, to be stipulations entirely as between the superior and the individual feuar, and that no *tertius* is to come in and attempt to enforce them. If the superior does not choose to enforce them, they cannot be enforced by anybody else. It is quite certain that in this particular district a very large number of these stipulations have been set aside in actual practice upon the estate, and the superior is not only not objecting, but is a consenting party to what is proposed to be done; and therefore I am compelled, following the case of *Hislop*, which I think went very far in this direction, to hold that the decision of the Dean of Guild here was a decision which he was not entitled to give, and that he was not entitled to refuse a lining to the railway company, who propose to erect this shaft upon back ground of their own property, and we must recall his judgment and remit back to him to grant the lining craved.

I would only like to say that, while not a matter of legal stipulation at all, it was publicly stated to us—and it was just what one would expect from a great company like the North British Railway—that, while they are proposing to erect the ventilating-shaft of brick, they do not intend in the event of its proving satisfactory, to keep it in a hideous and unsightly condition at that place. I am quite sure that they will face it up properly so as to make it as little as possible an eyesore to the neighbourhood; but we have only to settle the question of what is their legal right, and I am of opinion that their legal right is to have the authority to erect the ventilating-shaft which they ask.

LORD YOUNG.—I concur. I think it is very important to keep in view that the railway company are not only entitled, but are bound to ventilate their underground railway to the satisfaction of the town-council; and the town-council thought that the most satisfactory, if not the only satisfactory, way of performing this statutory duty was that the railway company should acquire a piece of ground outwith the limits of deviation, and upon that put the necessary shaft in order to accomplish the ventilation which it was their duty to accomplish somehow or other. They did acquire this property, which was adjacent to their line, although beyond the limits of deviation. It is their property now, and I am of opinion that no objection can be stated on the part of the objectors to the right of the railway company to become the proprietors of that subject, which they are at this moment.

Another objection to what they propose to do with the approbation of the town-council in the discharge of their statutory duty is that they have no statutory authority to make any erection upon that ground. If they required statutory authority to do it that objection would be unanswerable, but I think

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it clear that they require none. They are, however, not entitled to do anything which any ordinary citizen of Glasgow acquiring this property would not be entitled to do. Now, an ordinary proprietor acquiring this property would be entitled, or he would not, to make this erection, according or not as it was a violation of the feu-contract upon which the ground was acquired, or an unlawful use of it in itself irrespective of that.

Now, to take the last first, I think it clear enough that no use unlawful in itself is proposed. The idea of a ventilating-shaft with a chimney being an unlawful erection in the city of Glasgow is a strange proposition, I must say.

Of course the question of nuisance remains. If the use leads to the production of a nuisance then it may be stopped, but I cannot adopt the view of the Dean of Guild, that it cannot be but nauseous and hurtful to the neighbourhood. That I suppose means—I do not think it is intelligible if it means anything else—that the discharge by the ventilating-chimney will be nauseous and a nuisance. Well, we are assured that it will not, but that if it is it will be stopped. If it turns out to be a nuisance it will be stopped by compulsion, if not stopped voluntarily. The Dean of Guild cannot mean, I suppose, that the very sight of a chimney is nauseous and hurtful, and that it would depopulate the place immediately it was put up.

But, then, the question is, is it against the conditions of the feu? and I am of opinion with your Lordship that it is not. We have no concern with the superior, who assents to it, and therefore we only determine under this head that it is not in violation of any obligations put upon the feuar in favour of other feuars upon the Blythswood property. I do not enter into details; I think it is sufficient to state the conclusion, which is in accordance with the opinion which your Lordship has more fully expressed. It would be a sad pity if the ventilation of this underground railway was hindered or delayed merely because the people about Blythswood Square did not like the look of the chimney. If a nuisance should hereafter result, the nuisance must be abated in some way or other.

Your Lordship has noticed what was stated at the bar by the learned counsel, that this erection might be made ornamental and as unlike a chimney as the ingenuity and taste of an architect could devise. I am afraid that it would still maintain its distinctive appearance as a chimney, and I think there had better be no attempt made to disguise it; but there are differences of tastes in such matters, and if harmony can be produced by adopting some style of chimney which would meet with general commendation, there can be no objection to it; but I myself venture most humbly to say that I think there had better be very little attempt made to disguise it. It may be built of stone, if that is thought more beautiful than brick, but I should think it would not be very long before it assumed a colour in which stone would not be distinguishable from brick; but that is of no moment. I agree with your Lordship that the Dean of Guild is wrong, and that the railway company should get the decree sought.

Lord Rutherfurd Clark.—I am bound to follow the case of *Hislop*, and on the authority of that case I hold that the respondents are not entitled to enforce the conditions contained in the title of the appellants. I think it right, however, to say that I do not read that case as deciding that such a title can be

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given only by express words. I do not think, however, that it can be inferred from the deeds which are before us in the present case. The case of *Hislop* was, in my judgment, a much stronger one than the present for holding that the conditions might be enforced by the feuars, but the decision of the House of Lords negatives the existence of any such right.

LORD TRAYNER.—I concur with your Lordships in thinking that the Dean of Guild has gone wrong in pronouncing the judgment brought under appeal, and I cannot help saying that the three reasons upon which the judgment seems to have proceeded are each and all of them, in my opinion, quite unsound. The last mentioned, but which evidently bulks most largely and most influentially in the mind of the Dean of Guild, is that the proposed erection would be a nuisance. I think that there he anticipates what is not an ascertained fact; and more than that, that he is assuming a jurisdiction that does not belong to him, because the question, whether this is or may be a nuisance, is one which the Dean of Guild is not competent to try.

The second ground of judgment which I would refer to is, that the railway company are not entitled to do this, because the proposed erection is outwith the limits of their deviation, and because it is against the statute. The Dean of Guild has misapprehended the provisions of the statute entirely. They are not proposing to put up this ventilating-shaft under the statute; they are proposing to build the shaft upon property acquired by them as individual proprietors, and unless there be something in the title to the subjects which excludes their exercising this right as one of the rights of property, then they must be allowed to exercise it.

That brings me to the third and last of the reasons of the Dean of Guild in giving this judgment, which is, that the proposed erection will be foreign to the conditions of feu. Upon that matter I need say no more than that I entirely concur with your Lordships in the views which you have expressed. I think the judgment of the Dean of Guild ought to be recalled and the case remitted back to him, with instructions to grant the lining.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Dean of Guild appealed against: Remit the cause to him with instructions to grant the prayer of the petition."

MILLAR, ROBSON, & Co., S.S.C.—FORRESTER & DAVIDSON, W.S.—Agents.

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Moncreiff.

THE HON. F. J. MONCREIFF (Factor Loco Tutoris to C D), Petitioner.—*Blackburn.*

Parent and Child—Factor loco tutoris—Custody of child.—Circumstances in which authority was granted to a factor loco tutoris to detain the person of his ward in Scotland in opposition to the wishes of the ward's father, who was resident abroad.

1ST DIVISION.

C.

A B, a Scotsman, resident in Russia, but not naturalised in that country, married a Russian lady, who died in June 1881, leaving one daughter, C D, born in February 1880. In July 1881 C D was sent to reside with A B's mother in Scotland.

In May 1890 A B's mother presented a petition for the appointment of a factor loco tutoris to C D. She stated that C D's maternal grandfather,

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Moncreiff.

E F, had died in Russia in June 1887, and that C D thereby became entitled to certain rights of succession in the estate of the deceased, and that the said "A B, the pupil's father, is in embarrassed circumstances, and in order to the recovery and preservation of the share of the estate of the said E F falling to the said C D, and to the administration thereof for her behoof, it is necessary that a factor loco tutoris should be appointed by your Lordships."

No answers were lodged to this petition, and, on 3d June 1890, the Hon. F. J. Moncreiff, C.A., was appointed factor loco tutoris to C D.

After his appointment the factor granted a power of attorney in favour of Mr Edward Neil Primrose, merchant, St Petersburg, for the purpose of suing in the Russian Courts for C D's share of the inheritance.

Mr Primrose, on taking the usual steps in Russia, was opposed by A B, who appeared in the proceedings and pleaded that, he being the legal guardian of the child, her share of the estate ought to be paid over to him.

Thereafter, on 9th March 1891, the factor presented a note to the Court setting forth these facts, and further stating,—"It is believed that the Russian Courts have declined to recognise the right of the said A B to receive the inheritance of the said C D, so long as she remains out of his custody, and he has therefore intimated to her that she will require to come to Russia in May next in order to reside with him there. . . . The factor is of opinion that it would be highly prejudicial to the interests of the said ward that she should be intrusted to the custody or control of her father, and he is also advised that, on account of her constitution and the state of her health generally, residence in Russia would endanger her life." A certificate as to her health was appended, and the note craved the Court to grant authority to the factor to detain the person of his ward in Scotland, and under his custody.

On 11th March 1891 the Court pronounced an interlocutor ordering the note to be served on A B, and answers to be lodged in fourteen days, and "further, as craved in said note, direct and ordain the said factor loco tutoris to detain the person of the said C D in the meantime, and till the further orders of the Court."

On 1st July the factor moved the Court to confirm the interim order of 11th March.

He stated that attempts to serve the note on A B personally had failed; that on 21st April the factor wrote to A B through his Edinburgh agents enclosing a print of the note and registering the letter; that no answer had been received, but that on 2d June A B had written to his mother, and had incidentally mentioned that he had received a copy of the note.

THE COURT pronounced the following interlocutor:—"The Lords having heard counsel on the note for the factor loco tutoris, No. 7 of process, renew the order of 11th March 1891."

RUSSELL & DUNLOP, W.S., Agents.

GEORGE TAYLOR & COMPANY, Pursuers (Reclaimers).—*Asher*—*Wallace*.
GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders Respondents.—*D.-F. Balfour*—*Guthrie*.

No. 199.

July 3, 1891.

Taylor & Co. v. Glasgow and South-Western Railway Co.

Railway—Agreements and contracts—Rates—Preference.—A railway company agreed with a coalmaster to carry his coals to Ayr at the following lump rates:—From A (two miles) at 6d. per ton, from B (six miles), from C (seven miles), and from D (eight miles) at 8d. per ton; and that in the event of the railway company carrying coals to Ayr for any other coalmaster at lower rates it should be bound to reduce the rates under the agreement to those lower rates.

In an action raised by the coalmaster for repayment of alleged overcharges the pursuer averred that the railway company had been carrying coals to Ayr from the L. colliery, twenty-three miles distant, for 1s. 7d. per ton, being a rate under 1d. per ton per mile, while the pursuer had been paying, in terms of the agreement, on coals carried from the D pit to Ayr 1d. per mile, and from the B and C pits a higher rate per mile.

Held that the rates fixed by the agreement were lump rates not based on considerations of mileage alone, but graduated according to distance, a higher rate per mile being charged for short distances than for long distances, and that therefore it did not appear from the pursuers' statement that the rates charged against the L. colliery for carriage for twenty-three miles were lower rates than those charged against the pursuers for short distances, and action *dismissed* as irrelevant.

Mackinnon v. *Glasgow and South-Western Railway Co.*, 12 R. 1309, aff. 13 R. (H. L.) 89, *distinguished*.

2D DIVISION. Ld. Kyllachy. M.

THE late John Taylor Gordon was lessee of collieries at Enterkine, Sundrum, and Gadgirth, and also at Blackhouse, all in the vicinity of Ayr. He was also lessee of a private railway from Annbank (a name given to the district in which Enterkine, Sundrum, and Gadgirth are situated) to Ayr.

In 1864 the Glasgow and South-Western Railway Company promoted in Parliament a bill to enable them, *inter alia*, to make certain railways in Ayrshire. In connection therewith the company and Mr Gordon entered into an agreement, dated 27th and 28th February 1865, which provided as to the traffic from the above-named collieries of Mr Gordon (who was the second party to the agreement) to Ayr and Troon. The fifth article of this agreement provided as follows as to rates:—"Fifth, The rates payable by the second party to the first party on coal carried on the railways to be made under the authority of the said Act; from Enterkine, Sundrum, and adjacent coalfields to the harbour or other place of sale at Ayr shall be 8d. per ton; from these coalfields to the harbour at Troon, 1s. 5d. per ton; and from Blackhouse to the harbour or other places of sale at Ayr, 6d. per ton." The sixth article was as follows:—"Sixth, To all other places than those above-named (*i.e.* Ayr and Troon) the rates on coal shall be as follows, namely, for distances not exceeding six miles, 1½d. per ton per mile; for distances exceeding six miles and not exceeding twenty-five miles, 1½d. per ton per mile for the first six miles, and 1d. per ton per mile for the additional distance beyond six miles; for distances exceeding twenty-five miles, the above rates for the first twenty-five miles, and ¾d. per ton per mile for the additional distance beyond twenty-five miles. The above distances shall be calculated at the actual distance from the junction of the second party's private railway with the main line: Provided and declaring always that in the event of the first party charging to any other coalmaster or coalmasters or other parties in the coal trade in competition with the second party rates lower than those fixed by this agreement, then the first party shall be bound to reduce the rates fixed by this and the preceding article to the rates given by them to

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the said competing parties, which reduced rate shall only continue, however, so long as the said reduced rate is given to said competing parties."

The bill passed into law, and thereafter the traffic from the collieries was carried over the railway company's line made in virtue thereof.

On 18th June 1890, George Taylor & Co., coalmasters, who claimed to be in right of the agreement, raised an action against the Glasgow and South-Western Railway Company for declarator that the "defenders are not entitled to carry coals from coalfields further distant from Ayr and Troon than the coalfields mentioned in article 5 of an agreement between the defenders of the first part and John Taylor Gordon, Esquire, of Blackhouse, and then the sole partner of the pursuers' firm of the second part, dated 27th and 28th February 1865, at a lower rate per ton per mile than the pursuers pay under the said article without giving the pursuers a corresponding reduction; and the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuers (first) of the sum of £25,386, 1s. 11d. sterling of principal, and (second) of the sum of £8348, 17s. of interest thereon, conform to state to be produced at the calling hereof."

The pursuers stated that since 1874 they had sent large quantities of coal to Ayr and Troon, for which they had been charged "the lump rates mentioned in article 5 of the said agreement," and had paid these rates in ignorance of the fact that lower rates were being demanded from and paid by other traders in competition with them since 1874.

It is not necessary to refer to the pursuers' statement of alleged overcharges other than that in—(Cond. 11) ". . . The pursuers aver that the defenders are due and resting owing to them a rebate on the said coal and dross carried for them by the defenders to Ayr, from the beginning of 1874 to the end of 1887, calculated as follows, viz.:—The distance from Lanemark to Ayr Harbour is twenty-three miles. From 1874 to 1887 the defenders have charged the proprietors of Lanemark Colliery for the carriage of their coal and dross from that colliery to Ayr Harbour at the rate of 1s. 7d. per ton, or $\frac{1}{2}\frac{8}{3}$d. per ton per mile. The pursuers' pits are severally distant from Ayr Harbour six, seven, and eight miles, and during the said period the defenders have charged the pursuers for the carriage of their coal and dross the rate of 8d. per ton, or 1$\frac{1}{3}$d. per ton per mile in the case of the six mile pits, 1$\frac{1}{7}$d. per ton per mile in the case of the seven mile pits, and 1d. per ton per mile in the case of the eight mile pits. The pursuers were thus, as compared with Lanemark, overcharged on said coal and dross sent to Ayr from their six mile pits at the rate of 3$\frac{1}{2}\frac{1}{3}$d. per ton, from their seven mile pits at the rate of 2$\frac{4}{7}$d. per ton, and from their eight mile pits at the rate of 1$\frac{2}{3}\frac{8}{3}$d. per ton. The sum due and resting owing to the pursuers by the defenders in respect of said overcharge amounts to £26,311, 14s. 9d., conform to detailed statement No. 5 herewith produced and referred to." (Cond. 13) "The pursuers aver that the rates fixed in article 5 of the agreement were for convenience arrived at on the average distance of the coalfields from Ayr and Troon and were intended to be lower than they would have been had they been reckoned by the mileage scale in article 6, or by any other lower scale to which pursuers were entitled, in conformity with the provisions of that article. The defenders contend that the rates in article 5 must be regarded as fixed irrespective of distance or scale, and as they decline to make the rebate asked for by the pursuers this action has been rendered necessary."

The defenders, *inter alia*, pleaded;—(2) The pursuers' averments are not relevant to support the conclusions of the summons.

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From the statements and admissions of parties and from a map produced, it appeared that of the pursuers' collieries Blackhouse was two miles from Ayr, Enterkine was six, Sundrum seven, Gadgirth eight. Lanemark Colliery was about twenty-three miles from Ayr.

The Lord Ordinary (Kyllachy), on 30th January 1891, sustained the defenders' second plea in law, and dismissed the action.*

* "OPINION.—In this action the pursuers, who are a firm of coalmasters in Ayrshire, seek to recover from the defenders, the Glasgow and South-Western Railway Company, certain alleged overcharges for the carriage of coal, the said overcharges extending over the period since 1874, and amounting in gross to upwards of £25,000. The claim is based upon the provisions of a certain agreement made in the year 1865 between the defenders and the pursuers' late partner and author, Mr John Taylor Gordon, and, according to the pursuers, it is a claim analogous to that sustained by this Court and the House of Lords against the same defenders, in the case of *Mackinnon* v. *The Glasgow and South-Western Railway Company*, 12 R. 1309, and 13 R. (H. L.) 89.

"The agreement in question was made between the defenders and the late Mr Taylor Gordon, in consideration—as I think sufficiently appears—of the latter supporting a certain railway bill which the defenders were at the time promoting, and in consideration also of Mr Gordon undertaking to send along the proposed line of railway the whole traffic from his pits in the vicinity of Ayr. It is an agreement which contained a variety of provisions, and conferred various privileges on Mr Taylor Gordon, but, in the view I take of the case, it is only necessary to refer to those provisions which directly bear on the alleged overcharges.

"The provisions in question are contained in the fifth and sixth clauses, both quoted at length in the record.

"The fifth clause applied to traffic with Ayr and Troon, and the rates which it provided were lump rates—that is to say, the defenders undertook to carry Mr Gordon's coal from his pits at Enterkine, Sundrum, and adjacent coal fields, to the town and harbour of Ayr at a lump rate of 8d. per ton; from these coalfields to Troon at a lump rate of 1s. 5d. per ton; and from Blackhouse to the town and harbour of Ayr at a lump rate of 6d. per ton.

"The sixth clause applied to traffic to all other places than Ayr and Troon, and its rates were fixed on a different principle, viz., that of a mileage rate graduated according to distance, the lower distances being charged a higher and the longer distances a lower rate per ton per mile. It is not necessary to recite the particular charges, but at the end of the clause occurs the following provision, out of which the present question arises:—'Provided and declaring always that in the event of the first party charging to any other coalmaster or coalmasters or other parties in the coal trade in competition with the second party rates lower than those fixed by this agreement, then the first party shall be bound to reduce the rates fixed by this and the preceding article to the rates given by them to the said competing parties, which reduced rate shall only continue, however, so long as the said reduced rate is given to said competing parties.'

"It is not disputed that this proviso falls to be read as applying both to clauses 5 and 6, that is to say both to Ayr and Troon traffic on the one hand, and to general traffic on the other. Nor is it disputed that for the purposes of the present question its effect is the same as if, at the end of article 5, there had been added a declaration that in the event of the railway company charging to any competing coalmasters rates lower than those fixed by article 5, the railway company should be bound to reduce the rates fixed by article 5 to the rates so charged to the said competing coalmasters.

"The question at the present stage is whether the pursuers have relevantly averred that a certain rate charged to a certain competing coalmaster, viz., the Lanemark Coal Company, for the carriage of coal to Ayr is a lower rate than the rate or rates to Ayr charged to the pursuers under the said fifth article. That is to say, the question is whether what is averred on record with respect

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The pursuers reclaimed, and argued;—A proof should be allowed. The Lord Ordinary said that the pursuers had presented no standard of com-

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to the Lanemark rate stamps it as being in the sense of the agreement a lower rate than the pursuers' rates under article 5. I have come to be of opinion that this question must be answered in the negative.

"The facts which have to be kept in view, I think, are these—The pursuers' pits at Enterkine, Sundrum, and Gadgirth, to which the 8d. rate applies, are situated at varying distances from Ayr and Ayr harbour, the distances being, as is admitted, respectively, six, seven, and eight miles. The distance from Blackhouse to Ayr, the rate for which is 6d., is not set out on record, but the map produced shews it to be about two miles or perhaps less. The distance from Lanemark Colliery to Ayr Harbour is on the other hand said to be twenty-three miles, and the rate charged to the Lanemark Company is said to be 1s. 7d. per ton. It is not necessary, in the meantime, to go into the figures with respect to Troon traffic, except perhaps to say that the distances from the pursuers' pits to Troon range from fourteen to sixteen miles.

"In this state of the facts, one thing is at the outset clear, viz., that the Lanemark rate to Ayr is not absolutely lower than the agreement rate. It (the Lanemark rate) is 1s. 7d., while the highest agreement rate is 8d. I do not, of course, suggest that this is conclusive. On the contrary, I quite see the difficulty of holding that when the agreement speaks of 'lower rates' it means rates absolutely lower than the agreement rates. For one thing, the agreement has for Ayr traffic, not one, but two rates, viz., 8d. for Enterkine and 6d. for Blackhouse, and if the question were one of absolute rates, the inquiry would always be, which of the two was the rate to be compared? It is not, however, necessary to consider how far this difficulty is insuperable. It is enough to note that in whatever other sense the Lanemark rate may be lower than the agreement rate, it is not, and cannot be said to be lower absolutely.

"The point, therefore, really is, whether the Lanemark rate is relatively lower than the agreement rate, or rather the agreement rates. And this involves the question whether the pursuers have been able to point to any common standard of comparison applicable to both rates, and tested by which the Lanemark rate is higher than the agreement rates. After the best consideration I have been able to give to the pursuers' record, I am of opinion that they have failed to set forth any such common standard of comparison,—that is to say, that they have failed to indicate any scale or standard capable of being applied to the two rates in contrast and capable of being so applied consistently with the true construction of the agreement.

"Their first suggestion is that the two rates fall to be compared simply according to mileage; that is to say, they suggest that the agreement lump rate of 8d. falls to be broken up into as many rates as there are pits at different distances within the defined district, and that the rate per mile being for each pit thus ascertained, that rate falls for each pit to be compared with the Lanemark rate (1s. 7d. for twenty-three miles), which is equal to 19/23ds of a penny per mile. The result is to exhibit the Lanemark rate as lower relatively than any of the agreement rates, the latter being, in the case of the eight mile pits, 1d. per ton per mile; in the case of the seven mile pits, 1 1/7d.; in the case of the six mile pits, 1 1/6d.; and in the case of Blackhouse (which is close to Ayr), about 3d. per ton per mile.

"In my opinion, this method of calculation is illegitimate. A simple mileage standard is not, in my opinion, applicable to the pursuers' rates under article 5. It cannot, I think, be held that the parties to the agreement intended that the rates under article 5 should be judged by such a standard. Nothing seems plainer than that the rates in question were fixed altogether irrespective of mileage. The 8d. rate applies equally whether the pits are distant eight miles or seven miles or six miles, and would equally apply if pits were opened within the district mentioned ten miles or twelve miles from Ayr. Moreover, the 6d. (Blackhouse) rate is, judged by mileage, about three times higher than the 8d. rate, and altogether, it is quite obvious that article 5 proceeded on the principle, first (as be-

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parison between their agreement rate and the Lanemark rate. But the proper method was to reduce both to a mileage rate, and then compare tween the 8d. and 6d. rates), of charging higher rates per mile for short distances than for long; and next (as among the various pits within the Enterkine and Sundrum district), of ignoring mileage altogether. How, in these circumstances, it can be predicated that the Lanemark rate, being 19/23ds of a penny per mile for twenty-three miles, is a lower rate, in the sense of the agreement, than either or both of the pursuers' rates under article 5, I do not understand. It is impossible to say what would have been the agreement rate for twenty-three miles had the pursuers' district extended to that radius. Judged by the difference between the two rates stipulated, it is quite possible that for so long a distance the rate would have been quite as low as the Lanemark rate.

"In point of fact (apart from the difficulty of at all breaking up lump rates into mileage rates, and apart also from the difficulty that, when so broken up, the result is not one, but several, mileage rates), the pursuers' contention involves—as it seems to me—this cardinal absurdity. It assumes that rates for long distances were—according to the intention of the parties to this agreement—to be charged for at the same rate per mile as short distances. But this is contrary to all practice and all experience, and the absurdity is well illustrated by taking the 6d. rate from Blackhouse, and applying the pursuers' principle to that rate. The result would be that, because Lanemark (twenty-three miles), gets a rate of 1s. 7d., the Blackhouse rate (two miles), would have to be reduced from 6d. to something like 1½d. in gross, or ¾d. per ton per mile, notwithstanding that for distances under six miles the minimum rate shewn on any of the tables or scales produced is 1½d. per ton per mile.

"It appeared to be thought that the adoption of a simple mileage standard receives support from the case of *Mackinnon*. That, however, is not so. The pursuers in that case were themselves charged according to a mileage scale graduated according to distance, and there was no difficulty in applying that scale, both to the pursuers' traffic and to the traffic of the competing traders who were said to have got lower rates. Accordingly, what was there done was first to compare the lower rate complained of with the rate which, according to the graduated mileage scale, was the appropriate rate, and then to reduce the pursuers' rate proportionately to the difference between the appropriate rate and the actual rate charged to the competing traders. This method was obviously legitimate, and made full allowance for the diminution of the mileage rate according to distance. And accordingly all that was struck at in *Mackinnon's* case was an undue diminution in the mileage rate, which the difference in distance did not justify. There was no suggestion in that case of a simple mileage standard such as is suggested here. The question was between rates absolutely lower, and rates relatively lower according to a prescribed and graduated mileage scale; and what the Court held was only this, that where 'lower rates' are mentioned in an agreement for rates fixed according to mileage, the reference is not to rates absolutely lower, but rates relatively lower according to the prescribed mileage standard.

"I reject, therefore, as quite inadmissible the pursuers' first standard of comparison. But, apparently conscious of the difficulties which I have pointed out, the pursuers have on record suggested two other standards of comparison in the shape of two graduated scales or schedules which they find in force on the defenders' system, and by means of which they seek to perform the same comparison as was properly and successfully performed in the case of *Mackinnon*."—(His Lordship held these to be inapplicable to the pursuers' and the Lanemark traffic, and concluded thus):—

"I therefore find that the pursuers have failed to set out any facts or figures which imply or enable me to affirm that the Lanemark rate is lower than all or any of the pursuers' rates under article 5. And this is tantamount to saying that the pursuers have not stated a relevant case, and that their action must be thrown out. I have not found it necessary to decide—and indeed it is impossible to do so by anticipation—what exactly the agreement means when it speaks of

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them.[1] Here two lump rates were found. The pursuers paid 8d. per ton for eight miles, Lanemark colliery, 1s. 7d. for twenty-three miles, the same eight miles, plus fifteen. The meaning of the agreement was that when another trader was charged less per mile for any distance, the pursuers' rate should be reduced so as to be on an equality therewith.

Argued for defenders;—The pursuers must be able to shew a standard of comparison between their rates and Lanemark rates or Kilmarnock scale. They failed to do so. In *Mackinnon's* case, which they represented as an authority for them, there was such a standard.

THE COURT adhered.

MACKENZIE & BLACK, W.S.—JOHN C. BRODIE & SONS, W.S.—Agents.

No. 200.
July 3, 1891.*
Smith v. Smiths.

MISS MARY SMITH (Melville Smith's Executor), First Party.
MISS MARY SMITH AND OTHERS (Melville Smith's heirs *in mobilibus*), Second Parties.—*Goudy—Cullen.*
WILLIAM SMITH AND OTHERS (George Greig Smith's heirs *in mobilibus*), Third Parties.—*C. K. Mackenzie—Hunter.*

Foreign—Succession—Interpretation of Settlement.—Lex domicilii—Lex loci actus.—Questions as to the interpretation of a *mortis causa* deed disposing of moveable estate must be solved by the law of the domicile of the granter of the deed, unless the deed shall disclose an intention on the part of its granter that some other law should be invoked.

Circumstances which were held to be insufficient to displace the general rule.

2D DIVISION. M.

MELVILLE BABINGTON SMITH, who was born in Scotland in 1838, emigrated to New Zealand in 1862, and between that year and 1881 carried on business partly in New Zealand and partly in Scotland, making several visits to Scotland. In 1881 he bought, along with his brother George, a sheep farm, called Pouparæ, in New Zealand. He and his brother George in 1885 left New Zealand for Scotland on a visit, and before starting both employed a solicitor in Gisborne, New Zealand, to make their wills, which they executed there. George died in Scotland in 1886 leaving children, and Melville returned to New Zealand to sell Pouparæ. He sold it and started for Scotland, but died in New York in 1887 without children. His will, made at Gisborne, was found in his portmanteau.

It ran in the following terms, viz.:—"This is the last will and testament of me, Melville Babington Smith, of Pouparæ, in the district of Poverty Bay, in the colony of New Zealand, sheep farmer: I hereby revoke all other wills or testamentary documents at any time heretofore made by me, and declare this to be my last will and testament: I appoint my friend, Alexander Mackenzie of Ormond, sheep farmer, and David Kirkpatrick of Poverty Bay, sheep farmer (hereinafter called 'my said trustees'), to be trustees and executors of this my will: I give and bequeath the sum of £100 sterling to my sister-in-law, Mary Ann Smith, wife of Well-

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lower rates. It may be that in some future case rates may come into controversy the amounts and conditions of which may make it possible, or even easy, to affirm that they are lower than the agreement rates. But for the purposes of the present case it is, I think, enough that the Lanemark rate complained of is not shewn to be a lower rate in the sense of the agreement, assuming everything to be true which the pursuers aver."

[1] Mackinnon v. Glasgow and South-Western Railway Co., July 15, 1885, 12 R. 1309, June 23, 1886, 13 R. (H. L.) 89; Dalmellington Iron Co., Feb. 26, 1889, 16 R. 523.

* Decided June 6, 1891.

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wood Smith; the sum of £100 sterling to my niece, Ellen Smith, wife of Richard Corrie; £100 sterling to Carlaw Smith of Gisborne, auctioneer; and £25 sterling to each of my said executors: And I give, devise, and bequeath all the rest, residue, and remainder of my real and personal estate, of whatsoever nature and kind soever, unto my said trustees upon trust, to sell and convert the same into money, and out of the proceeds of such sale and conversion, in the first place, to pay all my just debts, funeral, and testamentary expenses, and then to pay the residue thereof in manner following, namely:—One-third of such nett proceeds to my brother George Greig Smith, and his heirs absolutely; one other third to my brother, James Smith, of Park End, Lochmaben, Scotland; and the remaining one-third equally between my sisters Jane Smith and Mary Smith, as tenants in common: And I devise unto my said trustees all estates vested in me as trustee or mortgagee, according to the equities thereof.—In witness whereof, I have to this, my last will and testament, set my hand this 6th day of February 1885."

The trustees named declined to act, and the deceased's two sisters were appointed executors-dative. Jane subsequently died, and Mary was left sole executor.

Since George had predeceased his brother, a question now arose on the construction of the terms of the bequest "to my brother, George Greig Smith, and his heirs absolutely." If these words were construed by the law of New Zealand, there was, since George himself had predeceased, a lapse, and Melville's next of kin took the legacy. If, on the other hand, the law of Scotland ruled, then George's children, as being his heirs *in mobilibus*, took.

A special case was presented to the Court by (1) Melville Smith's executor, as holder of the fund; (2) his next of kin; and (3) George's children and heirs *in mobilibus*.

The case put to the Court as the first question whether under the circumstances there set out Melville was domiciled in Scotland or in New Zealand, but on reference being made to the case of *Lawson's Trustees* v. *Lawson*, July 4, 1883, 10 R. 1084, where it was laid down that a question as to domicile, being a question of fact, could not be decided by the Court on a special case, it was admitted for the second parties that Melville had died a domiciled Scot.

That being admitted, the question came to be,—"Does the law of Scotland or the law of New Zealand regulate his testamentary succession?"

Argued for the second parties;—Recent decisions had confined the function of the *lex domicilii* within narrower limits than were at one time assigned to it.[1] Lord Kingsdown's Act[2] had sanctioned the execution of a testament in conformity with the *lex loci actus*. In *Mitchell & Baxter's* case[3] the considerations which would suffice to introduce a rule of law other than that of domicile were pointed out. The domicile here was in England. Against that the place of execution was Scotland, the deed was drawn by a Scots writer, two of the trustees were Scotsmen, the other being the testator's husband. The fund dealt with was a fund held under a Scots trust over which the testator had a power of appointment, and the language of the deed was technical Scots language. So here the place of execution was New Zealand, the deed was drawn there by a New Zealand solicitor, the trustees were New Zealanders, and the estate dealt with was real estate in New Zealand. There were besides several

[1] M'Laren on Wills and Succession, i., p. 39.
[2] 24 and 25 Vict. c. 114.
[3] Mitchell & Baxter v. Davies, Dec. 3, 1875, 3 R. 208.

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technical expressions of New Zealand law used. When, then, the question was put, what is the meaning of the expression "to my brother George and his heirs absolutely," the only person who could answer that was the New Zealand solicitor, who would answer in terms of his own law. He could speak no other law language than that of New Zealand, and therefore the law of New Zealand must tell the executor what to do in the case which had happened. There were several cases which went to establish that the presumption in favour of the law of the domicile might be overcome.[1] The turning point of the present case was the necessity of interpreting a technical term. To do so you must go to the law of the country to which that term belonged,[2] and that necessarily was the country to which the solicitor who used the language belonged. If it was argued on the other side that it was better to avoid intestacy, and that therefore the Court should adopt the law of Scotland, that was a begging of the whole question. If the law of New Zealand applied, it had reasons, satisfactory to itself, for bringing about intestacy in such circumstances.

Argued for the third parties;—There was no doubt about the general presumption in favour of the *lex domicilii* as the law that would regulate the succession, testate or intestate, in moveables.[3] This indeed was admitted to be so in the case of *Mitchell & Baxter* founded on by the other side, and it was remarkable that in none of the cases cited on the other side except *Mitchell & Baxter* was effect given to the *lex loci actus* against the *lex domicilii*. These two were identical in all the cases cited, the rival being either the *lex fori* or the *lex rei sitæ*. Hence any observations were *obiter* merely. Now, did the circumstances here raise the same case as in *Mitchell & Baxter*? It was submitted that they came nearer the cases of *Anstruther* and *Bradford*,[4] in neither of which was the presumption in favour of the *lex domicilii* displaced. In *Mitchell & Baxter* the lady whose deed was in question was by origin Scots, the deed being executed in Scotland, and had only changed her domicile derivatively through her husband. The estate there was a Scots heritable bond, while here the estate was money only. There were highly technical expressions of Scots law used there, while here there was no technicality in the phrase "heirs absolutely." It was absurd to use the law of New Zealand to make a man intestate and then to distribute his estate not under that law, but the law of Scotland, as the second parties here must do if they were successful.

At advising,—

Lord Trayner.—The first question submitted by the parties for the determination of the Court involves a question of fact, and is therefore a question we cannot determine under a special case. But the parties agreed at the bar that it should be held as admitted that Melville Babington Smith was domiciled in Scotland at the date of his death. With that admission I have no hesitation in answering the second question. I am of opinion that Mr Smith's will must

[1] Thomson's Trustees v. Alexander, Dec. 18, 1851, 14 D. 217, 24 Scot. Jur. 101; Ferguson v. Marjoribanks, April 1, 1853, 15 D. 637, 25 Scot. Jur. 376.

[2] Rainsford v. Maxwell, Feb. 6, 1852, 14 D. 450, 24 Scot. Jur. 221; Trotter v. Trotter, June 10, 1829, 3 W. and S. 407.

[3] Story, sec. 479; Bar's International Law, sec. 110; Purvis' Trustees v. Purvis' Executors, March 23, 1861, 23 D. 812, 33 Scot. Jur. 404; Erskine v. Wylie, 1862, 10 H. of L. Ca. p. 1.

[4] Anstruther v. Chalmer, 1826, 2 Simon, p. 1; Bradford v. Young, 1885, L. R., Ch. Div. 29, p. 617.

be construed, and his testamentary succession regulated by the law of Scotland, that being the law of his domicile, and there being nothing in Mr Smith's will, or in the circumstances attending its execution, to indicate any intention on his part that his testamentary succession should be regulated by any other law.

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LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred.

THE COURT, "in respect the parties by their counsel admit that Melville Babington Smith was domiciled in Scotland at the date of his death, answer in the affirmative the first of the questions stated in the case, and with regard to the second question are of opinion that his testamentary succession is regulated by the law of Scotland."

JAMES FORSYTH, S.S.C.—J. C. & A. STEUART, W.S.—Agents.

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MISS JESSE MARY CHAMBERS AND OTHERS, Petitioners.—*Lorimer—Johnston.*
THE EDINBURGH AND GLASGOW AËRATED BREAD COMPANY, LIMITED, Respondents.—*M'Kechnie—C. S. Dickson.*

Company—Rectification of register—Misrepresentation—Misrepresentation of reason why certain directors had retired—Companies Act, 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 35.—The memorandum of association of a company, registered under the Companies Acts, 1862-1886, bore that the registered office of the company would be in England, but in the copy of the memorandum of association printed on the back of the prospectus it was stated that the registered office would be in Scotland. In consequence of this discrepancy no allotment of shares was made, the company was wound up, and a new company was formed, with its registered office in Scotland. The prospectus of the original company bore that Mr Esslemont, M.P., was to be the chairman, and Dr Clark, M.P., one of the directors of that company, and in a circular sent along with the prospectus of the new company to persons who had applied for shares in the original company it was stated, after explaining the necessity for the formation of the new company, that, "as the company will now fall to be managed in Glasgow, Messrs Esslemont and Clark, the two members of Parliament (whose parliamentary duties will prevent their attendance at the board), and Mr M'Cankie [another original director] have retired." This circular then requested the applicants to renew their applications for shares.

Certain persons who had applied for shares in the original company, and had had shares allotted to them in the new company on their renewed application after receiving the above circular, sometime afterwards petitioned the Court to order the removal of their names from the register of the new company. They averred that they had applied for shares on the faith of the representation that Mr Esslemont was to be chairman, and Dr Clark a director of the company; that they had renewed their application only in consequence of the statement that these gentlemen had retired from the board because their parliamentary duties made it impossible for them to attend the meetings of the board in Glasgow; and that this statement was false, and was calculated to deceive, as the true reason why Messrs Esslemont and Clark had retired was that they were dissatisfied with the prospects of the company.

The company denied these averments, and pleaded that they were irrelevant.

The Court *refused* the petition, holding that as the petitioners had applied for shares after the distinct statement that Messrs Esslemont and Clark were not to go on the board, it was irrelevant to inquire into the truth of the reasons stated for their retirement.

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1st Division. C.

In July 1888 a company called the Edinburgh and Glasgow Aërated Bread Company, Limited, was registered in England under the Companies Acts, 1862-1886. Clause 2 of the memorandum of association bore that the registered office of the company would be situate in England.

In the prospectus of the company, which was issued to the public on 17th December 1888, it was, *inter alia*, stated that the following gentlemen were to be the chairman and directors of the company, viz.:—(1) Peter Esslemont, Esq., M.P., Aberdeen (chairman); (2) G. B. Clark, Esq., M.P.; (3) William M'G. Burns, Esq., M.D.; (4) John M. Bryce, Esq., Glasgow; (5) John Crawford, Esq., Glasgow; and (6) James M'Cankie, Esq., Edinburgh.

In the copy of the memorandum of association printed on the back of the prospectus, it was stated that the registered office of the company would be situate in Scotland. On this discrepancy being observed by the solicitors of the company they advised the Glasgow directors of the company that they were not in safety to proceed to allotment, and it was arranged that the company should be wound up and a new company formed to be registered in Scotland. The English company was accordingly put into liquidation and a new company formed under the same name, with a registered office in Scotland.

On 31st December 1888 a circular was issued to those who had applied for shares in the English company by the interim secretary of that company, stating, *inter alia*, that "owing to a verbal error in the memorandum of association" to the effect that "the registered office of the company would be situate in England, instead of in Scotland," it had been found necessary to register the company in Scotland, and to manage the business in Glasgow; that the company had accordingly been registered in Scotland; and that "as the company will now fall to be managed in Glasgow, Messrs Esslemont and Clark, the two Members of Parliament (whose parliamentary duties will prevent their attendance at the board), and Mr M'Cankie have retired." The circular was accompanied by an altered prospectus, which contained an altered list of directors, and requested parties who had applied for shares to renew their applications.

On 22d January 1891 Jesse Mary Chambers and a number of other persons who had applied for shares in the English company, and had renewed their applications after receiving the second prospectus and accompanying circular, and had had shares allotted to them in the Scottish company, presented a petition for rectification of the register of the latter company by the removal of their names therefrom, and for repayment of the sums paid by them in respect of their shares.

After setting forth the facts regarding the formation of the company above narrated, the petitioners stated:—

"In acquiring shares in the said company as aforesaid the whole of the petitioners acted in the belief that Mr Esslemont had agreed to act as chairman and director of the said company, as set forth in the original prospectus, that he had a good opinion of the company, and that he had retired from the offices of chairman and director only because his parliamentary duties would interfere with his attendance at the meetings of the board in Glasgow, and this belief on the part of the petitioners was induced by the statements and representations made in the said prospectus and circular as before mentioned.

"Mr Esslemont has a very high reputation as a man of business and a financier, and this was well known to the petitioners, and the statements and representations with regard to him made in the prospectus and circular as before set forth were the means of inducing the petitioners to

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acquire shares, or at least they very materially influenced the petitioners in their decision in the matter.

"The petitioners have recently learned, and now aver that, as matter of fact, Mr Esslemont never agreed to act as chairman and director of the company, never gave authority for his name being advertised in the said prospectus as chairman or director, and never authorised the statement in the said circular that he had retired from the board in consequence of inability to attend the meetings of the directors in Glasgow. The change to Glasgow was no part of Mr Esslemont's reason for withdrawing. The promoters and directors of the company (other than Messrs Esslemont, Clark, and M'Cankie) were responsible for the said prospectus and circular, and they knew when the prospectus was issued that Mr Esslemont had not consented to act as chairman and director, and had not authorised them to use his name in the prospectus. At the time when they issued the said circular they knew that Mr Esslemont had repudiated all connection with the company, and that he had done so because he did not approve of the way in which the company had been promoted, the amount paid in promotion-money and the payment for the directors of qualifying shares, and also because he did not believe that the company would be a financial success. He stated these objections to the said promoters and directors, both verbally and in writing, in or about the month of December 1888.

"The prospectus and circular referred to were fraudulently conceived and issued in the terms above mentioned expressly for the purpose of misleading and deceiving applicants for shares, by inducing them to believe that Mr Esslemont had faith in the company, and was willing to lend his name to it, and put money into it, and as matter of fact the petitioners were so misled and deceived, and in consequence applied for shares."

The company lodged answers. They stated that all the arrangements as to the prospectus and formation of the respondents' company, and the applications for shares therein, were known to and approved of by Dr Clark and Mr Esslemont; that the whole statements in the circular and relative prospectus were made *bona fide*, and were true; and that the petitioners were aware at the time of their application for shares that Mr Esslemont was not to be a director of the company; and they submitted that the petitioners' averments were irrelevant, and, so far as material, unfounded in fact, and that the petition should be refused.

A proof was allowed. The following was the import of the evidence, which was taken before Lord M'Laren:—Early in the summer of 1888 Mr Esslemont was asked by Messrs Turner and Dermer, who were the promoters of the company, whether he would join the board as chairman. He had several meetings with these gentlemen, but would give no positive answer. He deponed that his impressions of the company were at first favourable, but gradually grew less favourable. Ultimately he arranged with Dr Clark that Dr Clark should visit Glasgow to make inquiries and report to him. Dr Clark never reported to Mr Esslemont, but on 16th December 1888 the latter received the following letter from Mr Turner:—"I understand from Mr Dermer, who arrived from Glasgow this morning with Dr Clark, that you have definitely assented to take the chairmanship of our company, subject to the requisition from the directors, which I enclose herewith, and which you will notice includes the signature of Dr Clark. I have therefore given directions for the prospectus (approved by the other directors) to be printed in form enclosed herewith. It is proposed to advertise on Tuesday. Will you kindly leave a note here, which I will call for this evening about eight o'clock, stating your approval. I am sorry to trouble you to-day, but I

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understand you are leaving London to-night for Scotland." Mr Esslemont did not reply to this letter, but the prospectus was published with his name as chairman.

On 27th December a meeting of the directors was held in Glasgow. Mr Esslemont was present, but declined to take the chair. He complained that his name had been published as chairman without his consent. It did not appear that anyone took the chair at that meeting, and a general discussion ensued as to promotion-money and other matters. Mr Esslemont stated that he would join the board only on certain conditions which he stated, and among them that Mr Gourlay, accountant, should be appointed to investigate into the propriety of the sums charged for the promotion of the company. This was agreed to, and the meeting adjourned until the following day. At the adjourned meeting a somewhat heated discussion occurred, the result of which was that Mr Esslemont intimated that he would not become a director, and left the room. After he had left Dr Clark stated that as Mr Esslemont declined to act he also did not wish to remain on the board (there was no dispute that Dr Clark had agreed to join). The question then arose as to how these changes in the list of the directorate should be published, and it was ultimately agreed to make the intimation contained in the circular above quoted. Three of those present deponed that this was done in consequence of what Dr Clark had said regarding himself, but Dr Clark deponed that he had no recollection of making any such statement. Both he and Mr Esslemont stated that they did not retire because their parliamentary duties in London would prevent them from attending to the business of the company in Glasgow. Mr Esslemont deponed,—"When I saw the statement in the circular issued to shareholders relative to the reason of my resignation, I wrote a letter to the company repudiating it." Mr David Craig, a partner of Craig & Risk, the company's solicitors, deponed that he and Mr Turner called upon Messrs Colquhoun, the agents for Mr Esslemont and Dr Clark, and shewed the draft circular with the proposed clause relating to the withdrawal of these gentlemen from the company, and that it was approved of by Mr James Colquhoun. Mr James Colquhoun deponed that he did not revise the circular, and had no authority to do so, and that he understood that the whole object of shewing him the circular was that he might be made aware that in the circular to be issued the fact of Mr Esslemont and Dr Clark being no longer directors was made public.

Most of the petitioners were examined. They deponed that they had taken their shares on the faith of Mr Esslemont's name and also of Dr Clark's in the original prospectus and of the intimation in the second prospectus; but it did not appear that any of the petitioners knew much about either Mr Esslemont or Dr Clark, except from inquiries or consultation of directories, &c.

It appeared that the circumstances founded on by the petitioners were not publicly known till about the end of 1889, when an article on the subject appeared in a financial newspaper.

Argued for the petitioners;—There had been such misrepresentation on behalf of the company as entitled the petitioners to repudiate their contract to take shares. The misrepresentation consisted in publishing the statement that Esslemont and Clark had retired from the directorate because they were unable from their parliamentary duties to attend the meetings in Glasgow. That representation was false, in the first place, in regard to Esslemont at anyrate, because he had never agreed to become a director of the original company, and, in the second place, in regard to both, because it was not the true reason of their refusal to join the Scot-

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tish company, assuming that they had agreed to join the board of the original company. The mere giving of a false reason for a director's retirement might not entitle a shareholder to rescind his contract; the true reason might be a matter entirely personal to the director; but where the true reason was—as the evidence established it was here—that the director had doubts as to the probable success of the company, then, to publish as his reason that he had not time to attend to the affairs of the company, was to publish a misrepresentation as to a material fact which was calculated to mislead the public into taking shares in the company; and persons who had taken shares in reliance on the truth of the representation were entitled to rescind their contract as soon as they discovered the misrepresentation. It was settled that the publication of certain persons' names as directors of a company might be a most material circumstance to induce persons to join the company, which, if the publication were false in fact, would entitle persons who had taken shares on the faith of these names to repudiate.[1] The same reasoning applied to a case like the present, where, although there were no actual names erroneously included in the second list of directors, there were names published in such a way as to amount to a certificate of confidence in the company by the persons named. That was really the same thing as publishing these persons as directors. It was true that the company was not bound to give any reasons why certain directors had retired, and had the company followed that course here, it could not be doubted that the intending shareholders would have inquired into the reason why such persons as Messrs Esslemont and Clark had retired. The effect of such a statement as that here complained of was to mislead the public into making no such inquiry. The petitioners did not require to establish a case of fraudulent misrepresentation; they were entitled to rescind if there had been misrepresentation of a material fact (on which they had relied), although that misrepresentation had not been fraudulent.[2]

Argued for the respondents;—There had been no misrepresentation here. It was clear that Clark had agreed to join the original company, and the fair inference from the evidence was that Esslemont had done so also. Then, as to the truth of the reason given for their retirement, three witnesses stated that Clark had given that reason at the meeting after Esslemont had left, and his evidence on that point was only *non memini*. According to his own account, his only ground for retiring was that Esslemont had retired. Then, as to Esslemont, it was difficult to say why he had retired, but neither his solicitor nor he himself had taken any objection to the statement on which the petitioners founded; and it rather appeared that he had retired because he could not get on with some of the other directors. At anyrate, the petitioners had failed to establish that his reason was that he had doubts as to the stability of the company, and if they failed to establish that, their case failed. But assuming that there had been the misrepresentation complained of, the petitioners, nevertheless, were not entitled to relief, unless they established that they relied on the names of Esslemont and Clark—one or both—in taking shares.[3] In exceptional cases such reliance might be presumed. If, for example, the name of a Rothschild was erroneously published in a list of

[1] Smith v. Chadwick, 1882, L. R., 20 Chanc. Div. 27 (aff. on other points 1884, L. R., 9 H. L. 187); *In re* Scottish Petroleum Co., 1883, L. R., 23 Chanc. Div. 413.

[2] Cases *supra*; Reese River Silver Mining Co. v. Smith, 1869, L. R., 4 Eng. and Ir. App. 64.

[3] Smith v. Chadwick, *supra*, note 1.

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directors, persons who had taken shares would probably be entitled to rescind without proving that they had specially relied on that name. The present case was not of that sort, and therefore it was necessary to prove that the petitioners had relied on Messrs Esslemont and Clark being directors. Now, as regarded Clark, there was practically no such evidence; and, as regarded Esslemont, it was for the most part of a very general character. None of the petitioners knew Esslemont personally, or knew anything about him, except what they had learned from chance inquiries. Again, the petitioners had taken their shares on the clear understanding that Esslemont and Clark were not to be directors. Therefore the misrepresentation—if it was a misrepresentation—as to their reasons for retiring was irrelevant. Lastly, they had delayed unduly in bringing this petition. The repudiation must be immediate on the facts coming to the knowledge of the shareholders,[1] which it had not been here.

At advising,—

LORD PRESIDENT.—This is an application under section 35 of the Companies Act of 1862 to have the names of the petitioners removed from the register of the Edinburgh and Glasgow Aërated Bread Company, Limited. It appears that in July 1888 a company was incorporated under that name, and that by the second clause of the memorandum of association of that company it was provided that the registered office should be in England; but the copy of the memorandum of association printed on the back of the prospectus of the company, which was issued to the public in December 1888, stated that the registered office of the company was to be in Scotland. When this discrepancy was discovered by the solicitors of the company, they advised the Glasgow directors of the company that they were not in safety to proceed to allotment, and it was arranged that the original company, which may be called the English company, should be wound up, and that a new company, which should have its registered office in Scotland, should be formed. And this accordingly was done. The English company was wound up, and the new or Scottish company came into existence in place of the English company, and under the same name. It is from the register of this second company that the petitioners desire their names to be deleted.

It appears that the prospectus of the English company bore that Mr Esslemont, M.P., was to be chairman, and Dr Clark, M.P., one of the directors of that company, but the prospectus of the Scottish company does not contain the names of either of these gentlemen as members of the board of that—I mean the Scottish—company, and in a circular which was issued at the same time as the prospectus of the Scottish company it is stated that, "as the company will now fall to be managed in Glasgow, Messrs Esslemont and Clark, the two members of Parliament (whose parliamentary duties will prevent their attendance at the board), and Mr M'Cankie have retired." Now, what the petitioners say is, that they relied upon these two gentlemen, Messrs Esslemont and Clark, joining the company and becoming directors, and that they would not have joined the company but for the confidence which they had in the administrative and financial abilities of these gentlemen, particularly Mr Esslemont; and if this application had been made during the existence of the English company one

[1] Lawrence's case, L. R., 2 Chanc. 412; Wilkinson's case, L. R., 2 Chanc. 536; *In re* Scottish Petroleum Co. *supra*, p. 1043, note 1.

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could have understood the complaint of the petitioners, but that is not so. It is not from the English but from the Scottish company that the petitioners desire to withdraw. The reason which is assigned for Mr Esslemont and Dr Clark not becoming members of the company is that their parliamentary duties in London would prevent them from attending to the business of the company in Glasgow. The petitioners say there were other reasons why Mr Esslemont in particular refused to become connected with the Scottish company, but I do not think the Court has anything to do with that. It may or may not have been convenient for Messrs Esslemont and Clark to attend the meetings of the board in Glasgow, or they may have retired for reasons known to themselves which they were under no obligation to disclose to anyone. The important matter, as far as the present application is concerned, is, that the petitioners cannot say that they were entitled to rely on Messrs Esslemont and Clark becoming directors of the new company, because they were distinctly informed by the circular of 31st December 1888 that these gentlemen would not be directors, and this circular was in the hands of the petitioners before they sent in their applications for shares in the new company. It appears to me that this circular is conclusive of the whole matter against the petitioners, for it puts the new state of matters fully and distinctly before them, and it was only after receiving this circular that they applied for the shares which they now seek to repudiate. The circular told the petitioners everything they were entitled to know, and their only complaint is, that Messrs Esslemont and Clark did not disclose to the petitioners, and to all the world, all the reasons they had for declining to become connected with the Scottish company. I think that is an untenable proposition, and therefore I am for refusing the petition.

LORD M'LAREN.—I agree with your Lordship in thinking that there is no substance in the reasons which have been assigned by the petitioners for having their names removed from the register of shareholders of this company. As your Lordships are aware, I heard the proof, and I was so much impressed with the want of reality in the case, that at the close of the proof I ventured to suggest to counsel to consider whether it was worth their while to incur the expense of printing, because it was impossible, after listening to the evidence, not to see what the inevitable result must be.

I understand that what the petitioners rely upon is, that the circular of 31st December 1888, while stating that Messrs Esslemont and Clark were no longer to be directors of the company, gave a reason for their declinature to join the board which was not the true reason, and was moreover a reason which left shareholders in the belief that these gentlemen, although they had found it necessary to retire, nevertheless continued to approve of the plans and prospects of the company. Now, it seems to me to be a strong thing to say that a company is to be held responsible for all the inferences, however extravagant, that may be drawn from its circulars. I think it is sufficient if it is held responsible for the truth of the facts which it publishes. Here the fact was that Mr Esslemont and Dr Clark had retired. What their reasons for taking that step may have been appears to me to be altogether immaterial to the purpose of the circular, and after all the evidence which I have heard I am still very much in the dark as to Mr Esslemont's true reasons. He seems to have hesitated a good deal about joining the company, although he had been in negotiation with the promoters for some months, and had invited Dr Clark to go to Glasgow to report

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to him on the subject. Dr Clark's opinion was favourable, yet when Mr Esslemont received a letter stating that a list of directors would be published, and asking whether it might be assumed that he would be one of them, he returned no answer. In these circumstances I cannot but say that the promoters were quite entitled to assume that Mr Esslemont meant to carry out his provisional arrangement with them and become a member of the board. No doubt they were under a misapprehension; for even after his name had been published on the list of directors as the chairman of the company, he does not seem to have made up his mind. Instead of writing to say that he would not act, he went to Glasgow and attended the first meeting of the board, which he had no right to do unless as a member of the board. It appears, however, that he went there to ascertain whether the company was constituted on a sound basis, and he made the suggestion that an accountant should be appointed to go into the expenditure of the promotion-money. That was quite right, and all the other directors were of the same mind. Mr Esslemont's nominee was appointed accountant; but at the adjourned meeting on the following day Mr Esslemont was still dissatisfied, and while his proposals were under discussion, it appears that in consequence of an altercation between himself and another of the directors, he left the room, declaring that he would have nothing more to do with the company. I cannot say that, even upon his own evidence, he left for any reason connected with the stability or commercial value of the company. He appears to have left for reasons of a purely personal character with which the public had nothing to do. Naturally some remarks were made after he had left as to how the matter was to be put into the circular; and three gentlemen who were present have deponed that Dr Clark suggested that the best way to deal with it, so far as he was concerned, was to state that his parliamentary duties in London made it difficult for him to attend the meetings of the board in Glasgow, and this reason, which applied to Dr Clark, applied also to Mr Esslemont. The other directors did not know of any other reason, because no other reason was stated to them. They had Dr Clark's authority for the statement made regarding him; and the circular was shewn to the gentleman appointed by Mr Esslemont as his agent, and was approved by him. It was afterwards shewn to Mr Esslemont, and while he made some demur as to the statement of the reason, he said he would not object to the circular going out in these terms.

It therefore appears to me that there was neither fraud on the part of the directors or the salaried officials of this company, nor even innocent misrepresentation of such a character as would entitle the petitioners to be relieved of their responsibility as shareholders of the company on the ground of error *in essentialibus*. The reason assigned for the retirement of Mr Esslemont and Dr Clark appears to me to belong to the category of conventional excuses, which a person gives when he deems it proper to assign some reason for his conduct, although his real reasons may have been indisputably a private affair of his own. It is quite understood that such conventional reasons need not be the true reasons. The fact that Messrs Esslemont and Clark had retired was all that the public had any legitimate concern with, and that fact having been duly intimated, the petitioners cannot be said to have taken their shares in reliance upon these gentlemen being on the board. I do not think that the intimation of a conventional reason for their retirement constitutes any guarantee on the part of those making it that Messrs Esslemont and Clark continued of the same

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mind as regards the probable future of the company as they are assumed to have been when they agreed to join the board.

LORD KINNEAR.—If the petitioners had been induced to take shares on the representation that Messrs Esslemont and Clark were to be the chairman and a director of the company respectively, and in the belief, founded on personal knowledge, that these gentlemen would not give their names to any concern of the soundness of which they were not satisfied, and in reliance on the concern having the benefit of the skill and experience which they understood these gentlemen to possess, then no doubt in my opinion the petitioners, on discovering that these representations were false, would be entitled to have their contract to take shares set aside. But then, although the prospectus of the first company did contain a representation that Mr Esslemont was to be a director, and it is not clear that that representation was well founded in point of fact, I do not think that this will assist the petitioners much, for I do not think that they are entitled to inquire into the truth or falsehood of that representation in the prospectus of the first company, because that first company has been wound up, and one constituted on a different basis put in its place. I agree with Lord M'Laren in thinking that Mr Esslemont was entitled to withdraw from the company for any reason which he thought good, because he had not bound himself by any final agreement to take shares in the company. At the same time I think it quite fair to observe that I cannot see anything of the nature of fraud or improper motive in issuing a prospectus which contained Mr Esslemont's name as chairman of the company. I think that the promoters had sufficient ground for believing that they had Mr Esslemont's authority for what they did. That company, however, is, as I have said, wound up, and a new one put in its place, and the only question which we have to consider is whether the prospectus of this second company contains any representation, whether fraudulent or not, in regard to material facts, which on investigation has now turned out to be false.

The representation in the circular which is founded on as being both false in fact and material is to this effect. It is stated that owing to an error in the memorandum of association to the effect that the registered office of the company would be in England instead of in Scotland, it had been found necessary to register the company in Scotland and to manage the business in Glasgow; that the company had accordingly been registered in Scotland, and then the circular proceeds in these terms, "As the company will now fall to be managed in Glasgow, Messrs Esslemont and Clark, the two members of Parliament (whose parliamentary duties will prevent their attendance at the board), and Mr M'Cankie have retired." Now, I agree with your Lordships that Mr Esslemont was not bound to give any reasons to the promoters for withdrawing, and if he did give his reasons to the promoters, I am of opinion that they were under no obligation to publish these reasons. But then it is said that those who framed the circular are not content with a mere statement that Mr Esslemont had retired, for they go on to give a reason for his action, which was not only false in fact as not being Mr Esslemont's true reason, but was also misleading, inasmuch as the statement of it was calculated to induce people to think that Mr Esslemont had no other reason. Now, I entirely agree with Lord M'Laren that the statement about Mr Esslemont's parliamentary duties amounts to nothing more than one of those conventional excuses with which we are familiar. I think it is

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impossible that it should bear the construction which the petitioners put upon it. What they say is this:—"The prospectus and circular referred to were fraudulently conceived and issued in the terms above mentioned, expressly for the purpose of misleading and deceiving applicants for shares, by inducing them to believe that Mr Esslemont had faith in the company, and was willing to lend his name to it, and put money into it, and as matter of fact the petitioners were so misled and deceived, and in consequence applied for shares." It appears to me out of the question to say that the statement in the circular would convey any such meaning to any intelligent reader. The only fact which it states is that Esslemont and the other directors had retired, and it therefore warned the public that they were not to be directors. It also gives a reason for their withdrawal, but to infer from the statement of that reason the conclusion that Mr Esslemont continued to have confidence in the company appears to be wholly unreasonable. I therefore agree with your Lordships in thinking that the petitioners have failed to shew any reason for having their names removed from the register.

LORD ADAM was absent at the hearing.

THE COURT refused the petition.

SOMERVILLE & WATSON, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

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GEORGE BURRELL AND OTHERS (Owners of the "Strathspey"), Pursuers (Reclaimers).—*Ure—Younger.*
DAVID MACBRAYNE (Owner of the "Islay"), Defender (Respondent).—*Asher—Salvesen.*
Et e contra.

Ship—Collision—Pilot—Compulsory pilotage district—Master—Responsibility for leaving dock—Employment of tug—Merchant Shipping Act, 1854 (17 *and* 18 *Vict. cap.* 104), *sec.* 388.—The "Strathspey," a steamship of 992 tons, shortly after leaving the port of Glasgow, and when in charge of a pilot, and within the compulsory pilotage district of the River Clyde, in going down the river, came into collision with, and injured another vessel, the "Islay." The accident was due to the violence of the wind and the "Strathspey's" want of steerage-way, arising from an unusually strong ebb tide, and the slow rate at which the vessel was moving in order to comply with the river bye-laws, which forbade more than a certain rate of speed.

In an action of damages at the instance of the owner of the "Islay" against the owners of the "Strathspey" the pursuer pleaded that the master of the "Strathspey" was answerable either by himself or in conjunction with the pilot for allowing his ship to leave the dock, and for neglecting to employ a stern tug to assist in steering her, and that the weather and tide conditions were such as to amount to a case of manifest danger, for the disregard of which the presence of the pilot did not relieve him from liability.

Held that as the pilot was in charge before the vessel left the dock,* it was for him to decide whether she could prudently leave her moorings, and whether a tug was required, and that the pursuer, on whom the *onus* lay, had failed to prove contributory negligence on the part of the master; and further, that the

* The Merchant Shipping Act, 1854 (17 and 18 Vict. c. 104), sec. 388, provides,—"No owner or master of any ship shall be answerable to any person for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law."

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local conditions of wind and tide on the day in question did not present a case of manifest danger such as to have made it the duty of the master to have taken his ship out of the hands of the pilot.

ABOUT half-past five o'clock, on the evening of the 25th of January 1890, the s.s. "Strathspey," of 992 tons register, left the Queen's Dock, Glasgow, and proceeded down the River Clyde. When she arrived at a point a little above Pointhouse Wharf she came into collision with the steamer "Islay," which was proceeding up the river. Both vessels were injured by the collision. An action of damages was brought by the owners of the "Strathspey" against the owner of the "Islay," and subsequently a cross action of damages was brought by the owner of the "Islay" against the owners of the "Strathspey," and the actions were conjoined.

In the action at the instance of the owner of the "Islay," it was averred;—(Cond. 3) "The said collision was due entirely to the fault of the defenders, or of those for whom they are responsible. Looking to the state of the weather, and the very heavy current which was running down the river, it was grossly imprudent for the 'Strathspey' to have left the Queen's Dock and proceeded on her voyage on the night in question. At all events she should not have attempted to do so without the assistance of one or more tugs to help to steer her in the narrower parts of the channel. The defenders or their captain were grossly negligent in failing to provide such a tug or tugs. Owing to the state of the tide, the 'Strathspey,' as she was unprovided with a tug or tugs to assist in steering her, required to proceed at an unsafe and improper rate of speed in the part of the river where the collision took place, in order that she might have steerage-way. She could not in consequence be navigated in a safe and seamanlike manner. The result was, that instead of keeping clear of the 'Islay,' as she ought to have done, she ran into her port sponson."

The owners of the "Strathspey" answered;—"By article 1 of the bye-laws and regulations enacted by the Trustees of the Clyde Navigation, in virtue of the Act 21 and 22 Vict. cap. 149, it is provided that 'Every vessel, of whatever description, exceeding sixty tons register, navigating the River Clyde, shall, unless the master or person in charge holds a certificate under the Merchant Shipping Act, have a pilot on board duly licensed by the Statutory Board for licensing pilots, who shall be placed on an elevated station so as to be able to see distinctly in due time any vessel or obstruction ahead.' At the time of the collision she was in charge of a licensed pilot, James Patience, whose orders were all obeyed by the crew of the ship. If any fault was committed in the navigation of the 'Strathspey' it was the fault of the pilot. The defenders refer to section 388 of the Merchant Shipping Act, 1854."

They pleaded;—(2) *Separatim*, The collision having been occasioned by the fault of a licensed pilot acting in charge of the "Strathspey," within a district where pilotage was compulsory by law, the defenders are entitled to absolvitor.

The Lord Ordinary allowed a proof.

The circumstances under which the collision took place were thus described by his Lordship:—

"It was the duty of the 'Strathspey,' which was going down the river, to keep to the north side; and of the 'Islay,' which was coming up the river, to keep to the south side. It is therefore admitted that if the collision took place on the south side of the river the 'Strathspey' must have been in fault, and if upon the north side of the river the 'Islay' must have been in fault.

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"In my opinion it is established that the collision took place on the south side of the river. . . .

"Further, I am of opinion that the balance of the other evidence in the case is in favour of the view that the collision was caused by the 'Strathspey' sheering across to the south side, and certainly the probabilities of the case point to the accident having happened in that way.

"At the time when the 'Strathspey' left the Queen's Dock an unusually strong current was running down the river, and a gale, almost a hurricane, was blowing across the river from south to north. In such circumstances, the skilled evidence establishes that it is difficult to keep a vessel coming down with the stream under complete control, without going at a rate of speed dangerous at that part of the river.* If the vessel is not kept at such a speed as to give the helm complete command over her, she is necessarily, to a greater or less degree, at the mercy of the current, and may easily, in a narrow waterway such as the Clyde is at the place where the collision occurred, be carried or sheer to the one side or the other before those on board can stop her or alter her course.

"Those who were on board the 'Strathspey' agree in saying that she did not go fast down the river. The engineer, Robert Brown, deponed that the engines were kept at slow, and occasionally stopped altogether for a short time. If this was the case, I do not think that she could possibly have been at all times completely under control of her helm, and if she was not it is not difficult to see how the collision came about. A ship in coming out of the Queen's Dock has her bow pointed somewhat across the river towards the south bank. It is therefore necessary in order to get her into her course down the northern side of the river to put the helm aport. Further, if the tide is running down, it catches the port bow when the ship comes out of the dock, and that also has a tendency to send her to the north. When the 'Strathspey' came out of the dock those in charge of her say that the helm was ported, and that she went over to and down the north side of the channel. There are two buoys between the entrance of the Queen's Dock and Pointhouse Wharf, and Patience, the pilot of the 'Strathspey,' says that she passed within 10 feet of the first buoy, and grazed the second buoy. Accepting this statement as accurate, it is evident that the 'Strathspey' was then on a course which, if continued, would have taken her right into Pointhouse Wharf. Therefore the helm must have been starboarded, which would have the effect of bringing the bow of the ship towards the south, and laying her to some extent across the current. If the ship was not under complete control, it is easy to see how, in these circumstances, she might get across to the south side of the river before she could be brought round again upon a port helm. After careful consideration of the whole evidence, this seems to be what actually happened, the result being that the 'Strathspey' ran into the 'Islay,' which was on her own side of the river.

"In regard to the 'Islay,' she was proceeding up the river upon the south side of the Channel. Her progress had been somewhat retarded by the 'Hallegarde,' which was being towed up in front of her, and she had stopped her engines altogether for a short time when opposite Pointhouse

* It appeared from the proof that there was a bye-law of the Clyde Trustees regulating the rate of speed at that part of the river to four miles an hour, that "tramp" boats of the class of the "Strathspey" require to go through the water at three or four knots before they feel the helm, and that the current on the day in question was at least a three knot current.

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Wharf, but before the 'Strathspey' came down she had again steamed ahead. When the master of the 'Islay' saw that the 'Strathspey' was crossing the river he backed the engines in order, if possible, to get out of her way. To do so seems to have been the only chance which he had of avoiding a collision, and I am of opinion that no blame whatever attaches to those in charge of the 'Islay.'"

It appeared from the evidence that it was high-water at Glasgow at 4.41 that afternoon, that the "Strathspey" started at 5.20, that the ebb tide was unusually strong, and that there was a heavy spate in the river. Patience, the "Strathspey's" pilot, deponed,—"The captain was on the bridge beside me. He obeyed all my orders instantly. The third mate was at the helm. He obeyed my orders. In fact all the crew obeyed the orders I gave."

The evidence as to the practice regarding the employment of a tug to assist vessels down the river was contradictory, but it was not proved that it was at all usual in vessels of the size of the "Strathspey,"* although some witnesses stated that it would have been prudent for the "Strathspey" to have had one on the occasion in question. The evidence was also contradictory as to whether it was for the pilot or for the master to say that a tug should be taken.†

The further evidence in the case sufficiently appears from the opinions of the Lord Ordinary and of Lord Kinnear.

The Lord Ordinary (Low), on 19th February 1891, pronounced the following interlocutor in the conjoined actions:—"Finds that the collision between the steamers 'Strathspey' and 'Islay,' referred to on record, which took place on 25th January 1890, was caused by the fault of those on board and in charge of the 'Strathspey,' and for whom the owners thereof are responsible, and was not caused by the fault of those on board and in

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* James Patience, the "Strathspey's" pilot, deponed,—"I had no talk with the captain about taking a tug. With ships of the size of the 'Strathspey' I never take a tug, unless there is some defect about the engines. If a ship is very long and light she needs a tug to help her to steer and to turn the bends of the river. The 'Strathspey' is about 240 feet long. I don't call her a long ship. She can take the bends of the river without any assistance. I never had any difficulty in steering her."

Robert Buchan, a pilot, deponed,—"By the Court.—It was simply because it was such a very wild night that I think the 'Strathspey' ought to have had a tug on that occasion. In ordinary circumstances with steamers of that size it is not the practice to have a stern tug, although it has been done. By counsel for David Macbrayne.—I don't think it is even common to have stern tugs for steamers of that size and class in ordinary circumstances. It has been done; but vessels below 1000 tons don't usually have a tug in common circumstances."

Daniel Dunn, master of the "Strathspey," deponed,—"I have been in the 'Strathspey' for six years as second mate, mate, and then master. I have held a master's certificate for about four years. I have sailed down the Clyde from Glasgow in the steamer fourteen or fifteen times, and up the Clyde about as often. I have come up the Clyde in other vessels besides her. The 'Strathspey' steers very well. I never had a tug to assist in navigating her either coming up or going down the river, except on one occasion when the main engines were not working. There was no need of a tug so far as I can see. The ship took the bends in the river quite easily without the assistance of a tug."

† William Cook, the manager for the owners of the "Strathspey," deponed in cross,—"We leave it entirely to the pilot to decide whether or not he will have a stern tug in taking a vessel down the river. If he wants a tug he comes up and tells us, and we order it."

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charge of the 'Islay'; therefore in the action at the instance of Burrell and others, the owners of the 'Strathspey,' against Macbrayne, the owner of the 'Islay,' assoilzies the defender from the conclusions of the summons, and decerns: And in the action at the instance of Macbrayne against Burrell and others, finds that the defenders are liable in damages to the pursuer, and appoints the cause to be enrolled that parties may be heard on the sum for which they are liable, in accordance with these findings: Reserves all questions of expenses, and grants leave to reclaim."*

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* "OPINION.— . . . . It is necessary now to consider an alternative defence stated by the owners of the 'Strathspey,' viz., that, assuming that the collision was occasioned by fault in the navigation of that vessel, the owners are freed from liability under the 388th section of the Merchant Shipping Act of 1854, in respect that the vessel was in charge of a licensed pilot, and within a part of the river where pilotage is compulsory.

"To this alternative defence the owners of the 'Islay' reply that the fault which truly occasioned the collision lay in leaving the Queen's Dock in circumstances which rendered it dangerous to do so, and that that was a matter for which the master, and not the pilot only, was responsible.

"The question thus raised is one both of novelty and difficulty, but I shall state what I conceive to be the law applicable to such a case, and consider how it falls to be applied to the facts disclosed in evidence.

"The following propositions in law appeared to me to be settled:—(1) Where, in a collision, a vessel is proved to be in fault, the master and owners are *prima facie* liable, and in order that they may take the benefit of the 388th section of the Merchant Shipping Act they must prove that the fault was that of the pilot, and of the pilot alone. If both the pilot and the master were in fault the owners are responsible. (2) The pilot, while the ship is under his charge, supersedes the master in all matters connected with the navigation of the ship, and (assuming that the collision was not due to defect in the ship or her apparel) it is sufficient to throw the fault upon the pilot to prove that the master and crew obeyed and properly carried out his orders; but (3) the fact that a pilot is in charge will not free the master from responsibility if he allows the ship to run into an apparent and obvious danger; for example, if he allows the anchor to be weighed and the ship to proceed in a thick fog.

"These propositions are, I think, all established by the cases of the '*Peerless*,' 13 Moore's P. C. Cases, 484, and the '*Julia*,' Lushington's Reports, 224.

"In the present case I think that it is clear that the pilot alone was responsible for all that occurred after the 'Strathspey' left her moorings in the Queen's Dock, because the ship was then under his charge, and it is not disputed that the master and crew carried out the orders which he gave. But the question is, whether the default which led to the accident did not consist in going out of the dock under the existing conditions of wind and tide, or, at all events, in going out without a stern tug to control the course of the vessel. Now, as I have already said, the ship left the dock at half-past five on a January night, when, although there was no fog, it was of course dark. The tide had then turned, and as there had been an abnormally high tide and a heavy land-flood the seaward stream was unusually rapid and powerful. Further, a gale of great violence was blowing. It was under these conditions that the 'Strathspey,' a vessel of 992 tons register, and a full-bottomed cargo boat, built upon lines not adapted to expeditious handling (although for her class she appears to have steered well), was taken out of dock to navigate seaward a narrow and frequented channel. The alternative dangers to which such a proceeding exposed her were that she must either steam at a dangerous speed in order to keep steerage way, or run the risk of becoming unmanageable. In the view which I take of the evidence, it was the latter danger in which she became involved, and which resulted in the collision. The pilot steamed slowly, as by the bye-laws of the Clyde Trustees he was bound to do in that part of the river, and the result was that the force of the elements rendered the ship unmanageable.

And on 18th March following his Lordship decerned against the owners of the "Strathspey" for £550 of damages, and found them liable in the whole expenses of the conjoined actions.

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Short of going at greater speed—which under the bye-laws he was not entitled to do—I do not find any evidence that the pilot when once in the stream could by more skilful navigation have averted the catastrophe. The cardinal mistake was, in my opinion, venturing into the river at the time when the ship left the dock. She could have left in safety an hour or two earlier, because the tide would have been against her, and she would have had the advantage of daylight. Probably she might also have started in safety later in the evening when the downward rush of the tide had lost its force. But to start at the time she did, when the ebb tide was running its strongest, and the wind and the darkness increased the peril, was, in my judgment, according to the preponderance of evidence and as the event proved, rash in the extreme.

"The question is, was the pilot alone responsible for allowing the 'Strathspey' to start when she did, or was the master also responsible? I think that the answer to that question depends upon whether the danger was one of such a purely local nature that the master could not reasonably be expected to know of or appreciate it, or whether it was so patent that any master with a competent knowledge of his profession could see it for himself. If the danger was of the latter character, I do not think that it can be said that no duty or responsibility rested upon the master. No doubt, when the ship is once under way, the pilot has, unless in very exceptional cases, the sole and supreme command. But I cannot but think that it is for the master to decide whether the ship is to be got under way or not. If he is doubtful he may properly enough avail himself of the local knowledge and experience of the pilot, and if, in a land-locked channel like the Clyde, the pilot assured him that there was no danger to be apprehended, probably the duty of the master will be discharged. In the present case the master did not consult the pilot. Both he and the pilot assumed—erroneously, as it turns out—that there was no danger; or, being anxious to start, ignored the danger. Was then the danger one which the master might reasonably be expected to have foreseen? I think that it was. According to the evidence it seems to me that the danger was obvious enough, and must have been apparent to any seaman who took the trouble to consider the matter. The master must have known that the tide had been extraordinarily high, that the heavy rains had added to the flood, and that a strong stream when the tide turned would be the result, and he saw that it was blowing hard and that the night was dark. Further, he had been fourteen or fifteen times down the Clyde, and as many times up again, and could not plead that he was in a locality wholly unknown to him. In these circumstances it was, in my opinion, contrary to his duty to leave the dock at the time he did,—and to say that he did not know of the state of matters in the river is, in my judgment, no excuse, because he ought to have ascertained them. No doubt the pilot ought to have warned him of his danger; but, in my opinion, the circumstances were such that the master ought himself to have seen and considered the risk.

"There was a great deal of evidence led as to the use of a tug astern a vessel going down with the tide. Many of the most experienced witnesses say that on such a night a tug would have been of little use. I am inclined, however, to think that if a stern tug had been employed, no blame could have been justly attributed to the master in allowing the ship to start. As, however, a tug was not employed, the matter does not seem to be important. Whether the fault lay in starting at all, or in starting without a tug, I think that the master was equally responsible.

"I am therefore of opinion that the plea rested upon the 388th section of the Merchant Shipping Act cannot be sustained.

"The result is that I assoilzie the owners of the 'Islay' in the action at the instance of the owners of the 'Strathspey,' and find them entitled to damages in the action at their instance."

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The owners of the "Strathspey" reclaimed against both interlocutors, but at the hearing they stated that they did not propose to dispute the Lord Ordinary's finding that their vessel was to blame; the fault, however, was that of the pilot and not to any extent that of the master.

Argued for them;—The Lord Ordinary had accurately stated the facts as to the conditions of wind, weather, and tide at the time of the collision, and as to the primary cause of the accident being due to the vessel having ever left the dock. But he had wrongly attributed the fault of her leaving to the master. It was the duty of the pilot to consider whether the ship could safely be taken to sea. In the case of the navigation of a river like the Clyde, the knowledge and services of a pilot were much more necessary than they would have been if the vessel had been setting out to sea from an open roadstead. The conditions of tide and weather, which made it unsafe to venture down the river on the afternoon in question, were just those which ought to have been known to and appreciated by the pilot, and to which the provision of the Merchant Shipping Act regarding compulsory pilotage applied.[1] It was not disputed that every one on board the "Strathspey" was at his post. Everything therefore was in favour of the ship, and although the *onus* was upon the owners to shew that the fault was not theirs, they had discharged it. But it was further said that there was negligence on the part of the owners, or of the master as representing them, in starting without a tug. But there was no evidence to support this. It was, no doubt, the case that with the larger class of vessels a tug was sometimes taken. But this was not universal, and the "Strathspey" was not a vessel of such a size as to require a tug. Besides it was for the pilot to judge whether a tug was necessary or not;[2] as long as the pilot was in command he was responsible. Further, it was not material to the accident here that a tug was not taken. There was further no obvious and known danger here for taking the vessel into which the master would be held responsible.[3] The case of the "*Borussia*"[4] was explained in the report of the case of the "*Maria*";[5] she was not in compulsory pilotage waters when the accident to her took place; but assuming that she was, the Court held in the "*Borussia*" case that it was manifestly dangerous to have moved her from the dock at the time, and that the owners were therefore liable.

Argued for the respondent;—The "Strathspey" ought not to have left the docks at all, or if she did leave, she ought to have had a stern tug. (1) There was a duty on the master to consider whether she ought to have left port at all. The act of starting was a different thing from the act of navigation, which was the province of the pilot. It was only when the navigation commenced that the pilot's duties also began. If the master had authorised or asked the pilot to take the responsibility of deciding this question it would have been different. Where, as here, the question of the admissibility of starting was not discussed between them, the fault presumably was with the master.[6] At anyrate, there was a very heavy *onus* upon the master to prove that the fault was not his, and was

[1] The "Christiana," 1850, 7 Moore's P. C. Reps. 160; the "Lochlibo," 1850, 3 William Robinson's Admir. Reps. 310, and 1851, 7 Moore's P. C. Reps. 427; the "City of Cambridge," 1874, L. R., 5 P. C. App. 451; the "Oakfield," 1886, L. R., 11 Prob. Div. 34.

[2] The "Peerless," 1860, 13 Moore's P. C. Rep. 484; the "Lochlibo," 1850, 3 William Robinson's Admir. Reps. 310.

[3] The "Oakfield," 1886, L. R., 11 Prob. Div. 34.

[4] 1 Swabey's Reps. 94.

[5] The "Maria," 1867, 1 Adm. and Eccles. Reps. 358.

[6] The "Schwalbe," 1860, 14 Moore's P. C. Reps. 241.

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due to the pilot; and he must further shew that it was the exclusive fault of the pilot. If the master had not been entirely to blame here, he was at least guilty of contributory negligence. The state of the weather on the evening in question was such as the ordinary sailor was able to judge of, without any special or local knowledge such as required the experience or called for the intervention of the pilot.[1] (2) The question of the employment of a tug fell within the duties of the master. The pilot had no authority to engage one.[2] (3) The case was one where the master ran into a manifest and obvious danger, and on that ground alone the master was responsible.[3]

At advising,—

LORD KINNEAR.—The question that we have to consider is, whether the owners of the s.s. "Islay," or the owners of the s.s. "Strathspey," or either of them, are responsible for the consequences of the collision which took place between these two vessels in the Clyde on the evening of 25th January 1890? The Lord Ordinary has given us in his opinion a very clear account of the material facts. It is not disputed that his Lordship's opinion is perfectly sound so far as he finds that no fault is to be attributed to the "Islay"; and, on the other hand, it is not very seriously disputed that he is also right in saying that the collision is to be ascribed to the fault of some person or persons in charge of the "Strathspey." Nor do I think it is very seriously disputed that his Lordship is right in the opinion which he has expressed both as to the proximate cause of the accident and as to the particular fault—if there be any fault—which he holds to be proved against the "Strathspey."

The "Strathspey" was lying at the east end of the Queen's Dock in Glasgow. The Lord Ordinary says that at the time she started to go down the river the tide had just turned, "and as there had been a heavy land-flood, and an abnormally high tide, the seaward stream was unusually rapid and powerful. Further, a gale of great violence was blowing." In these circumstances the Lord Ordinary points out that the alternative dangers to which a ship going down the river was exposed, in navigating seawards so narrow and so frequented a channel as the Clyde, were that she must either steam at a dangerous speed in order to keep steerage-way or run the risk of becoming unmanageable. The risks to which she would be exposed, if she steamed at a dangerous speed, are obvious enough; on the other hand, if she was not going through the water at a considerably more rapid rate than the water itself was moving, it was impossible to gain steerage-way so as to bring the ship fully under the command of the helm. Now, the Lord Ordinary thinks it was the latter of these two dangers in which the ship became involved. When the collision became imminent, or at all events when the risk of the two ships coming into collision became obvious to those on board the "Strathspey," it is not, I think, suggested that any wrong or improper order was given by the persons in charge, but the ship was going at such a speed that she had not, for the reasons which the Lord Ordinary has pointed out, and to which I have adverted, complete steerage-way. She therefore became

[1] The "Borussia," 1856, 1 Swabey's Reps. 94; the "Girolamo," 1834, 3 Haggard's Adm. Reps. 176; the "Julia," 1861, 1 Lushington's P. C. Reps. 224; the "Oakfield," 1886, L. R., 11 Prob. Div. 34; the "Belgic," 1875, L. R., 2 Prob. Div. 57; the "Ocean Wave," 1870, L. R., 3 P. C. Apps. 205; Marsden on Collisions at Sea, 246.

[2] The "Borussia," 1856, 1 Swabey's Adm. Reps. 94.

[3] The "Girolamo," 1834, 3 Haggard's Adm. Reps. 176.

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unmanageable and helpless, and when the proper order was given for bringing her to the north side of the river, which was her own proper side, she did not answer the helm, but was carried or sheered towards the south, and came into collision with the "Islay."

Now, I quite concur with the Lord Ordinary that this is the result of the evidence as to the cause of the accident; and that being so, the first question which it appears to me to raise is, whether there was any fault on the part of those in command of the "Strathspey" in steaming at so slow a rate of speed as they had actually adopted—a rate which they ought to have known must expose the ship to the danger of becoming unmanageable in consequence of the rapidity of the current at the time. The Lord Ordinary says this was not a fault, because the regulations and bye-laws of the Clyde made it necessary to steam slowly at that particular part of the river, and because the officer in charge therefore could not have gone faster without infringing those bye-laws. I am not satisfied that it is proved that the officer in command could not have gone at greater speed without infringing the bye-law; nor am I satisfied that it is proved that he could not have done so, that night, without running into some other hazard such as that which he encountered by doing as he did. But I do not think it is material to consider whether that is proved or not, because I think the Lord Ordinary is quite right in saying that the "Strathspey" was at that moment exposed to alternative hazards; and even if it were proved that the officer in command, in choosing between two risks, had taken one which led to disaster, while if he had chosen to encounter the other he might have taken the ship down the river in safety, I do not think that that would amount to fault on the part of the officer in charge for which he or his owners could be made responsible, because if he came into a position without any fault of his own in which he had to exercise his judgment between two alternative hazardous courses, and did exercise his judgment and take the course which he thought best, I do not think it would be possible for the Court to say he was blameable for the choice he had made. I therefore agree with the Lord Ordinary in thinking that we must go further back to find fault—if there was any fault—on the part of those in charge of the "Strathspey." His Lordship says that the fault consisted in leaving the dock at all, at the particular time and under the particular circumstances under which the "Strathspey" started, and I further agree with his Lordship in that opinion. I think the evidence shews that to leave the dock and proceed down the river at the time when the "Strathspey" started, when the ebb tide was at its strongest and the wind and darkness increased the peril, was, according to the evidence, a very imprudent course to take. Now, if that be so, I think that is a fault for which the owners of the "Strathspey" would be responsible if the ship at the time was under the command of the master for whom they are answerable, and if the fault was committed by the master.

But then the defenders say they are free from liability in consequence of the provisions of the 388th section of the Mercantile Shipping Act, because their vessel was under the charge of a licensed pilot, and in a part of the river where pilotage was compulsory. The question therefore comes to be, whether the pilot or master of the vessel is responsible for taking her down at the particular time, and in the circumstances in which she left the dock. Now, there is no question as to the obligation of owners of ships of this class to have a duly licensed pilot on board. A pilot had accordingly been engaged to take the "Strathspey" down the river, and he came on board while she was still in dock. I think the duty

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of the master when his ship was ready to start was to put her in charge of the pilot, and thereafter to obey the pilot's orders, and see that they were obeyed by his crew. I think that was his sole duty. The evidence of the pilot is conclusive to the effect that this duty was fully performed. The pilot took charge of the vessel before she proceeded from the dock, and from the moment that he took charge the conduct of the navigation belonged exclusively to him. He was therefore responsible for carrying her through the dock, out of the dock into the river, and down the river seawards so long as she remained within the limits of the water where pilotage is compulsory. I think it follows that it was for the pilot and not for the master to determine the particular time at which it would be prudent to leave the dock and enter the river. I cannot assent to the proposition which was urged upon us very forcibly by the respondents' counsel that it was the master who was responsible for getting the ship under weigh, and that the pilot was responsible only for her navigation after she had begun to move through the water. There can be no divided authority in the ship on a question so vital to her safety; and it appears to me that the pilot, who is responsible for taking the ship safely out of the dock and down the river, must be the sole authority to decide whether she can prudently leave her moorings and enter the river at any particular condition of wind and tide. It is said that the owners are responsible because the fault consisted not merely in starting in circumstances which made it dangerous to leave the dock, but in starting in those circumstances without any tug astern. I agree with the Lord Ordinary in thinking that it is not proved that a tug would have been of service, in the particular circumstances of this case. But however that may be, it is clear upon the evidence that although it may be useful or necessary to employ a tug for vessels of a certain length, which cannot readily take the bends of the river without such assistance, it is not necessary nor customary that a tug should be employed for a ship such as the "Strathspey." If the abnormal condition of the river made it prudent or necessary to take unusual precautions, it was for the pilot to point out the necessity. It was for him to say either that he could not start at all while the river was running so strongly, or that he could not start without additional help if he thought additional help was required. Therefore if I am right in thinking it was for the pilot to decide whether he could safely go down the river at all, it seems to me to follow that it was for him to say whether he could start with the ship in her ordinary condition, or whether he required to have more than usual assistance—because of the exceptional state of the river. It is not suggested that he asked for any such assistance, or that he had any doubt as to his ability to take the ship down the river safely without it; and indeed it is clear from his own evidence that he had no such doubt, because he says that the difficult part of the task was in taking the vessel from the dock, which was crowded with shipping, and that when he got clear of the dock he thought all his difficulties were at an end.

Agreeing therefore with the Lord Ordinary as to the blame which is imputed to the "Strathspey," I am of opinion that the fault lay with the pilot. He was bound to know the state of the tide and the state of the current, and the rate at which he could steam, and to consider whether steaming at such a rate and in such circumstances it would be possible to keep steerage-way upon the ship—to know the risks to which he was exposed in going down the narrow channel of the Clyde at that place. It was for him alone, considering all these matters, to

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decide whether it was safe to leave the dock; and if he was blameable for so deciding I think the blame lies with him and not with the master.

But then it was maintained that in order to give the owners the benefit of the 388th section of the statute it is necessary for them to prove that not only was the pilot in fault but that he was solely in fault, and therefore that they must prove that there was no fault at all on the part of the master. And it was said that they had failed to discharge that burden, because they had not proved that it was in fact the pilot and not the master who had given the order to get under weigh. It is not enough, according to the argument, to say that a pilot was in charge; it must further be shewn that the master did not interfere with his authority and give orders to start either without consulting him at all, or in disregard of his opinion, if he was consulted. Now, there is undoubtedly some authority in support of the argument which was so maintained to us; and in particular there is the authority of the judgment of the Privy Council in the case of the "*Iona*," which was delivered by Sir Richard Kindersley, in which that learned Judge says this—"It is not enough for the owners to prove that there was fault or negligence in the pilot. They must prove to the satisfaction of the Court which has to try the question that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage." But the question whether the doctrine of law so stated ought to be followed was considered, and decided in the negative by this Court in the case of the *Clyde Navigation Trustees* against *Barclay, Curle, & Company*, and the decision of the Court was upheld by the House of Lords on appeal, 3 R. (H. L.) 44, and as the question is one of very general importance, and was argued to us upon the footing that the law is either unsettled or that it must have been held to have been fixed in accordance with the opinion which I have just read, it seems to me to be very important to call attention to what was said by the learned Lords who advised the House in the case of the *Clyde Navigation Trustees*. Lord Chelmsford quoted the passage I have mentioned in the judgment of the Privy Council, and said that this doctrine imposed "upon the owners a species of negative proof which it is impossible for them to give." Lord Selborne said that he did not consider that the expressions used in previous cases were intended to lay down any arbitrary rule inverting the general principles of *onus probandi* as applied to this particular class of cases; and then he proceeded to lay down what in his judgment is the true position of a shipowner pleading the exception established by statute. And his Lordship says this:—"There are three things necessary to be proved—first, that a qualified pilot was acting in charge of the ship; secondly, that that was compulsory; and thirdly, that it was his fault or incapacity which occasioned the loss or damage. I apprehend that if a defender proves all these three positions and proves nothing more, then the burden is upon the pursuer, to lay some foundation, at all events, for alleging that, notwithstanding the proof given that there was a qualified pilot in charge and that compulsory, and that he committed some fault or shewed some incapacity by which loss or damage was occasioned, yet there was also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for such a case of contributory negligence must be laid, and I apprehend it is clear on general principle that the burden of laying that foundation rests upon the pursuer. And then his Lordship goes on to say, quoting what had been said by Lord Moncreiff in the Court below, that "the true principle is that it is not enough

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for the owners to shew that the damage arose through the fault of the pilot, if there is reasonable ground for saying that there was contributory fault on the part of the master or crew. The proof of circumstances which *prima facie* shew such reasonable ground for saying that there was contributory fault on the part of the master or crew no doubt would throw upon the defender the burden of explaining these circumstances so as to satisfy the Court that in point of fact the *prima facie* conclusion from these circumstances is not correct." The nature of the proof his Lordship goes on to consider. But upon that authority the only question which we have to consider upon this part of the case seems to be whether there is any reasonable ground for holding that the master contributed in any way to the fault which I hold to be proved against the officer in charge of the ship. It is said that we cannot hold that the pilot gave the order to get under weigh because it is not proved that the master did not give that order. I think if the relative duties of master and pilot are as I have described, it was for the pursuer who intends to allege that the fault was attributable to the master, to lay some foundation, at all events, for making that charge against him, and there is absolutely none to be found in the evidence.

But then there remains a different ground to which the Lord Ordinary has given effect. His Lordship holds that although the pilot was in charge of the ship, and although it may have been primarily his duty to consider and decide at what time the ship should get under weigh, the master also is responsible because he allowed the ship to run into an apparent and obvious danger. Now that appears to me to raise a much more difficult question, because now that we have the whole facts before us, it would certainly appear to have been very imprudent to start at that time. But it does not follow that there was any imprudence on the part of the master. The question is, whether the danger was so obvious that any seaman of competent skill ought to have foreseen it so clearly while his ship was still in dock as to make it his duty to take the ship out of the hands of the pilot, to take the responsibility upon himself, and to relieve the pilot of responsibility, by ordering him not to start. I do not think that in considering that question we ought to take into account the circumstance upon which the Lord Ordinary relies, that the master of this particular ship had been in the Clyde on various occasions before this occasion into which we are now inquiring. If the master had been in the Clyde before, I presume his ship was, on those previous occasions, as on this, in charge of a pilot; and therefore his presence on board the ship would not necessarily give him any local knowledge which ordinarily competent seamen in command of seagoing vessels would not obtain. But if the question depended to any extent upon local knowledge, then it seems to me to be clear that it is the local knowledge of the pilot, and not that which the captain may have accidentally obtained, which must prevail. Therefore I think the question depends upon whether this was an apparent and obvious danger which no competent master would allow his ship to encounter, irrespective of any local knowledge which the particular master might happen to have acquired. Now I am unable to agree with the view taken by the Lord Ordinary upon this question, because I think that all the circumstances which made it so hazardous for the ship to start upon her voyage were purely local conditions, of which the pilot was not only in law the proper judge, but of which he was by far a more competent judge than the master could be. There is no evidence that it was at all impossible for such a ship as the "Strathspey" to steam down the Clyde merely because the river was running at a particular

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pace, in consequence of the combination of the ebb tide and a land-flood. The "Strathspey" might have been able to go down the Clyde and go to sea with perfect safety, but what made her voyage dangerous was the particular rate of speed at which the river was running in relation to the rate at which it was necessary for the "Strathspey" to steam; and in considering whether that was a danger which the master was bound to estimate for himself to the exclusion of the judgment of the pilot, it appears to me that there are two considerations to which the Lord Ordinary has adverted which are very material. In the first place, his Lordship says that the cardinal mistake was in leaving the dock at the particular moment that the ship did leave. "She could have left in safety an hour or two earlier, because the tide would have been against her, and she would have had the advantage. Probably she might also have started in safety later in the evening when the downward rush of the tide had lost its force." Now it appears to me these are considerations the weight of which it was for the pilot to determine.

But then the other point to which his Lordship adverts is this, that the whole difficulty and danger arose from the impossibility of steaming at a greater speed than that actually adopted. Now, if it was in consequence of the bye-laws of the Clyde Trustees for the regulation of the navigation of the river that the pilot was compelled to adopt the rate of speed which he adopted, it appears to me that was eminently a consideration of which he was not only the proper judge, but the only competent judge. But if the bye-laws were not so rigorous as to involve any infringement or breach of rule on the part of the pilot, if he had chosen to steam at a somewhat more rapid pace than he actually chose, that again was a question of judgment for the pilot in command of the ship, and nobody else. The question therefore is, whether the master was not fairly entitled to believe that a pilot who undertook to take his ship safely down the river seawards was to be trusted with the decision of the question, whether either the bye-laws of the Clyde Trustees or any other consideration made it impossible for him to steam at the proper pace which was necessary in order to navigate the Clyde safely. That was the whole question the pilot had to consider. It appears to me it was a question for the pilot, and I am unable to agree with the Lord Ordinary in thinking that the conditions which the pilot ought to have known and taken into account in considering it, must necessarily have been so apparent and obvious to a shipmaster who had not the local experience of the pilot as to shew him his ship was being carried to destruction, and to compel him to take her out of the hands of the proper and responsible officer.

I am therefore on the whole of opinion that the judgment of the Lord Ordinary is right and ought to be adhered to in so far as he finds that the collision between the steamers was caused by the fault of those on board and in charge of the "Strathspey," and was not caused by the fault of those on board and in charge of the "Islay," and therefore that in the action at the instance of the owners of the "Strathspey" against the owners of the "Islay," the defender should be assoilzied. But I am unable to agree with the other conclusion at which his Lordship has arrived, and I think it ought to be altered so far as it finds that the owners of the "Strathspey" are responsible to the owners of the "Islay" by reason of the fault of the officers in charge being a fault for which they are answerable. I think the second plea in law for the defenders in the action at the instance of the owners of the "Islay" is well founded.

LORD M'LAREN and the LORD PRESIDENT concurred. No. 202.

The LORD PRESIDENT stated that LORD ADAM, who was not present at the advising, also concurred. July 3, 1891. Owners of the "Strathspey" v. Owner of the "Islay," *et e contra.*

THE COURT recalled the Lord Ordinary's interlocutors of 19th February and 18th March 1891: In the action at the instance of the reclaimers against the owner of the "Islay" they assoilzied the defender; and in the action at the instance of the owner of the "Islay" against the owners of the "Strathspey" they sustained the second plea in law for the defenders, and assoilzied them.

WEBSTER, WILL, & RITCHIE, S.S.C.—WHIGHAM & COWAN, S.S.C.—Agents.

JAMES RUTHERFURD, Pursuer (Reclaimer).—*Comrie Thomson—Salvesen.* No. 203.
M. MACGREGOR & COMPANY AND ANOTHER, Defenders (Respondents).—*Asher—Dickson.* July 4, 1891. Rutherfurd v. MacGregor & Co.

Sale by auction—Bankrupt estate—Purchase by law-agents employed by trustee in sequestration—Bankruptcy (Scotland) Act, 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 120.—The law-agents who had been employed by the trustee in a sequestration bought certain of the sequestrated effects which had been exposed by the trustee for sale by public roup. An unsuccessful bidder brought an action for reduction of the sale, and for declarator that he had become the purchaser of the subjects at the upset price, which was offered by him, on the ground that the law-agents had arranged with the trustee not to hold him personally liable for payment of their account, that there were no assets to which the agents had to look for payment save the subjects sold, and that the value of the subjects did not exceed the amount of their account. He pleaded that the sale was thus truly made for their behoof, and that they were not entitled to bid.

The Lord Ordinary (Kyllachy) held that the fact that the defenders had substantially the sole interest in the sale would at common law have disqualified them from bidding at the sale, but that as creditors they were entitled to do so under section 120 of the Bankruptcy Act, 1856. On a reclaiming note, *held* that at common law the agents were not disqualified from bidding by the interest they had in the sale, the subject sold being the property of the trustee, and the offer to purchase being made *bona fide* and not for the purpose of increasing the price.

Opinions (*per* Lord Young and Lord Rutherfurd Clark) that a law-agent employed by the trustee in a sequestration is not in respect of his account a creditor in the sequestration in the sense of the 120th section of the Bankruptcy (Scotland) Act of 1856.*

2D DIVISION. Ld. Kyllachy. J.

ON 17th December 1890, Richard Brown, who had been appointed trustee on the sequestrated estate of James Young Guthrie, S.S.C., exposed for sale by public roup the book-debts, books, papers, accounts, and other effects belonging to the sequestrated estate. The only offerers at the sale were Messrs M. MacGregor & Company, W.S., who had been employed by the trustee as his law-agents in the sequestration, and James Rutherfurd, writer, Glasgow. The subjects were knocked down to MacGregor & Company at the price of £23.

On 2d February 1891 Rutherfurd brought an action against the trustee and MacGregor & Company for reduction of the sale, for declarator that the subjects had been purchased by the pursuer at the upset price of £5 sterling offered by him at the exposure for sale of the subjects, and

* The Bankruptcy Act, 1856 (19 and 20 Vict. c. 79), sec. 120, enacts,—"When any estate is sold publicly by virtue of this Act, it shall be lawful for any creditor to purchase the same; but the trustee, or commissioner, or adjudger selling as aforesaid shall not be entitled to purchase."

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further, for decree ordaining the trustee to execute and to deliver to him an assignation of the subjects.

The pursuer averred that MacGregor & Company had unpaid accounts against the trustee amounting to upwards of £200, for services rendered by them as law-agents on the trustee's employment. (Cond. 3) " . . . There were no assets available for the payment of those accounts but the price which might be obtained for said book-debts, books, accounts, papers and others exposed for sale as aforesaid. The trustee had an arrangement with his said agents that he should not be personally liable for their accounts, but should be liable only for the amount of assets in his hands belonging to the said sequestrated estate." (Cond. 4) "The said exposure for sale was thus truly made for behoof of the trustee's said law-agents. They were virtually the sellers. The price to be got was all to go to them towards payment of their account up to the full amount thereof. They received it accordingly. They received also the whole balance in the trustee's hands. Any increase of price up to the amount of their accounts was solely for their benefit. Their unpaid accounts exceeded £200, and it was all the same to them whether they offered at the sale the full amount of their accounts or any less sum. They could, without injury to themselves, have run up the bidding against a competitor to upwards of £200, and might then have dropped the sale into his hands at that figure. All the offers made on behalf of the said law-agents were illegal and invalid, and the sale to them was illegal and invalid. Their bidding was unfair to the pursuer. . . ."

MacGregor & Company lodged defences. They explained "that the balance in the trustee's hands was not sufficient to meet the expense of the sale and the trustee's discharge. Said balance was paid in terms of the instructions of the creditors in the minute of meeting of 19th January 1891." An extract of this minute was produced. The minute bore that the sale to the defenders was approved of, and that the trustee was instructed to grant the necessary conveyance and to hand over to the law-agents any balance remaining in his hands after paying the expenses of his discharge to account of the business charges due to them. The defenders admitted that they did not hold the trustee liable for their accounts beyond the amount of assets of the estate in his hands.

The pursuer pleaded;—(1) All the offers made at the said sale, after the offer of the upset price made on behalf of the pursuer, being illegal and invalid, the pursuer is entitled to decree of reduction as concluded for. (2) The pursuer having made the only valid offer at the said sale, is entitled to the purchase, and to decree as concluded for, in terms of the declaratory and other conclusions, with expenses.

The defenders pleaded, *inter alia*;—(3) The pursuer's statements are irrelevant and insufficient to support his pleas. (4) The offers made at the said sale by or on behalf of these defenders having been legal and valid, absolvitor should be pronounced.

On 22d May 1891 the Lord Ordinary (Kyllachy) repelled the reasons of reduction, and assoilzied the defenders from the conclusions of the action.*

* " OPINION.—I have considered the argument in the case which I heard on Saturday last, and have referred to the authorities; but the conclusion to which I come is, that the question here is solved by the provision of the Bankrupt Act, which gives creditors a right to purchase at public sales of the bankrupt estate. I incline to accept the pursuer's view that the defenders here had, as law-agents in the sequestration, and as such entitled to payment of their accounts out of the first end of the estate, substantially the sole interest in the result of the sale, and that at common law that was a sufficient disqualification as against their bidding or purchasing. But, conceding this, I see no reason for reading the

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The pursuer reclaimed, and during the discussion in the Inner-House amended his record by adding after the second sentence in cond. 4 the following averment:—"The value of the subjects exposed for sale was not more than the claim of the defenders on their said account."

Argued for the pursuer;—The Lord Ordinary's decision, as regarded the application to the case of the 120th section of the Bankruptcy Act, 1856, was ill-founded. That section could only apply to persons who were creditors at the date of the sequestration. As regarded the common law, the Lord Ordinary's view was favourable to the pursuer. The defenders had given up their claim against the trustee personally, and they were trusting for payment of their account to the sale of the subjects, which formed the sole asset of the bankrupt estate. They were really the only persons interested in the result of the sale, and were virtually the sellers. They were therefore disqualified from bidding at the sale or purchasing.[1]

Argued for the defenders;—The Lord Ordinary's construction of the 120th section of the statute was sound. Although the defenders might not be able to rank as ordinary creditors, and had a claim against the trustee personally, they were not the less creditors entitled to purchase at public sales of bankrupt estate. Assuming, however, that the statute did not apply, they were entitled at common law to bid and purchase an asset of the bankrupt estate.[2] They were neither disqualified by their interest in the result of the sale nor by their arrangement with the trustee.[3]

LORD JUSTICE-CLERK.—I do not think there are any features of serious difficulty in this case.

Mr Comrie Thomson candidly admitted that, apart from the arrangement made by the defender with the trustee in the sequestration—to the effect that he would not insist on his claim against the trustee personally, but rely solely on the assets of the estate—he would not have a stateable case. In other words, he admitted that he could not maintain in the ordinary case that the agent in a sequestration might not bid for and purchase an asset of the sequestrated estate.

I am quite unable to see how the arrangement made by the defender can make any difference in the case of his making a *bona fide* bid for and buying an asset of the trust-estate. I see no distinction in the fact that he has given up what was his legal right, if the assets of the sequestrated estate should prove insufficient to meet his claim. I do not think that the present case is at all the

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statutory exemption in favour of creditors so narrowly as to exclude the agent in the sequestration, who, although he does not rank as an ordinary creditor, and has no doubt also a claim against the trustee personally, is yet, to all intents and purposes, a creditor in the sequestration, having a claim against the assets of the estate, which is none the worse because it is preferable.

"It may be that the result is to innovate on the common law rule applicable to sales by auction, but that is just what the statutory provision was designed to do. Nor is there any hardship to intending purchasers, because they knew, or are bound to know, that in sales of a sequestrated estate they were open to competition from creditors, including, it may be, sole creditors, who may often have the sole interest in the price."

[1] Faulds v. Corbet, &c., Feb. 25, 1859, 21 D. 587, 31 Scot. Jur. 313; Watson v. Maule, Jan. 19, 1743, M. 4892; Grey v. Stewart, July 7, 1753, M. 9560; More's Notes to Stair, lix.

[2] Noble v. Campbell, Nov. 4, 1876, 4 R. 77.

[3] Shiell v. Guthrie's Trustees, June 26, 1874, 1 R. 1083.

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same as *Faulds* v. *Corbet*. I think it is more like *Shiell* v. *Guthrie*. But it is not necessary in my view to consider the distinction between these cases, because, if I am right in thinking that the arrangement made by the defender with the trustee makes no difference, I think the case of *Noble* v. *Campbell* is absolutely in point. The Lord President there points out that there is no such officer known to the law as the agent in a sequestration, and the person who acquires that title is simply the person employed by the trustee to do business for him in matters in which he is entitled to employ others to assist him. I think the case of *Noble* effectually disposes of this case, and I see no ground stated on record to suggest that the defender was not a *bona fide* purchaser of the asset in question. It is said that his account was larger than the value of the asset, but he, knowing that he had a claim against the estate, and that he was entitled to get payment in money, wanted to get the estate into his own hands, as he thought he could make something of it. I see no reason to think that the defender was acting with anything but an honest desire to get the asset knocked down to him at such a price that he could make something out of it.

With regard to the ground on which the Lord Ordinary has disposed of the case, I desire to add that I am not prepared to proceed upon that ground, though I am not prepared to say that it is wrong.

Lord Young.—I have come to the same conclusion. The case is interesting chiefly owing to the singularity of the circumstances, but when understood it is simple enough.

The bankrupt was a solicitor in Edinburgh, and in the result the whole estate left in the hands of the trustee consisted of the book-debts, books, accounts, and papers of the bankrupt. That was a speculative estate, and in the end all the creditors were satisfied that it would not yield more than would satisfy the trustee's claims, and that the trustee's claims for cost of management must be met before the claims of creditors. That being their view, the next fact to be noted is that the chief, if not the only party with whom the trustee had to deal, was the defender, who had, and there is no reason to doubt very properly, arranged that he would not hold the trustee personally liable for any claims he might have for services rendered, if the estate should not prove sufficient to meet these claims.

Such being the state of affairs, the estate in the hands of the trustee was exposed for sale, and, as was very proper, for sale by public roup, though I think, the creditors being willing, there would have been no objection at common law—there might be under the statute—to the estate being handed over by the trustee to the agent, and in my opinion there is nothing in the common law of Scotland to prevent the defender being a bidder at the sale. If he had bid beyond the amount of his account, the surplus after payment of his account would have gone to the creditors. If anyone had been prepared to give more than he was, there would have been no obstacle to such a purchaser acquiring the subjects. I see, therefore, no objection at common law to the defender's buying the subjects.

As at present advised, I could not assent to the ground on which the Lord Ordinary has put his judgment. I do not think the authority of the Bankruptcy Act is necessary to sanction the course taken by the defender, but if the sanction of the statute was necessary, I should not, as at present advised, be able to find

such sanction in the statute, for I incline to the view that the defender was not a creditor in the sequestration in the sense of the Act. No. 203.

July 4, 1891.
Rutherfurd v. MacGregor & Co.

LORD RUTHERFURD CLARK.—I am of the same opinion. The subject of the sale in this case was an asset of a sequestrated estate. I think that simple statement shews that this case does not fall within the rule of *Faulds* v. *Corbet*, because it is perfectly obvious from that statement that the subject of the sale was the property of the trustee in the sequestration, and not in any sense of the agent in the sequestration.

It is said that a difference arises in consequence of the arrangement made between the agent and the trustee, under which the liability of the trustee to the agent was limited to the value of the assets of the estate. I see no difference which that can make in regard to the matter of which I am now speaking. The trustee did not give the agent anything, and so the property of the estate necessarily remained in the trustee. The agent had nothing more than a personal claim against the trustee, that claim, however, being limited to the value of the assets of the sequestrated estate. The present case, therefore, is in no way similar to the case of *Faulds* v. *Corbet*, which proceeded on the ground that a seller may not himself buy the subject which he is selling.

It is further argued that the defender's interest in the value of the asset sold disqualified him from bidding at the sale. I have shewn that he was not disqualified in the sense of being owner of that asset either in title or fact, and if he was not owner, I can see no other disqualification which would prevent him from bidding at the sale. It was held in the case of *Noble* v. *Campbell* that the law-agent of the trustee in a sequestration might lawfully purchase an asset of the sequestrated estate, and I do not think that it makes any difference whether the agent is or is not a creditor of the trustee personally at the time of the purchase, or whether his contract with the trustee is of the usual kind, or his claim is limited as it was in this case.

I can understand that a very different case might arise if it were averred that the agent, having such an interest that the estate should realise a large value, had bid at the sale, not from a *bona fide* desire to purchase, but in order to increase the price. That might have been a very different case, but it is not averred. I assume, and I have no doubt that my assumption is in accordance with the fact, that the defender was a *bona fide* purchaser at the sale, desiring to make the purchase which he made, and I see nothing to prevent him becoming a purchaser.

I concur with Lord Young in what he said with regard to the Lord Ordinary's judgment. I am not satisfied that the defender is a creditor in the sequestration in the meaning of the Bankruptcy Act, and though I do not express a definite opinion on the matter, I am not prepared to proceed on the ground on which the Lord Ordinary has decided the case.

LORD TRAYNER was absent.

THE COURT adhered.

GILL & PRINGLE, W.S.—M. MACGREGOR & Co., W.S.—Agents.

DAVID MILNE CRABBE, Pursuer (Respondent).—*D.-F. Balfour—Law.* No. 204.
ROBERT WHYTE, Defender (Reclaimer).—*Asher—Dickson.*

July 7, 1891.
Crabbe v. Whyte.

Judicial factor—Curator bonis—Investment of ward's funds—Personal liability of curator bonis.—A curator bonis lent funds belonging to his ward on

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the security of a tenement of houses and shops in a new street which was then in the course of formation in Dundee. When the loan was arranged the buildings were not nearly completed, but when the money was advanced the houses and shops were finished, and were for the most part let, but some workshops, of which the tenement also consisted, were unlet. The loan was made on a valuation by an architect of professional standing in Dundee, employed by the borrower. The valuation was made from plans, the buildings themselves not being examined. The security proved wholly inadequate to meet the loan.

In an action by the executor of the ward against the curator bonis *held* that the security was not such as a trustee ought to have accepted, and that the defender was personally bound to replace the sum lent.

1st Division. Ld. Kyllachy. C.

On 21st October 1890 David Milne Crabbe, executor of the late Mrs Isabella Milne or Allan, who had died in the Sunnyside Asylum, Montrose, on 15th April 1888, brought an action against Robert Whyte, solicitor, Forfar, who had been appointed curator bonis to Mrs Allan on 15th April 1875, concluding for payment of £3217, being a sum of £2700 belonging to the curatory estate, which the pursuer alleged had been invested on insufficient security through the negligence of the defender, together with arrears of interest on the said sum, and certain other alleged debts to the estate.

The defender pleaded;—(5) The defender having been guilty of no negligence in the matter alleged, *et separatim*, the pursuer having suffered no loss from the defender's actings, the latter should be assoilzied.

A proof was allowed. The following passage from the Lord Ordinary's opinion was admitted by the defender at the hearing in the Inner-House correctly to summarise the import of the evidence:—"The defender was curator bonis to the late Mrs Allan. At Whitsunday 1878 he lent £2700 of his ward's funds to Messrs Kinnes, builders in Dundee. The security was a tenement of houses, shops, and workshops, situated in Victoria Road, Dundee. Victoria Road was a new street then in course of formation, in the line of an old street, known as Bucklemaker's Wynd, which had been removed, or was in course of removal by the Dundee Improvement Trust. When the loan was arranged [in February 1878] the tenement in question was not nearly completed; but at Whitsunday 1878, when the money was advanced, the houses and shops were finished, the workshops being also finished except as regards their internal fittings. At that date also the houses were let and occupied, as were also one or perhaps two of the shops; but the workshops were unlet and unoccupied, and have never yet been more than partially let. The loan was made on an estimated rental, made up from the plans, and on a valuation proceeding on that rental, obtained by the borrower, and furnished by his agent to the curator. The valuation brought out a value of £4200, the rental being estimated by the valuator at about £300. The valuation was by Mr M'Laren, architect, Dundee, a gentleman of undoubted character and professional standing. The buildings themselves were not examined, except that they were visited by the valuator when in course of erection, and also by the curator's partner in business, who took charge of the transaction. The security has, in result, proved wholly inadequate. The curator has for some years been in possession, and the interest is at present in arrear to the amount of over £300. The gross rental has never exceeded £250, and is at present only £237; and the feu-duty being £73, and the taxes and repairs considerable, there is no doubt that the interest is unsecured, and that the property, if now sold, would realise considerably less than the amount of the loan. These facts are undisputed."

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On 10th April 1891 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the defender is not entitled to take credit in his accounts, as curator, for the sum of £2700, invested by him as at Whitsunday 1878 on the security of the house property in Dundee, referred to on record: Finds that he is bound—on receiving an assignation of the said security and payment, or credit in his account for all sums of interest received therefrom and credited to the ward in his account—to replace in the funds of the curatory the said sum of £2700, with interest at the rate of four per cent per annum from the date of the loan until replacement: Finds that the curator's account falls to be corrected accordingly: Appoints the cause to be enrolled for further procedure: Grants leave to reclaim." *

The defender reclaimed, and argued;—On the facts the case was distinguishable from *Raes* v. *Meek*,[1] and in accordance with the law there laid down in the House of Lords, the defender had used the reasonable care

* "OPINION.—(After the narrative of the facts quoted above)—I do not enter into some other matters which bulk largely in the proof, and as to which there is more or less controversy. I refer to the unsubstantial character of the buildings, the non-allocation of the feu-duty, and certain departures from the plan which reduced the cost of the building. The facts as I have stated them are, as I have said, undisputed, and are enough for my judgment.

"The question is, whether the ward's representatives are bound to accept or are entitled to repudiate the investment. They say that it was a bad investment, and that the curator has failed to shew that he used ordinary care and prudence in making it.

"I consider that there is no law applicable in such cases except the general rule that a trustee must exercise in making investments ordinary care and prudence. Certain subordinate rules are said to have been established by the decisions, but I doubt whether that is so. More particularly, I hesitate to say, universally, that a loan is bad merely because the security consists of unfinished or unoccupied buildings. Such a loan certainly requires to be justified, but cases may be conceived in which it might be so. So also it is not, I think, conclusive that the loan has been made on what is called a borrower's valuation, or that the premises forming the security have been converted to some new purpose, or are situated in a new street or a new locality. All these things separately might pass; and I do not consider that either the recent case of *Rae* v. *Meek* or any of the numerous cases there cited have established any rule of law to the contrary.

"But the present case presents an unfortunate combination of unfavourable features. There is not, indeed, any suggestion of improper motive. The curator, I do not doubt, did for his ward what he would have done for himself; and, in so far as he erred, he did so, I have no doubt, in company with other experienced men of business whom long immunity had at that period led into loose practice. But, however honest the curator was, I am unable to hold that a loan can be supported as a proper trust investment which is made on the security of unlet or unfinished buildings in a new and unestablished street, and which proceeds upon a valuation obtained by the borrower, and based upon an estimated rental calculated from plans and untested by experience. All these features unfortunately concur here, and where they do concur I fear there is no room for doubt that a curator or trustee who makes such a loan does so at his own risk, and is bound to replace the money advanced when required to do so by the beneficiaries.

"I shall therefore find that the curator is bound to account for the sum of £2700 in question, with interest from the date of the loan at the rate of four per cent; he, on the other hand, receiving credit for all interest hitherto paid, and being entitled to receive an assignation of the security in his own favour, and at his own expense."

[1] Raes v. Meek, July 19, 1889, 15 R. 1033, Aug. 8, 1889, 16 R. (H. L.) 31.

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which a man of ordinary prudence would shew in the management of his own affairs.

The Court made avizandum, intimating that if necessary they would call on the pursuer.

At advising,—

LORD M'LAREN.—This is a reclaiming note against an interlocutor of Lord Kyllachy, in which it is found that the defender, a curator bonis, is not entitled to take credit in his account for a sum of £2700, which the Lord Ordinary holds to have been invested on insufficient security. The security consisted of a tenement of houses, shops and workshops, which at the time of arranging the loan were being put up in a street in Dundee, which is described as being then in course of reconstruction. I cannot state the facts on which the liability of the curator bonis is said to be founded better or more shortly than by reading a few sentences from the Lord Ordinary's judgment. "The loan was made on an estimated rental made up from the plans, and on a valuation proceeding on that rental, obtained by the borrower, and furnished by his agent to the curator. The valuation brought out a value of £4200, the rental being estimated by the valuator at about £300. The valuation was by Mr Maclaren, architect, Dundee, a gentleman of undoubted character and professional standing. The buildings themselves were not examined, except that they were visited by the valuator when in course of erection, and also by the curator's partner in business, who took charge of the transaction. The security has, in result, proved wholly inadequate. The curator has for some years been in possession, and the interest is at present in arrear to the amount of over £300. The gross rental has never exceeded £250, and is at present only £237; and the feu-duty being £73, and the taxes and repairs considerable, there is no doubt that the interest is unsecured, and that the property, if now sold, would realise considerably less than the amount of the loan." These facts, as the Lord Ordinary observes, are undisputed.

I agree with the Lord Ordinary that the obligation of a trustee in the matter of investments is that he shall exercise ordinary care and prudence in judging of the sufficiency of the security offered. In the two recent cases in the House of Lords, *Knox* v. *Mackinnon* (Aug. 7, 1888, 15 R. (H. L.) 83), and *Raes* v. *Meek*, the diligence required of a trustee was described as that which a prudent man of business would use in his own affairs. In applying this rule we must of course assume parallel cases. A prudent man of business may be a builder by profession, or a dealer in subjects which are more or less speculative, but which on the average of all his transactions yield him a profitable return. Such an illustration is evidently not at all to the point. We must suppose a prudent man desirous of placing a sum of money in a state of safe investment, such as will produce only the ordinary interest of a loan on heritable security. The point for consideration is then the safety of the security. I shall not be thought to state the rule with undue severity against trustees when I say that a trustee will, in my view, only be personally responsible for losses when it appears that he has not made due inquiry as to the safety of the security, and that the security is not in fact such as a trustee ought to accept.

A trustee is not required to exercise a personal judgment in matters of professional skill; he is therefore entitled to act on the opinion of a conscientious and skilful valuator selected by himself to advise him as to the suitability of the property as a security for trust money. If he takes such advice and acts

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according to the best of his judgment, I should not hold him responsible for supervening loss.

But again, a trustee may have omitted to take advice, and may have acted without much consideration, and loss may result. Still, if he can satisfy the Court that the investment was such as a trustee would have been advised by competent judges to accept, or that it was such as a trustee might lawfully and prudently accept, he will not be responsible, because, in the case supposed, although the trustee was negligent, the loss was not caused by his negligence, but is due to the depreciation of property or other causes.

In the present case I agree with the Lord Ordinary that the security was not such as a trustee ought to have accepted; because it was a security of a speculative character consisting of unlet and unfinished buildings, in a new and unestablished street, the rental being calculated from plans and measurements, and not based in any fair sense on actual transactions. I am also of opinion that the defender was negligent,—I do not mean that he was intentionally negligent,—only that he did not take the proper means of satisfying himself as to the suitability of the security for the purposes of trust-investment. I do not overlook the fact that the defender was furnished with a valuation prepared by an architect and valuator who is admitted to be of high standing in his profession. But this was a valuation obtained by the borrower. I assume that the valuation was a fair one, just such a valuation as might guide a company or a private lender who might be willing to lend on such security, taking on himself a certain risk for which he might be indemnified by charging suitable interest. But the opinion of the architect was never asked as to the propriety of lending trust money on such security, and I am not going to assume from the statements made in the valuation that the answer to such an inquiry would have been an affirmative answer. I think it must be taken that the defender acted without due inquiry, and without taking account of the considerations which made this heritable property an unsafe investment for trust money, and that the defender may therefore be properly required to replace the money advanced on receiving an assignation to the security. It follows, in my opinion, that the reclaiming note should be refused, and the interlocutor affirmed.

LORD KINNEAR.—I am of the same opinion. I entirely concur with everything that the Lord Ordinary has said, both as to the facts and as to the law applicable to these facts. I think the case of *Raes* v. *Meek* is directly applicable to the present case, and rules it.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

THE COURT adhered.

JAMES D. TURNBULL, S.S.C.—MACRAE, FLETT, & RENNIE, W.S.—Agents.

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Davidson v. Davidson's Executor.

ROBERT DAVIDSON, Pursuer (Respondent).—*Rhind*—*Wilson.*
RICHARD DAVIDSON (Helen Davidson's Executor), Defender (Appellant).—*Jameson*—*Sym.*

Process—Sheriff—Appeal—Judicature Act, 1825 (6 *George IV. c.* 120), *sec.* 40—*Act of Sederunt*, 11*th July* 1828, *sec.* 5.—A Sheriff-substitute allowed a proof on 2d April. On 21st May he sisted the process for a month on the motion of the defender. The pursuer appealed to the Sheriff-principal, who, on 5th June, recalled the sist, and remitted to the Sheriff-substitute to fix a new

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diet of proof. On 15th June the latter fixed a new diet of proof. On 16th June the defender appealed to the Court of Session for jury trial.

Held (*diss.* Lord Young) that the appeal was incompetent under section 5 of A. S., 11th July 1828, as the only interlocutor allowing a proof was that of 2d April, and no appeal had been presented within fifteen days thereafter.

Kinnes v. *Fleming*, Jan. 15, 1881, 8 R. 386, and *Williams* v. *Watt & Wilson*, May, 28, 1889, 16 R. 687, *followed*.

2D DIVISION. Sheriff of Roxburghshire. I.

ROBERT DAVIDSON raised an action in the Sheriff Court of Roxburghshire at Jedburgh against Richard Davidson, the executor-dative of the deceased Helen Davidson, for the sum of £700, being the amount which the pursuer averred had been bequeathed to him by Helen Davidson in a holograph will.

The defender denied that the alleged will was in the handwriting of the deceased.

On 2d April 1891 the Sheriff-substitute (Speirs) allowed a proof, and fixed a diet of proof.

On 7th May the Sheriff-substitute, on the motion of the defender, adjourned the proof to 28th May, and on 21st May he pronounced this interlocutor:—"On the defender's motion sists the cause for one month, in order that the defender may raise an action of reduction" of the alleged holograph will "in the Court of Session."

On 23d May the pursuer appealed to the Sheriff. Notwithstanding the appeal, the defender proceeded to raise an action of reduction of the will in question, on the ground of forgery, in the Court of Session, the summons being signeted on 1st June.

On 5th June the Sheriff (Hope) pronounced the following interlocutor:—"Sustains the appeal; recalls the interlocutor appealed against; remits to the Sheriff-substitute to fix a new diet for leading the proofs allowed by interlocutor of 2d April last."

On 15th June the Sheriff-substitute, on the pursuer's motion, assigned the 6th July as a new diet of proof.

On 16th June the defender appealed to the Second Division of the Court of Session, under section 40 of the Judicature Act, in terms of section 5 of the Act of Sederunt, 11th July 1828,* with a view to having the action removed to the Court of Session and conjoined with the action of reduction, and tried by jury.

The pursuer objected to the competency of the appeal, on the ground that the defender had failed, in terms of section 5 of the Act of Sederunt, to appeal within fifteen days of the interlocutor of the Sheriff-substitute of 2d April, which was the interlocutor allowing the proof, and which had not been brought under the review of the Sheriff, or recalled by him.[1]

Argued for the defender;—(1) The appeal was timeously presented.

* Section 5.—"Whereas it is enacted by section 40 (of the Judicature Act) that in all cases originating in the inferior Courts, in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof shall be pronounced . . . it shall be competent to advocate such cause to the Court of Session, it is enacted and declared . . . that if . . . neither party, within fifteen days in the ordinary case, and in causes before the Courts of Orkney and Shetland within thirty days after the date of such interlocutor allowing a proof, shall intimate in the inferior Court the passing of a bill of advocation, such proof may immediately thereafter effectually proceed in the inferior Court . . . and if within these periods respectively no intimation shall be made of any such bill of advocation, the proof shall then proceed, and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented."

[1] *Authorities.*—Kinnes v. Fleming, Jan. 15, 1881, 8 R. 386; Williams v. Watt & Wilson, May 28, 1889, 16 R. 687.

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It was within fifteen days of the Sheriff's interlocutor of 5th June. Under the appeal to the Sheriff all the interlocutors of the Sheriff-substitute were submitted to his review, in terms of section 29 of the Sheriff Courts (Scotland) Act, 1876 (39 and 40 Vict. cap. 70). In his interlocutor he might have discharged the proof, or of new allowed proof. His interlocutor was one in effect allowing proof. In the cases founded on by the pursuer fifteen days had elapsed from the date of the Sheriff's interlocutor, as well as from that of the Sheriff-substitute. (2) Even if it should be held that the appeal was not presented within fifteen days of the interlocutor allowing proof, that period of time had not been fixed by an Act of Parliament, but by an Act of Sederunt. The Court had therefore a discretion in the matter. They were not absolutely bound by an Act passed by themselves for the purpose of regulating procedure in the Court. The case of *Boyd, Gilmour, & Co.*[1] shewed that the Act of Sederunt was not to be rigidly adhered to where grave injustice would be done, and that it was in the discretion of the Court to enforce its penal provisions. The reason of a limit of fifteen days being fixed by the Act of Sederunt was that the proof might "immediately thereafter effectually proceed"; but in this case there was interjected an interlocutor sisting the process, so that the proof could not effectually proceed till the sist was removed.

At advising,—

LORD JUSTICE-CLERK.—It is unfortunate that in the circumstances of the present case we should be called upon to decide a question of such importance. But seeing that it has been forced on our attention, we must determine it in accordance with the decisions in prior cases of a similar kind.

In this case the Sheriff-substitute allowed a proof on 2d April 1891. In allowing a proof he took the usual and proper course of appointing the diet of proof for a day more than fifteen days beyond the date of his interlocutor, in order that the defender, who was the party who had not moved for proof, might, if he thought proper, appeal within fifteen days in terms of the Act of Sederunt, 1828. The defender took no steps of any kind till 7th May, long after the fifteen days had expired; even then he only moved that the diet of proof should be adjourned.

The question for us to decide is whether the right of appeal under the Act of Sederunt falls if not taken within fifteen days. That it does has been conclusively and definitely settled by numerous decisions. We ourselves have had recently before us the case of *Williams* v. *Watt & Wilson*, in which we held the point was decided, and in the words of Lord Young in that case, that "the meaning of the Act of Sederunt has been determined, and we cannot go back on the cases that have settled it." In the present case there has been no appeal up to 16th June, although proof was allowed on 2d April. In accordance with the decided cases, especially *Kinnes* and *Williams*, that circumstance deprived the defender of any further right of appeal against the interlocutor allowing the proof. So strongly was that held by the Court in one case, that of *Duff* v. *Stewart* (Oct. 20, 1881, 9 R. 17), that they decided that in an action in which the value of the cause was not ascertained and the Sheriff had allowed a proof, if the party wishing to appeal did not get the property valued and obtain leave to appeal in time for him to take his appeal within the fifteen days, his right of appeal fell.

On the 21st of May the defender moved for a sist on the ground that he was

[1] Boyd, Gilmour, & Co. v. Glasgow and South-Western Railway Co., Nov. 16, 1888, 16 R. 104.

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about to raise an action of reduction in the Court of Session, his object plainly being to get the case removed to the Court of Session *ob contingentiam*. The Sheriff-substitute allowed the sist. The pursuer appealed to the Sheriff, who, on 5th June, pronounced this interlocutor:—"Sustains the appeal; recalls the interlocutor appealed against: Remits to the Sheriff-substitute to fix a new diet for leading the proofs allowed by interlocutor of 2d April last." Nothing can be more plain than that the Sheriff's interlocutor does not deal with an appeal against the interlocutor of 2d April on the question of proof; that interlocutor still stood, and the only reference the Sheriff made to it was to remit to the Sheriff-substitute to fix a new diet for leading the proof. It was suggested that if the terms of the Sheriff's interlocutor had been different, that if instead of fixing a new diet he had of new allowed a proof, an appeal would have been competent. As to that, I express no opinion. It has no bearing on the present case. There cannot be any doubt that an allowance of proof may be treated as if it had lapsed, and a proof of new allowed. Where that happens, it may be that one of the parties may get the advantage of that by having the power to appeal under the Act of Sederunt set up for another period of fifteen days. But nothing of the kind occurred here, no proof was allowed except upon the 2d of April, and no appeal was taken within fifteen days thereafter. In the case of *Kinnes* the Lord President rules it to be absolutely decided that an appeal is incompetent, on the footing that the Sheriff's interlocutor was not one allowing proof. In my opinion the interlocutor of the Sheriff in this case is exactly in the same position.

A distinction was attempted to be made between this case and the cases already decided, viz., that in the latter the appeal was taken after the expiration of fifteen days from the date of the Sheriff's interlocutor, the fact being that the Sheriff did not fix a new diet of proof, but that this was done by the Sheriff-substitute on a later date, while in the present case the appeal was taken within fifteen days from the date of the Sheriff's interlocutor, by which he remitted to fix a new diet. In my opinion this makes no difference in the present circumstances, as the proof was allowed by the Sheriff-substitute, and his interlocutor allowing proof was never brought under the review of the Sheriff, and the Sheriff does not by his interlocutor dispose of any question of allowing a proof. It only put matters in train for carrying out the allowance of proof which was made by the Sheriff-substitute on 2d April, and which is a standing interlocutor, and the only interlocutor in the case by which a proof is allowed.

I am therefore of opinion that we must hold this appeal in which we are called on to bring the case here from the Sheriff Court incompetent, as not having been timeously taken. I understand the object of the defender is to get the Sheriff Court process absorbed in the action of reduction at present running its course in the Outer-House. Our present decision does not prevent him getting this done if the Lord Ordinary, on a motion being made to have the cause remitted *ob contingentiam*, thinks such a course competent. All that we decide is that this present appeal is incompetent.

LORD YOUNG.—I regard the question of the competency of this appeal as one of extensive interest and importance. But, in my opinion, the parties would have acted wisely in avoiding its discussion by agreeing between themselves or taking the opinion of the Court—if agreement was impossible—upon the question, whether it was most fitting that the real point of dispute between the parties should or should not be tried along with the action of reduction now in

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the Outer-House. One of the parties was willing that this should be done, but the pursuer thought it would be for his advantage to refuse to concur in that course being followed, and has pressed the question of the competency of this appeal on our consideration.

The interlocutor of the Sheriff-substitute allowing the parties a proof of their respective averments, which, we are now told, involve a question of forgery, was dated 2d April 1891. From that date down to the 21st May—not a very long time—the defender appears to have been making inquiries regarding the genuineness of the will. He made various motions to the Sheriff-substitute to postpone the proof till the result of his inquiries was known, and to some purpose, for on 7th May, on the motion of the defender, the Sheriff-substitute adjourned the date of the proof till 28th May, and before the latter date he was induced to sist the case for a month in order that an action of reduction of the will in question might be brought by the defender in the Court of Session. All that shews that the defender desired to avoid a proof in the Sheriff Court, and all his actings were directed against the interlocutor allowing the proof. On 23d May, after the interlocutor allowing the sist, the pursuer appealed to the Sheriff.

Now, by clause 29 of the Sheriff Court Act, 1876, it is provided that an appeal to the Sheriff "shall be effectual to submit to the review of the Sheriff the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the Sheriff to do complete justice without hindrance from the terms of any interlocutor in the cause and without the necessity of any counter appeal." I should have thought it too clear to be disputed that this appeal to the Sheriff was effectual to submit to his review the interlocutor of the Sheriff-substitute allowing a proof. That interlocutor did not become final on 17th April, it was appealable to the Sheriff, and was submitted to his review by the appeal of 23d May. If it was otherwise the Sheriff could not have done anything but allow a proof, but it is conceded by all parties that the Sheriff might have refused to allow the proof. In short, it is admitted as clear that the interlocutor allowing the proof was subject to the revision of the Sheriff by reason of the appeal of 23d May, and that he might have recalled that interlocutor. He, however, thought that the proof should proceed. It is not right, in my opinion, to say that he did not address his mind to the question of proof. He addressed his mind to that question, and to nothing else; he refused to sist the process and remitted to the Sheriff-substitute to fix a new diet of proof. Was the interlocutor of 2d April not in suspense till the Sheriff pronounced his judgment of 5th June? It was not if the Sheriff had no power to deal with it, but if the parties are right that the Sheriff might have recalled the interlocutor, it was in suspense. That, in my opinion, is clear.

The question is, do, under the Act of Sederunt, the fifteen days run from the date of the Sheriff's interlocutor? On that question I have quite a distinct opinion that they do so run. It was said that the case had been settled by authority, but, in my opinion, there is no authority on the point. In neither *Kinnes* nor *Williams* could the question have arisen, because, although in both these cases there was an appeal to the Sheriff, there was no appeal to this Court till long after fifteen days had expired from the date of the Sheriff's interlocutor. But in the present case there was an appeal to this Court within fifteen days of the Sheriff's interlocutor, and on that fact my opinion rests.

I shall advert to these two cases—your Lordship mentioned also the case of

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Duff; it has no bearing on the point, not the least. In the cases of *Kinnes* and *Williams*, after the Sheriff had pronounced an interlocutor similar to the one pronounced here, the Sheriff-substitute of new fixed a diet of proof. It was held that the appeal to this Court could not be maintained, unless it could be shewn to the Court that an appeal within fifteen days of the interlocutor allowing the proof had been competently taken. No appeal was taken within fifteen days of the Sheriff's judgment, and if the Act of Sederunt applied at all, the contention of the appellant must have been that the interlocutor of the Sheriff-substitute fixing a new diet of proof was an interlocutor allowing a proof, but it was held that it was not. But the Court did not hold that the interlocutor of the Sheriff was or was not one allowing a proof, since no appeal was taken within fifteen days from its date. I was a concurring party in the judgment of *Williams*, which was similar to the case of *Kinnes*, and was decided on the same grounds.

In the present case, however, we have before us a distinct question which arises for the first time. Does an interlocutor allowing proof, which is brought by appeal under the Sheriff's consideration remain in suspense by reason of the statutory provisions in regard to the appeal till the Sheriff disposes of it? In my opinion the interlocutor of the Sheriff in the present case is one allowing proof in substance and effect, and the question ought to be answered affirmatively so that the fifteen days during which an appeal to this Court is competent run from the date of the Sheriff's interlocutor.

The general interest and importance of the question is at once apparent. If it is answered otherwise than as I have indicated, if an appeal from the interlocutor of the Sheriff-substitute be taken to the Sheriff, and he does not dispose of the case for six months or any other period beyond fifteen days, and then dismisses the appeal, and remits to the Sheriff-substitute to take the proof, in that case the proof must be taken in the Sheriff Court, and if the case were thereafter appealed to us and then to the House of Lords our judgment on the facts would be final, so that it could not be disputed by the Court of last resort. But the object of the Judicature Act in allowing an appeal such as the present was that our judgment should not be final on the question of fact. The importance and grave significance of the question is illustrated by a judgment which was pronounced the other day in the House of Lords. There a proof was taken in this Court in a case which had been appealed here from the Sheriff Court, and we pronounced findings of fact in that case which were reversed in the House of Lords. Now, if the proof in that case had been taken in the Sheriff Court and we had pronounced exactly similar findings they would have been final, and could not have been reversed.

The question is therefore of great importance, and I have given expression to some of the considerations which an important question occurring for the first time has occasioned in my mind. On the whole matter I am of opinion this appeal should be sustained.

Lord Rutherfurd Clark.—I think this appeal is incompetent. The only interlocutor allowing a proof is that of 2d April, and no appeal was taken by the defender within fifteen days of that interlocutor. I think the decision in this case turns on the question whether the Act of Sederunt applies in this sense that the appeal must be taken within fifteen days of the interlocutor allowing the proof. I think this question is determined affirmatively by the cases bearing on the point.

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Of course if the Sheriff-substitute pronounces an interlocutor allowing a proof, and that interlocutor is appealed to the Sheriff, the days during which an appeal may be taken to this Court do not run from the date of the Sheriff-substitute's interlocutor, but from that of the Sheriff. In this case, however, the judgment of the Sheriff-substitute allowing a proof was never brought under the notice of the Sheriff. All that was done by him was to appoint a new diet of proof; this means nothing more than recalling the sist. I think, therefore, that the case is in this position, that there is no interlocutor allowing a proof except that of 2d April, and no appeal having been taken by the defender within fifteen days he is barred from now appealing the case here.

LORD TRAYNER.—I confess I was not able to appreciate the value or relevancy of much of the argument that was addressed to us from the bar. The question here is whether this appeal is or is not competent under the fifth section of the Act of Sederunt of 1828. The words of that section, as they have been interpreted by various decisions, are to the effect that if an appeal is not taken within fifteen days from the date of the interlocutor allowing a proof, the right of appeal falls. The only interlocutor allowing a proof that I can find in the present proceedings is that of the Sheriff-substitute dated 2d April 1891; and if the fifteen days for appealing are to be reckoned from that date then this appeal is incompetent, not having been taken within the prescribed period. It is said, however, that when the pursuer appealed against the interlocutor of 21st May, by which the Sheriff-substitute sisted process for a month, he also brought up for review the earlier interlocutor allowing a proof. That the pursuer could under his appeal to the Sheriff have submitted to review the interlocutor allowing a proof, and all previous interlocutors, is certain. I think, however, that he did not do so. Lord Young thinks the Sheriff applied his mind to the question whether there should be a proof, because he remits to the Sheriff-substitute "to fix a new diet for leading the proof allowed by interlocutor of 2d April last." I think the Sheriff applied his mind to nothing but the question of the sist, and that his interlocutor would have been in effect the same if, refusing the pursuer's appeal, he had remitted to the Sheriff-substitute "to proceed with the cause." But such an interlocutor could not be read as one allowing a proof. I think, farther, it is clear that the Sheriff had no intention of allowing a proof, for he directs the Sheriff-substitute to proceed with the cause under an existing order for proof, with which he, the Sheriff, does not interfere. It was suggested that where an interlocutor of a Sheriff-substitute allowing a proof was appealed against, and the appeal not decided upon for more than fifteen days, the right of appeal would be lost, if the appeal in this case was held incompetent. There is no room for apprehension on this head, because in such a case the interlocutor of the Sheriff affirming his Substitute's interlocutor would in itself be regarded as an interlocutor allowing a proof, from which the fifteen days for appealing under the Act of Sederunt of 1828 would be reckoned. This has been so decided. I concur with the majority of your Lordships in thinking the present appeal incompetent. I think we could not hold otherwise without setting aside the decisions in the cases of *Kinnes* and *Williams*.

THE COURT dismissed the appeal as incompetent.

WILLIAM OFFICER, S.S.C.—W. & J. BURNESS, W.S.—Agents.

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Liquidators of Coustonholm Paper Mills Co., Limited, v. Law.

JOHN MACLAY MURRAY AND ANOTHER (Liquidators of Coustonholm Paper Mills Company, Limited), Petitioners (Respondents).—*D.-F. Balfour—Burnet.*

WILLIAM LAW, Respondent (Reclaimer).—*Asher—Strachan—Ure.*

Company—Winding-up—Agreement to give fully paid-up shares—30 *and* 31 *Vict. c.* 131 (*Companies Act*, 1867), *sec.* 25.*—A person who had sold a paper mill, &c. to a limited company, formed for the purpose of acquiring it and carrying on the business, for the sum of £12,000, agreed to take £8500 of the price in fully paid-up shares of the company. This agreement appeared in the minutes of the directors of the company, and was carried out by the issue of shares to the vendor, but was never filed with the Registrar of Joint Stock Companies.

The company having become insolvent and gone into liquidation, the liquidators proposed to place the vendor on the list of contributories in respect of shares so issued and still held by him, with liability to the amount of the uncalled capital effeiring to them. The vendor maintained that the shares must be treated as fully paid up, and that no liability attached to him in respect of them.

Held (*aff.* judgment of Lord Stormonth Darling) that he must be placed on the list of contributories with liability as contended for by the liquidators, *dis.* Lord Young, who was of opinion that the transaction, following on the agreement, was virtually a payment in cash for the shares to their full value by the vendor.

2D DIVISION. Ld. Stormonth Darling. M.

BY agreement, dated 8th and 11th January 1886, William Law, proprietor of Coustonholm Paper Mills, near Glasgow, the first party, agreed to sell to T. F. Weir, S.S.C., the second party, these mills and their appurtenances at the price of £12,000, that Mr Weir might promote a company to acquire them and to carry on the business. The agreement bore that the purchase price was to be payable thus, viz.:—"£4500 in fully paid-up shares, certificate of which shall be delivered to the first party within at latest three months from the registration of the company, and the balance of £7500 by the limited company to be formed as aforesaid freeing and relieving the first party of his liability under and becoming responsible for the bonds, obligations, and securities for which the first party is at present liable in relation to the said business."

The company was formed, the capital being £25,000 in 2500 shares of £10 each. The memorandum of association set forth that the objects of the company were to purchase the Coustonholm Paper Mills, &c., and carry on their business, and "to adopt and carry out" the agreement between Law and Weir already referred to. This memorandum was dated 7th April 1886, and the company was registered on 13th April 1886.

The agreement of January 1886 was not carried out in terms by the company. At a meeting of the directors on 24th March 1886 it was minuted, "In respect the price of the mill, amounting to £12,000, less amount of bonds, say £3500, will amount to £8500, Mr Law has consented to accept of the entire sum of £8500 in fully paid-up shares of the company." Mr Law was present at the meeting and acquiesced in this arrangement.

This second agreement was adopted by the company at a general meeting on 28th July 1886.

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* Sec. 25.—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

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Following out the agreement of 24th March, shares were issued to Mr Law certified as fully paid up. In the books of the company Mr Law was credited with the price, and debited with the amount of the shares.

The company was ordered to be wound up by an interlocutor of the Second Division, dated 11th June 1889. At this time 150 shares stood in Mr Law's name, 130 of which had been issued to him originally, and twenty acquired by him from his son-in-law, Mr Wilson. He had parted with the other shares originally issued to him. At the date of the liquidation the full amount of the capital had not been called up.

The liquidators proposed to place Mr Law on the list of contributories for 150 shares, rendering him liable to payment of the calls still due and unpaid on these shares. Law objected, and to try the question a record was made up.

The liquidators pleaded;—(2) No contract relative to the said 130 shares, or the payment thereof, having been filed with the Registrar, the said 130 shares must be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, in terms of section 25 of the Companies Act, 1867.

Law pleaded;—(1) The shares held by the respondent must, in the circumstances condescended on, be held as paid in cash, and no further liability in respect thereof attaches. (2) The shares standing in the respondent's name having been accepted by him in lieu of the company's obligation to relieve the respondent of his debts and liabilities in connection with said business, were in reality paid for in cash. (4) In respect that the said agreement was fully set forth in the memorandum and articles of association, the requisites of the statute were complied with, and no liability now attaches in respect of said shares.

It was admitted by minute that Wilson never paid any cash or gave any consideration for the twenty shares issued to him, and that this fact was well known to Law. In consequence of this admission the question came to be confined to the 130 shares.

Lord Stormonth Darling (Ordinary), on 27th February 1891, repelled the pleas for the respondent, found that the respondent was "rightly entered by the liquidators in the list of contributories appended to the note, No. 24 of process, as holder of 150 shares; that the said shares must be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." *

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* "OPINION—. . . . As regards the whole of the shares it is admitted that there was no registered contract, and as regards 20 of them it was conceded at the bar that no cash had been paid, and that Mr Law knew this when they were transferred to him, but as regards the remaining 130 shares it was maintained on his behalf that although no cash was paid for them the company were bound to relieve him of certain obligations to his creditors, including a debt of £2500 to the Clydesdale Bank; that the company failed to fulfil this obligation; that he was compelled to take the shares in lieu thereof, and therefore that the shares must be held to have been paid in cash. Reliance was placed on a series of English cases which relax the strict words of the statute—to this extent, that where money is due by the company to the intending shareholder on the one hand, and by the intending shareholder to the company on the other, and the parties agree to set the one demand of money against the other, that shall be held to be a good payment in cash. The cases are *Spargo*, L. R., 1873, 8 Ch. App. 407; *Ferrao's*, 1874, L. R., 9 Ch. App. 355; *Barrow-in-Furness*, 1880, L. R., 14 Ch. Div. 400; *Jones, Lloyd, and Co.*, 1889, L. R., 41 Ch. Div. 159.

"Though I am not bound by these decisions, I should think it right to follow them on a question affecting the construction of a British statute, and not turning on any peculiarity of Scots law, if the facts were such as to warrant their application. But I think the facts are the other way. These facts, so far

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being fully paid-up shares under an agreement by which he contracted to convey property to the company, and to take shares in payment of the price of the property handed over.

The case has been repeatedly and anxiously considered by the Court since the debate upon it was heard, and in now stating the opinion at which I have ultimately arrived I desire to express my feeling that no more time has been spent upon it than its importance demanded, whether from a general point of view, or in view of the party's interest to which I have already alluded.

The affairs of the Coustonholm Paper Mills Company, Limited, are in course of being wound up under an order of this Court pronounced on 11th June 1889. The present proceedings relate to certain shares of the company held by William Law, on which the liquidators demand that Mr Law shall pay the whole amount, it being not disputed that he holds these shares, and that he has not directly paid for them in cash. Mr Law, on the other hand, maintains that although he has not directly paid in cash, he has done so indirectly, in respect that by agreement he made over certain property to the Coustonholm Paper Company, and took payment of the price in fully paid-up shares.

The history of the transaction is clear, and is not in dispute. Mr Law was formerly proprietor of the Coustonholm Paper Mill, and entered into negotiations for its sale with Mr Weir, S.S.C., who was acting for an intended company, the result of which was that he agreed to sell and Weir agreed to buy at a price of £12,000, the buyers stipulating that £4500 of the amount should be payable in fully paid-up shares of the new company, and that the balance of £7500 was to be met by the company relieving Mr Law of his liability under certain bonds, obligations, and securities, in which he was debtor. It was also part of the agreement that, with the exception of shares to the value of £800, all the other shares were to be subscribed for and paid in cash in the usual way. The shares included in the £800 worth were to be issued as fully paid-up to a firm of engineers for work to be done at the mill.

Mr Law was an active promoter of the company, and was appointed its managing director. At the first meeting of directors, on 24th March 1886, he was present as a director, and at that meeting an important change was made upon the agreement as it had been adjusted between Mr Weir and Mr Law. The company was freed from the obligation to take over Mr Law's liabilities except in so far as these were upon heritable bonds, which amounted to about £3500, and agreed to pay Mr Law the whole balance of the price, namely, £8500, in fully paid-up shares. The result of this arrangement was that the debt which was upon the property was transferred to the company and became their liability, and that Mr Law took, as representing the balance of the price, shares fully paid-up to the amount of £8500, remaining liable for the other debts.

Mr Law having received the shares, negotiated himself with his creditors, and induced them to accept transfers of shares from him in satisfaction of their claims, and no question arises in this case in regard to shares so transferred by him to others. But when the paper company went into liquidation he held 150 shares, and it is upon these that the liquidators now insist that he shall pay. As regards twenty of these shares there is no question. They were originally allotted to a Mr Wilson to qualify him for the directorate. No cash was paid for them, and they were transferred to Mr Law without value. The question truly relates therefore to the 130 shares, which were issued to Mr Law as part of the consideration for which he conveyed his property to the company.

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Court was therefore free to consider the case on principle. But, if there might be some difficulty in holding under the second agreement that the shares had been paid in cash, there was no such difficulty under the first, for there the company was bound to relieve Law of obligations to his creditors, *i.e.*, pay money for him. Now, it was this agreement which ruled the matter. It was distinctly referred to in the memorandum of association, and that memorandum was the charter of the company. It defined its business. The articles were only rules for carrying it on. There was no such reference in the *Northumberland Avenue Hotel* case, quoted on the other side.[1] [Some productions were made with the object of shewing that the 130 shares were issued to Law in lieu of part of the £7500 stipulated in the first agreement, and were no part of the shares issued to meet the £4500, the other stipulation in that agreement. It was unnecessary for the Court to determine this question in view of the opinions entertained by them on other points.]

Argued for the liquidators;—If the case was to be argued on principle, the principle was not far to seek. The object of the statute was to ensure that the nominal capital was really subscribed, or if it were not, that the other shareholders and the public should have notice of its absence. Hence, if there was an agreement binding the company to pay money, that might be set off, for the capital of the company would have to go to pay that money. But where there was no such liability, then to make shares fully paid up when no money was due to the holder of them which could be paid by set-off was *per ambages* to diminish the capital of the company. Now, here the company was never liable to pay money. The ruling agreement was the second agreement, and under it Law could claim no money, all he could ask for was shares. The rule in England was that a person whom it was endeavoured to make a contributory could not defend himself by anything short of a plea of payment. A plea of "accord and satisfaction" would not do.[2] A newspaper company which had inserted advertisements for a company on an unregistered agreement to get fully paid-up shares were held liable to pay calls.[3] A creditor of the company on a money payment not instantly due, if also a shareholder, must pay his calls in cash.[4] That was a strong illustration of the necessity of there being a money obligation in contradistinction to any other obligation. The second agreement was the binding agreement here, for the first was not binding on the company, never having been adopted by them.[5] But even if the first agreement was assumed to rule the case, it was not possible to say which shares, if any, were referable to the £7500, and the result was that the contributory must go on the list for the whole of them.[6]

At advising,—

LORD JUSTICE-CLERK.—This case is one of considerable importance to the law, and of very great importance to one of the parties, relating as it does to the question of the liability of a holder of shares in a limited company to pay the amount of them in cash, in a case in which he has *bona fide* accepted them as

[1] 1886, L. R., 33 Ch. Div. 16.
[2] Fothergill's case, 1873, L. R., 8 Ch. App. 270; Spargo, cited by Lord Ordinary.
[3] Pagin & Gill's case, 1877, L. R., 6 Ch. Div. 681; Andress' case, 1878, L. R., Ch. Div. 126 (see Thesiger, L. J.).
[4] Kent's case, 1888, L. R., 39 Ch. Div. 259; contrast Jones, Lloyd, & Co., 89, 41 Ch. Div. 159.
[5] Empress Engineering Co., 1880, L. R., 16 Ch. Div. 125.
[6] Fothergill's case, *ut supra*.

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ever. They are under no obligation to Mr Law which would entitle him to demand any money from them, if his demand was for implement of the agreement. Standing the agreement, his sole right as against the company is to have a certain quantity of shares made over to him as fully paid-up shares. If in fulfilment of the agreement the company tender to him shares, the nominal value of which amounts to the price set forth in the agreement, they have fulfilled their part of the agreement, and it matters not whether the true market value of the shares in money is a much less amount. On the other hand, if the shares were at a premium, so that on obtaining them a much larger sum could be realised than the money value of the property on which the agreement is based, the company could not refuse to deliver to him the same number of shares as if they were at par value. Thus it is not a money price to which he is entitled under the agreement, but shares the nominal value of which corresponds to the money price. Mr Law took all the prospects good or bad of the transaction. He had under his bargain no right to money from the company. He had a right to shares, and nothing else.

It is said that Mr Law, by his agreement with Mr Weir, agreed to sell his property "at the price of £12,000 sterling," and that this is inconsistent with the case for the liquidators. I do not think so. It was necessary to fix a price for the property as a basis for determining what number of shares should be handed over under the other head of the agreement. At least that was the natural way of ascertaining it. The two heads of the agreement cannot be taken separately. They must be read together, with reference to their bearing the one upon the other. I hold the effect of the agreement to be the same as if it had expressed the agreed-on value and the agreed-on principle of settlement in one article—as if it had said at the end of article 1 of the agreement, after the words "£12,000 sterling," "which price it is hereby agreed shall not be payable in cash, but the said first party agrees that the said price shall be payable as follows," and so on.

It may test the question to consider what would have been the state of matters had Mr Law, after entering into the agreement, demanded payment of the price in cash. Would it not have been a conclusive answer on the part of the company to say, "we have no agreement with you to pay cash, we have only undertaken to deliver to you certain shares, these we tender"; can it be doubted that their position would be unassailable? But if the company could resist a demand for cash, how can it be said that Mr Law paid for his shares in cash? His bargain was for shares on the distinct footing that they were to be handed over to him without his paying cash for them, not as a substitute for cash which he had a right to, but in fulfilment of the stipulation in which his claim against the company was to be met by an issue of shares. The question whether he would get what really represented in value the £12,000, or what would be of less value or of more value was a speculative question, and the transaction was on Mr Law's part essentially speculative. He had no right to £12,000 or any other sum. He had only a right to shares of that nominal value. Had the company failed to fulfil their part of the agreement by issuing the shares to him, I cannot think that his remedy would have been to maintain that he had sold the property to the company for £12,000, and to sue them for that sum. If he maintained the contract, he could only maintain his right to receive certain shares. If he desired to state an alternative, it appears to me that the only alternative he could state would be one of damages. And the

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measure of his damage would be the loss he sustained by not getting the shares issued to him.

I come therefore, after the best care I have been able to give to the consideration of the case, but in the end without doubt or hesitation, to the conclusion that Mr Law's shares being under the 25th clause of the Companies Act shares which must be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, they have not been paid in cash, and that as "the same have not been determined otherwise by a contract duly made in writing and filed with the Registrar of Joint Stock Companies" in terms of that Act, the liquidators' plea must prevail.

But it is said that this view of the matter is contrary to decisions which have been pronounced in England. Although we would not necessarily be bound by decisions of the English Courts, I agree with the Lord Ordinary in thinking that where there are English decisions giving distinct opinions upon the interpretation to be given to a British statute, we ought to follow them, unless there seems to be very strong ground for doubting their soundness. But it is necessary before considering that matter to ascertain whether the English decisions do result in a different view of the law from that which commends itself to us, looking at the question from our own standpoint. Now, in this particular case, after examining the English cases, I am satisfied that they in no way conflict with the opinion which I have expressed, and that, as I said before, they only decide that payment of shares may be made without an actual passing of money or cheques, in cases where there is on each side of the transaction an obligation to pay cash, and the claim for cash on each side is held to be paid by the discharge of the other.

The leading case in which this was held was the case of *Spargo*. If that case be examined, it will be found to be essentially different from the present, although resembling it in some of its external features. Spargo sold a mine to a company. The sale was for cash, and the company could have had no defence against a demand for an actual cash payment in settlement of the price. He also applied for and had allotted to him in the ordinary way a quantity of shares of the new company. What then occurred was this, that instead of the company paying him a cheque for the whole price of the mine, and he paying them a cheque for the whole price of the shares, he was credited with the one sum and debited with the other, and a balance having been brought out against him, he paid that balance in cash. In short, instead of handing money backwards and forwards unnecessarily, the contracts of both parties were implemented by ascertaining a balance of money liability, and by the person who on making up the account was due the balance paying it. In short, it was a mere convenient mode of settlement, but in no way affected the rights of parties. Spargo actually paid for his shares. They were not delivered to him as being fully paid shares. He took them under the agreed-on obligation of an ordinary applicant for an allotment, that he should pay for them, and he did pay for them. The company, on the other hand, did not pay the price of the mine in shares. They paid according to their agreement in cash. All that was decided by the Court in that case was this, that although each party had a right to be paid in money for what he was selling, it was not indispensable to its being held that the money was paid that the actual cash, or equivalents of cash, should be *in forma specifica* handed back and forward. The case is, in my judgment, entirely different from this case.

The present case seems to me to have much more resemblance to a subsequent

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ever. They are under no obligation to Mr Law which would entitle him to demand any money from them, if his demand was for implement of the agreement. Standing the agreement, his sole right as against the company is to have a certain quantity of shares made over to him as fully paid-up shares. If in fulfilment of the agreement the company tender to him shares, the nominal value of which amounts to the price set forth in the agreement, they have fulfilled their part of the agreement, and it matters not whether the true market value of the shares in money is a much less amount. On the other hand, if the shares were at a premium, so that on obtaining them a much larger sum could be realised than the money value of the property on which the agreement is based, the company could not refuse to deliver to him the same number of shares as if they were at par value. Thus it is not a money price to which he is entitled under the agreement, but shares the nominal value of which corresponds to the money price. Mr Law took all the prospects good or bad of the transaction. He had under his bargain no right to money from the company. He had a right to shares, and nothing else.

It is said that Mr Law, by his agreement with Mr Weir, agreed to sell his property "at the price of £12,000 sterling," and that this is inconsistent with the case for the liquidators. I do not think so. It was necessary to fix a price for the property as a basis for determining what number of shares should be handed over under the other head of the agreement. At least that was the natural way of ascertaining it. The two heads of the agreement cannot be taken separately. They must be read together, with reference to their bearing the one upon the other. I hold the effect of the agreement to be the same as if it had expressed the agreed-on value and the agreed-on principle of settlement in one article—as if it had said at the end of article 1 of the agreement, after the words "£12,000 sterling," "which price it is hereby agreed shall not be payable in cash, but the said first party agrees that the said price shall be payable as follows," and so on.

It may test the question to consider what would have been the state of matters had Mr Law, after entering into the agreement, demanded payment of the price in cash. Would it not have been a conclusive answer on the part of the company to say, "we have no agreement with you to pay cash, we have only undertaken to deliver to you certain shares, these we tender"; can it be doubted that their position would be unassailable? But if the company could resist a demand for cash, how can it be said that Mr Law paid for his shares in cash? His bargain was for shares on the distinct footing that they were to be handed over to him without his paying cash for them, not as a substitute for cash which he had a right to, but in fulfilment of the stipulation in which his claim against the company was to be met by an issue of shares. The question whether he would get what really represented in value the £12,000, or what would be of less value or of more value was a speculative question, and the transaction was on Mr Law's part essentially speculative. He had no right to £12,000 or any other sum. He had only a right to shares of that nominal value. Had the company failed to fulfil their part of the agreement by issuing the shares to him, I cannot think that his remedy would have been to maintain that he had sold the property to the company for £12,000, and to sue them for that sum. If he maintained the contract, he could only maintain his right to receive certain shares. If he desired to state an alternative, it appears to me that the only alternative he could state would be one of damages. And the

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measure of his damage would be the loss he sustained by not getting the shares issued to him.

I come therefore, after the best care I have been able to give to the consideration of the case, but in the end without doubt or hesitation, to the conclusion that Mr Law's shares being under the 25th clause of the Companies Act shares which must be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, they have not been paid in cash, and that as "the same have not been determined otherwise by a contract duly made in writing and filed with the Registrar of Joint Stock Companies" in terms of that Act, the liquidators' plea must prevail.

But it is said that this view of the matter is contrary to decisions which have been pronounced in England. Although we would not necessarily be bound by decisions of the English Courts, I agree with the Lord Ordinary in thinking that where there are English decisions giving distinct opinions upon the interpretation to be given to a British statute, we ought to follow them, unless there seems to be very strong ground for doubting their soundness. But it is necessary before considering that matter to ascertain whether the English decisions do result in a different view of the law from that which commends itself to us, looking at the question from our own standpoint. Now, in this particular case, after examining the English cases, I am satisfied that they in no way conflict with the opinion which I have expressed, and that, as I said before, they only decide that payment of shares may be made without an actual passing of money or cheques, in cases where there is on each side of the transaction an obligation to pay cash, and the claim for cash on each side is held to be paid by the discharge of the other.

The leading case in which this was held was the case of *Spargo*. If that case be examined, it will be found to be essentially different from the present, although resembling it in some of its external features. Spargo sold a mine to a company. The sale was for cash, and the company could have had no defence against a demand for an actual cash payment in settlement of the price. He also applied for and had allotted to him in the ordinary way a quantity of shares of the new company. What then occurred was this, that instead of the company paying him a cheque for the whole price of the mine, and he paying them a cheque for the whole price of the shares, he was credited with the one sum and debited with the other, and a balance having been brought out against him, he paid that balance in cash. In short, instead of handing money backwards and forwards unnecessarily, the contracts of both parties were implemented by ascertaining a balance of money liability, and by the person who on making up the account was due the balance paying it. In short, it was a mere convenient mode of settlement, but in no way affected the rights of parties. Spargo actually paid for his shares. They were not delivered to him as being fully paid shares. He took them under the agreed-on obligation of an ordinary applicant for an allotment, that he should pay for them, and he did pay for them. The company, on the other hand, did not pay the price of the mine in shares. They paid according to their agreement in cash. All that was decided by the Court in that case was this, that although each party had a right to be paid in money for what he was selling, it was not indispensable to its being held that the money was paid that the actual cash, or equivalents of cash, should be *in forma specifica* handed back and forward. The case is, in my judgment, entirely different from this case.

The present case seems to me to have much more resemblance to a subsequent

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case, that of *White*, in which the decision was to the same effect as that which I hold should be pronounced here. In that case, a company agreed with a newspaper proprietor that if he inserted certain advertisements he should be paid the amount chargeable for the advertisements in fully paid-up shares. The advertisements were inserted, and the proprietor made out an account and delivered it to the company, upon which the company allotted him shares to that amount as fully paid-up. The contract was not registered in terms of section 25 of the Companies Act, and the company afterwards went into liquidation. In that case Lord Justice James, who was one of the Judges who decided *Spargo's* case, held, without hesitation, that the liquidator's demand under the 25th section of the Act must receive effect. He held that the company never came under any obligation to pay any money, which is just the case here. He held that the bargain was that White should "accept payment in shares, and must not look for cash," which is just the case here. Therefore, he says "there never was that money demand, which was capable of being, I do not say set off in the ordinary legal sense, but set off by the parties meeting and agreeing to put debt against debt. That being so, it seems to me utterly impossible to bring the case within *Spargo's* case, and consequently the case must fail." I can see no distinction whatever between this case and *White's* case, and, on the contrary, find the grounds of Lord Justice James' judgment, in which his brethren concurred, to be entirely consistent with the views I have already expressed in the case we are dealing with.

But *White's* case further disposes of the very plausible argument that the naming of a definite sum or price makes the transaction for the sale of the article or property to the company practically a sale for cash, notwithstanding that there is an agreement to take shares. In *White's* case it was argued, and the Vice-Chancellor had given effect to the argument, that the services were rendered, and White's account for them was handed in before the issue of the shares, and the company in their letter had put their stipulation thus—"provided you are willing to accept payment of your account in fully paid-up shares." It was argued that this was a money account due by the company. But as Lord Justice Cotton pointed out, the rendering of the account was necessary for the fulfilment of the contract, in order to ascertain what quantity of shares should be allotted. It was, as he expresses it, "merely for the purpose of ascertaining the quantum, as a measure of the number of shares that were to be allotted." In this case, the ascertainment and fixing of a price by the agreement was necessary for the ascertainment of what number of shares the company would require to allot to Mr Law in order to fulfil their contract. There was no intention to contract on any other footing than that the company should allot, and Law should accept, fully paid-up shares. The agreement of price had no other purpose than to give a basis for ascertaining the number of shares to be allotted.

I have only further to point out that while this case is undoubtedly a very hard one for Mr Law, there would be hardship of a different kind if he escaped from the legal net in which unfortunately for him his feet are set. He could not be in his present position had his contract been registered. Such registration is no mere formality. It tends to the protection of the creditors of limited liability companies. It is the creditors of the company of which Mr Law was a shareholder who, through the liquidators, are insisting that he shall not be allowed now to found upon a special contract with the company, he having failed to take the steps required by statute as preliminary to his being allowed to found

upon his contract in a question with creditors. Persons transacting with such companies have a right to be protected against the risk of finding in a liquidation that, although ostensibly there is a large security in the shape of unpaid capital, much of this security is taken away by large quantities of the shares issued having been allotted as fully paid-up shares. Therefore the prescription that such allotment shall be registered, otherwise the shares will be deemed to be payable in cash, is one which has a most practical purpose, and however hard the case may be of one who has failed to see that the statutory requirement has been fulfilled, he has really only himself to blame.

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The view I take of the case, and which has been already expressed, makes it unnecessary to notice a subsidiary point which was raised in regard to the indentification of the particular 130 shares in question. The point seems not to have been raised before the Lord Ordinary, and as I am at one with his Lordship in disposing of the case upon the broad grounds which I have indicated, I refrain from saying anything upon it.

LORD YOUNG.—The questions which we have to decide arise in a liquidation process, and regard only 130 out of a much larger number of shares in the insolvent company which were issued to the respondent. These 130 shares now stand in the register in the respondent's name, as the holder, which he is admittedly, and the questions about them result in this one—whether or not the liquidator has rightly entered him in the register of contributories in respect thereof as being wholly unpaid. But as these questions are of a very general character, so that our opinion upon them will in its scope extend to many more shares which were issued to the respondent, the Lord Ordinary has very properly, if I may presume to say so, considered them with reference to the legal validity and effect of the contract between the respondent and the company, and all that passed between them in pursuance of it.

The respondent was the owner of certain paper mills, plant, machinery, and buildings, which the company desired to acquire for the purposes of their business. Accordingly, in January 1886, a contract was made between them whereby the former sold and the latter purchased the property "at the price of £12,000 sterling." By a term of the contract it was agreed that "the purchase price" to the extent of £4500 (which was subsequently increased to £8500) should be payable in "fully paid-up shares" in the company. The details of the contract, beyond what I have stated, are immaterial. This contract, the honesty of which is not questioned, and we have no reason to doubt, was completely executed in the sense of being implemented. The company got the property with a good title, entered into possession, and paid the price as agreed—ostensibly at least, and really as both parties believed.

Of the shares that were issued to the respondent all certified as fully paid, we are, as I have already stated, directly and immediately concerned with only 130—the remainder having been transferred by him to others on contracts of which we have no knowledge. With respect to these 130 shares, the liquidator maintains that the amount thereof, viz., £1300, not having been paid in cash, as required by section 25 of the Companies Act, 1867, the respondent, as the holder, must be entered as a contributory. Whether or not the amount of these shares has been paid in cash is the question to be decided, and it turns and depends exclusively on legal considerations and argument, the facts not being in controversy. These facts I have stated fully and exhaustively so far as necessary to

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raise the legal question, which I propose in the first instance, and indeed principally, to consider, deferring meanwhile the statement of a detail on which what I regard as a subsidiary question has been raised.

It may conduce to clearness and brevity in explaining my views to regard "the whole amount" of the shares in question, viz., £1300, as the whole contract price of the property sold by the respondent to the company, and doing so cannot possibly affect the argument one way or other. And the proposition which I propose to consider is this, that if the owner of property (land or goods) being money's worth, contracts to sell it to a company at the price of £1300 sterling, agreeing by the same contract to take payment of that price in fully paid-up shares in the company, and the company takes over the property, and makes payment therefor with shares, certified as fully paid to that amount, "the whole amount" of the shares is paid in cash.

The proposition involves the consideration of two questions, viz., 1st, what is "payment in cash"? and 2d, what is "a fully paid-up share"? and I shall try to consider them distinctly and separately—observing in the outset that in the consideration of them we have no aid from section 25 of the Companies Act, or from anything except the general rules of the common law, resting I hope and believe, on reason and good sense.

And first, what is meant by the word "cash," when used as in section 25 of the statute? Speaking negatively, its meaning is not confined to "currency," that is to say, minted gold and silver, and such bank notes as are, by statute, legal tender. But if not so limited what possible guide can we have except the rules of the common law, *i.e.*, the rules of reason and good sense, applicable to the particular case in which the question as to the meaning of the word may arise? But these rules are not confined to questions under section 25 of the Companies Act. And this suggests an observation, which I regard as one of much general practical significance, that every statute is to be construed and applied with a due reference to the rules of the common law, which it is undesirable, and indeed (fortunately) impossible that every statute should keep on repeating in case we should forget or neglect them in the particular case. My conclusion, therefore, is that the amount of any shares is to be held, or not, to have been paid in cash, by reference to the rules of the common law applicable to the facts of the individual case in which the question arises.

Second, what is "a fully paid-up share"? It is, I think, clearly a share, "the whole amount" whereof has been paid in cash. It is also, in my opinion, clear that a certificate by the proper officers of a company that certain shares are fully paid up is an acknowledgment which is *prima facie* binding on the company and available to the holder, that "the whole amount thereof" has been paid in cash. By the expression "*prima facie*" I mean to imply that such certificate may in any particular case be impeached on the ground that the company's officers were not warranted in issuing it.

It follows from what I have said that by the contract I am dealing with the purchasing company obliged themselves to deliver to the seller shares in the company, "the whole amount" of which was a certain specified sum of money sterling, and certified in the usual binding manner to have been paid, and as I assume and think paid in cash. I so assume and think because by section 25 of the Companies Act, 1867, presumably known to both the contracting parties, the amount of the shares could not be effectually paid, *i.e.*, paid at all, otherwise than in cash. But beyond this section 25 cannot affect the construction

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The contract price of the property is specified in sterling money, a fixed sum in no respect uncertain or variable. Then it is agreed that this "price" shall be paid by delivering shares of the same amount in sterling money—neither uncertain nor variable—with a formal and of course true and valid certificate that this amount has been paid. It is obviously immaterial to the argument whether the agreement was that the whole or only a certain fixed part of the contract price should be thus paid. I have, for simplicity, assumed that the whole was, and that the whole exactly corresponded with the amount of the 130 shares in question, viz., £1300, "the amount" of them being that exact sum, and incapable of variation. Now, the parties manifestly thought and assumed that the amount of the price might be set off against the amount of the shares, which being thus (by set off) paid in cash might legitimately be certified as paid accordingly. Whether or not this was a legitimate assumption is, I think, the question in the case. The statute only declares that the amount of the shares must be paid in cash. Whether a payment in cash has been operated by "set off" is a question at common law, as I have already pointed out. That it is capable of being so is not doubtful. Whether or not it has, in any particular case, depends on the facts of it, and is, I think, very plainly a question at common law.

Now it was conceded, as I understood, by the counsel for the liquidator that the price of property sold to a company may be set off against the amount of shares, so as to operate payment of the latter in cash under sec. 25 of the Companies Act, provided the contract for the sale of the property at a cash price is followed (at any interval however short) by an agreement to take payment thereof in paid-up shares, but not if such contract of sale, and such agreement as to the mode of payment, are in the same instrument—or of course merely simultaneous in the case of moveables—the sale of which requires no instrument. I must confess that I am unable to appreciate the logic or sense of the distinction. That the thing cannot be done in any way is an intelligible proposition, but that it cannot in the one way but may in the other, which does not appreciably differ from it—both being in the power and option of the parties who want to do it—is I own unintelligible to me. At common law (which in my opinion governs) we should, I think, characterise such a proposition as absurd; and if appeal is made to section 25 of the Companies Act, it does, I think, at least approach the ridiculous to suggest that the evil which that clause was intended to avoid exists when the thing is done by one instrument, but not when it is done by two, the thing itself being such as the parties were entitled to bargain for and accomplish without impediment from the statute.

It was argued on the part of the liquidator that, when the agreement to take payment of the price otherwise than in money occurs in the contract of sale, a money debt, or obligation to pay money, never exists, and that there is thus no debt (in money) due to the seller which can be set off against the money debt due by him to the buyers (the company). But is this so? I think it clear, on the contrary, that a contract of sale of land (or any commodity) at a fixed price in sterling money does of itself constitute a money debt and obligation, notwithstanding an agreement for the payment of it in a particular way. Such agreement is in its nature subsidiary. Suppose (the property being delivered and the period for paying the price arrived) that payment is not made in the

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manner agreed on, what is the seller's right under the contract? or has he none? I should think it clear at the common law that he has a right of action for the money price, although it may well be that he may elect, if he pleases, to sue for payment in the particular manner agreed on. Put the case that the mode of payment agreed on is that the buyer shall convey to the seller a certain house or piece of land of equal value, and fails to do so, having discovered that he cannot, or for any reason or for none does not. Is it doubtful that the seller may demand and sue for the price in money? The assumption on which this argument against the set-off rests is therefore unfounded, if the rules of the common law are to govern, and I know of no others which can be appealed to.

It was further urged that when the seller got the shares certified as fully paid up, although unwarrantably, they not being so in fact, he got all the price that he bargained for. But this is certainly untrue in fact, and the suggestion, if made by a private party, would be dishonest. The bargain was that the price should be paid by the delivery of shares "fully paid up" in fact, and not of shares untruly and unwarrantably certified to be so, and it cannot be reasonably or honestly represented that this was not the meaning and intention of both parties.

It was contended for the liquidator that the true import and meaning of the contract was, that the respondent should convey to the company his property, of the covenanted value of so many thousands of pounds, as a premium to induce them to give him shares, the amount of which he was to pay over and above, and it was pressed upon us that this was a quite fair and familiar sort of bargain, and might have proved profitable by a rise in the value of the shares. If this view is true in fact,—that is, if such is the true import and meaning of the contract,—any reference to section 25 of the Companies Act is idle, and we have been wearied and are wearying ourselves in vain with arguments about it. For in this view there is not and never was a contract that the amount of the shares should be paid otherwise than in cash. The registration before the shares were issued of the only contract regarding them would have been useless, for it does not relate to the payment of the amount of the shares, but only to a premium or bribe to induce the company to let the respondent have them. It would be a waste of time to dwell on a view so fanciful and untrue. Clause 25 of the Act may, or may not, defeat the intention of the parties as expressed in their written contract, but it cannot warrant a misrepresentation of it,—that is to say, the defeasance of it through the medium of misrepresentation.

It is perhaps superfluous to observe that the circumstance of the company being in liquidation does not affect the points I have been considering, which must be dealt with and decided exactly as they would have been had the company, as a solvent and going company, been demanding, and seeking to enforce, payment of calls on the shares in question. For the Companies Act, 1867, sec. 25, is applicable to the case of a solvent and going company exactly as it is to a company in liquidation.

I desire to point out the materiality, in my opinion, of the fact that the contract in question is a completely executed (in the sense of fulfilled) as distinguished from a current contract which is still wholly or partially unexecuted. When shares have been issued and registered on a contract between the shareholder and the company that the amount, necessarily a fixed sum of money, shall be paid with—say goods such as the company deals in—it may be that the company is at liberty to repudiate the contract as to the mode of payment, and,

founding on sec. 25 of the Act, require payment in cash. But then they shall *not* have the goods. They are entitled to have payment for the shares in cash, but not in both cash and goods—that is to say, twice over. If, however, the *contract* has been completely executed, the goods having been received and consumed or sold by the company, and the sellers' account stated and closed in the company's books, he being debited on the one side with the money amount of the shares and credited on the other with the same sum as the admitted contract price of the goods—the two entries thus balancing each other, I have to state it as my clear opinion that the matter cannot be gone back upon, and that it would be to prostitute sec. 25 of the Act from its legitimate purpose to permit it to be founded on to the effect that the shares are to be paid for over again in money, and that the goods are not to be paid for at all. But this is the very case we are dealing with. The company got the property which they bought from the respondent years (not many, but still years) before they went into liquidation, and in the respondent's account in their books credited him on the one side with the price (the amount not being disputable or disputed), and on the other debited him with the price (or amount) of the shares which had been delivered to him. Is it doubtful that according to the rules and principles of the common law this is a clear case of legitimate set-off (not merely pleaded, but allowed and acted on), and payment thereby of admitted mutual debts?

To avoid any risk of misapprehension I desire to say that the opinion which I have formed and expressed involves no questioning of the proposition that a shareholder of a bankrupt company in liquidation is not entitled to have his name struck out of the list of contributories by reason of a debt (of whatever amount) due to him by the company, or to set off such debt against the liquidator's claim for calls. What I dissent from, as in my judgment unsound, is the very different proposition that supervening bankruptcy and liquidation will destroy or affect in any way the validity of a payment by set-off to the solvent company, which was good and effectual prior to the liquidation.

Had the company here remained a solvent and going company, it is according to the opinion which I have expressed that they could not have gone back on the implemented contract between them and the respondent, and the account stated in their books not inaccurately but in all respects truly, on the footing of set-off allowed and acted on. I am further of opinion that, if the solvent company could not have gone back on it, neither can the liquidator. The matter was settled and terminated before the bankruptcy. It will, I should think, be conceded as a generally true proposition that settlements of accounts by set-off, which are of familiar and daily occurrence in the business of companies, are not opened up by subsequent bankruptcy and liquidation. If so, the challenge of the settlement here must be on the specialty that it related to the payment of shares. But here is no other specialty than such as sec. 25 of the Companies Act may introduce, and this enactment applies, as I have pointed out, equally to solvent and going companies—so that the supervening bankruptcy, after any interval, long or short, will not affect its operation.

The question, therefore, comes back to this, could the company, had it continued solvent, have gone back on the settlement by set-off?

The views which I have expressed extend to the whole shares delivered to the respondent, and the amount of which is entered against him in the company's books, and credited as paid by the cross entry of the contract price of the property which they got from him, and I am of opinion that the case ought

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to be decided accordingly, although in terms and in form the order or decree must be limited to the 130 shares now standing in the respondent's name.

But it is my duty to notice and express my opinion on another view which was argued to us, and indeed chiefly or solely relied on by the respondent's counsel—very reasonably, if they thought it clearly the strongest—for it is sufficient to avoid the demand made in respect of the 130 shares in question. It is founded on the fact which I have not hitherto stated, that by the contract in question the company obliged themselves to pay the contract price of £12,000 to the extent of £7500 by freeing and relieving him of debts to that amount due by him to certain creditors of his, and that by subsequent agreement the respondent agreed to relieve the company of this obligation to the extent of £4000, and instead to take that amount of paid-up shares, which were accordingly delivered to him, or rather shares to that amount unwarrantably (as the liquidator contends) certified as paid up. The amount of the whole shares delivered to him was £8500, including those to the amount of £4000 just referred to. Now, the question is this—whether a distinction can be made between shares to the amount of £4000, as being given for discharging the company of their obligation to pay the respondent's debts to that amount, and the remainder (to the amount of £4500) as being given directly in part payment of the price of the property sold. It is a nice distinction certainly, and it is a pity that there should be occasion to resort to it. But the respondent's counsel sought thereby to avoid the nice, and even subtle and captious, argument against them that, unless an agreement to take payment of the price of property in paid-up shares was made subsequent (however brief the interval) to the contract to sell at that price, there could be no money debt on which to found the plea of set-off. Their contention accordingly was, that to the amount of £4000 there was certainly a money debt due by the company to the respondent, inasmuch as they had bound themselves to pay that amount to creditors of his, and having failed to do so (which they did), and so left him to pay the amount himself, they were his debtors and he their creditor to that amount in cash, and so to that amount there was a debt due by the company to him which might be set off against any debt due by him to the company.

The liquidator answered, 1st, that the company did not undertake to pay the respondent's debts to his creditors to the amount stated, but only to relieve him of these debts; and, 2d, that it was impossible to say which of the shares delivered to the respondent were in direct payment of the price of the property under the original contract, and which of them were in lieu of their obligation to pay and relieve him of his debts.

I am of opinion that if an individual (or a company) undertakes for an onerous consideration to relieve a man of debts of his to a specified amount, and fails to do so, leaving him to pay them himself, the defaulting party is debtor for the amount, and that a valid plea of set-off may be based on the debt so incurred. I am further of opinion that this company thus became the debtors of the respondent to the amount, strictly in money, of £4000. It was certainly intended that it should be paid by so many of the shares (certified as paid up) delivered to him in 1886 as would amount to £4000, and why this intention should be frustrated I fail to see. Of course this involves the assumption that a money debt of £4000 may be set off against a money debt of the like amount due for shares, although to be paid in cash. But the assumption is, I think, clearly sound.

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Now, what has the distinguishing and identification of shares to do with the question of set-off? Take any number of shares you please, the amount of the whole of them was a certain fixed sum payable in cash to the company by the holder, and, if he was the company's creditor in a debt of £4000, he might, I should think, clearly on his part set it off, and the company on theirs take it as set off accordingly against his liability on any of the shares not exceeding that amount, and, if the shares are indistinguishable, which the liquidator here says they are, what can it signify to which of them, within the amount of the debt, the set-off shall apply? The respondent requires that it shall be applied to the 130 shares now standing in his name. Upon these shares he stands debited in the books of the solvent company with £1300 as money due by him in respect of them, while *per contra* he is credited with the debt of £4000 due to him by the company. I mean of course that this is the result of an intelligent reading of the entries. There were other entries, but it was manifestly immaterial to the company which of the cross entries should be set off against each other. Has the liquidator on behalf of the creditors any legitimate interest to oppose the respondent's choice? None that I can see, unless indeed he can reasonably say that he is apprehensive of the benefit of the whole or part of this set-off being claimed by the present holders of other shares assigned to them by the respondent. No suggestion to that effect has been or can, I think, reasonably be made, and I should be greatly indisposed to listen to a mere fanciful suggestion in order to do what I should regard as injustice.

I am of opinion with respect to all the shares here in question, registered in the respondent's name, that they are fully paid up, and therefore that the respondent ought not to be entered in the list of contributories in respect of them.

LORD RUTHERFURD CLARK concurred with the Lord Justice-Clerk.

LORD TRAYNER.—The liquidators of this company propose to place Mr Law's name on the list of contributories as the holder of 150 shares. Mr Law objects to this on the ground that his shares are all fully paid up, and that he is under no liability for calls or otherwise in respect thereof. Of the 150 shares twenty are held by him under transfer, the remainder under original allotment, but this difference in the title under which the shares are held makes no difference in the question of liability, having regard to the admitted facts of this case.

The company now in liquidation was formed for the purpose of taking over the Coustonholm Paper Mills then belonging to Mr Law, and of carrying on the business then and there carried on by him. By agreement, dated 8th and 11th January 1886, entered into between Mr Law and one of the promoters of the company, Mr Law sold the mills, with the plant, machinery, and whole pertinents, for the price of £12,000, which was to be payable as follows:—£4500 in fully paid-up shares, and the balance, £7500, by the company freeing and relieving him of his liability for the bonds, obligations, and securities for which he was then liable "in relation to said business." In consequence, as was explained at the bar, of the shares of the company not being taken up by the public as had been expected, the agreement above referred to was modified at a meeting of the directors of the company (so called, although the company was not yet registered), held on 24th March 1886, at which Mr Law was present. The minute of that meeting bears that "it was further agreed, in respect the price of the mills amounting to £12,000, less amount of bonds, say £3500,

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will amount to £8500, Mr Law has consented to accept of the entire sum of £8500 in fully paid-up shares of the company." Mr Law admits that he acquiesced in the arrangement thus made, and signed the minute of the meeting in token of his acquiescence. It is made a question now whether Mr Law's contract with the company is that expressed in the minute of 24th March or that expressed in the formal agreement of January. It does not appear to me to affect the result, whether the contract is to be taken as set forth in the one document or the other. Both agreements are the same in character, for by both and each of them Mr Law agreed to convey his property to the company in return for a certain number of shares and for relief from certain obligations. The number of shares and the amount of obligation from which relief is to be given differ, but that is not material to the question before us. I am of opinion with the Lord Ordinary that the agreement made in March "constituted an entire novation of the agreement of January," and therefore that the agreement of March is that which must be taken as regulating the rights and obligations of the parties. In that view, and having regard to the admitted facts of this case, and the law applicable thereto, I cannot see how Mr Law can successfully maintain that his name should not be placed on the list of contributories.

By the 25th section of the Companies Act of 1867, it is provided that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar at or before the issue of such shares. Now, under this statutory provision, there are only two modes in which a person holding shares in a company can escape from the position of a contributory in its liquidation. Either he must have paid for his shares in cash, or have registered, at or before the time when such shares were issued, a contract "duly made in writing," which determines that the shares are not to be paid for in cash. Mr Law cannot plead the latter of these grounds; for, assuming that the minute of 24th March may be regarded as such a contract as would fulfil the statutory description (whether it would or not I do not say), it was never filed with the Registrar. Nor can Mr Law plead the other ground of exemption from liability, because he has not paid "in cash" for his shares. It is said, however, that he must be dealt with as if he had paid cash, because he gave property in return for the shares. But this argument fails, I think, on the authority of the cases decided in England, to which we have been referred, and in which decisions I concur. The effect of these decisions is this,—if the person to whom shares are issued has a money claim against the company, that money claim may be set off as cash paid against the shares, it not being necessary in order to satisfy the provisions of the statute that the money claim should be paid in cash to the shareholder and handed back by him in cash as payment of the shares. The mere passing of money from hand to hand is not necessary, but it must be a money claim exigible from the company which is set off against the cash due for the shares. Now, Mr Law had and has no money claim against the company. He sold, or rather he bartered, his property for a certain number of shares and relief from a certain obligation. I leave the latter element out of view, because the relief stipulated for has been given. That he had no claim against the company for money may be shewn in this way. If he was now in an action for enforcing his rights against the company, what could he claim? Not money, because the company, offering him shares to the amount

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specified, would fulfil its obligation; and, on the other hand, if the company had been successful and the shares had risen in value, Mr Law could have declined payment of £8500 in money if offered to him, and have insisted on delivery of 850 shares. Shares therefore, and not money, was what Mr Law was entitled, and alone entitled, to demand,—shares, and shares only, the company was bound to give. It follows that if Mr Law had no money claim against the company, he had no claim which he could set off against his liability for "the whole amount" of the shares allotted to him; and if he could not plead set-off, and has not paid cash "to the whole amount" of his shares, his liability therefor continues.

It is said, however, that what Mr Law stipulated for was fully paid-up shares, and that if his shares are fully paid up no liability attaches to them; if they are not, then Mr Law is now entitled to demand the price of his property, and set off that price against liability as a contributory. It is not open to doubt, I think, that the shares held by Mr Law are not fully paid up, free from all further liability. Whatever these shares might be held to be in a question with the company, if it was solvent, they cannot be regarded as fully paid up in the liquidation. The amount of the shares has not been paid in cash, and Mr Law has failed to take that step pointed out by statute whereby he could have given these shares the character and privileges of paid-up shares. If,—not being paid-up shares,—Mr Law is still a creditor for the price of his property, he may have a claim against the company's estate, but to hold him entitled now to set off that claim against his liability as a shareholder would be to give him a preference over the other creditors of the company. Further, compensation, or set off against liability as a contributory, cannot be pleaded in a liquidation.

I have said that in my opinion the agreement made in March 1886 is that which must be taken as regulating the rights of parties. Would the result in this case be different if that agreement was set aside and the agreement of January substituted? I think not. Under it there was no obligation on the company to pay Mr Law any money. The company did, however, thereby undertake to relieve him of certain money obligations. It is pleaded that part of the shares allotted to Mr Law were allotted that he might fulfil the company's obligation of relief, and that, being so allotted against an existing money obligation, no claim can now be made in respect of these shares, on the principle of the decided cases I have already referred to. Without expressing either assent to or dissent from this view, I am of opinion that Mr Law cannot take any benefit from it. He has not shewn, and cannot shew, that the shares now held by him are shares which were issued by the company under their obligation to relieve rather than under their obligation to deliver shares.

I agree with the Lord Ordinary in thinking this a hard case for Mr Law. He has parted with his property for no valuable consideration, and the consideration which he did get has only, as it turns out, imposed upon him an additional liability. It might of course have been otherwise. The shares allotted to him might have proved very valuable, and he doubtless thought they would. But it would be incorrect, in my view, to say that Mr Law got nothing for his property. He got exactly what he bargained for, and all that can be said is that, as matters have turned out, he made a bad bargain. He could have protected himself by a simple enough measure pointed out by the statute, and having failed to do so, must now contribute to the payment of those creditors whose debts might never have been incurred had they known that the greater part, or at all

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events a great part, of the capital of the company was represented by paid-up shares held by one of the shareholders.

THE COURT adhered.

CARMICHAEL & MILLER, W.S.—T. F. WEIR & ROBERTSON, S.S.C.—Agents.

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DUKE OF ARGYLL, Pursuer (Reclaimer).—*Asher—Johnston—Macphail.*
A. A. LOCHNELL CAMPBELL, Defender (Respondent).—*D.-F. Balfour—Dickson—Forsyth.*

Salmon-fishings—Property—Title—Barony—Cruive.—In an action brought in 1889 by the Duke of Argyll for declarator that he had right to salmon-fishings in the River Awe *ex adverso* of the lands of E. on the south or left bank of the river, with the exception of certain pools, the pursuer founded on a crown charter of novodamus of 1667 which contained a grant of the barony of Lochow with the salmon-fishings. The lands of E. formed part of the barony of Lochow, and had been feued to the defender's authors under reservation of the fishings in the Awe.

It was not disputed that the defender had had possession of the salmon-fishings in question for upwards of forty years.

The defender pleaded that the pursuer had no title to sue, and, on the merits, founded on a crown charter of confirmation of 1727, conveying to a predecessor the barony of Kilmaronaig, described as "comprehending," *inter alia*, the lands of Ardchonnel "cum salmonum piscatione aquae de Awe vizt. tractus (lie) draughts salmonum de Polindownan et Polinstuck, et tractus (lie) draughts salmonum de Cruback, et tractus (lie) draughts salmonum de Sanluip jacen in aqua et ore ejusdem cum omnibus earundem privilegiis et pertinen, atqe. (lie) cruives super dictam aquam de Awe." It appeared from the charter of erection of the barony of Kilmaronaig that the lands of Ardchonnel and the Awe fishings attached thereto were not included in the barony; Kilmaronaig and Ardchonnel were both distant from the River Awe.

The defender maintained that the charter of 1727 and infeftments following thereon were a sufficient title to which to ascribe his possession (1) as a title to the barony of Kilmaronaig, including Ardchonnel, with its salmon-fishings in the Awe; (2) as a title to a barony; (3) as a title to the lands of Ardchonnel, with salmon-fishings in the Awe.

Held (1st) (*diss.* Lord Young) that the pursuer's charter of novodamus of 1667 was a valid grant of the barony of Lochow with the salmon-fishings thereof, and by implication included salmon-fishings in the Awe, where it adjoined the lands of the barony, up to the *medium filum* of the river; (2d) that the defender had no title to which his possession of the salmon-fishings could be ascribed, in respect (1) that the defender's crown charter of confirmation of 1727, being merely a charter by progress, did not incorporate the lands of Ardchonnel and the fishings in the Awe with the barony of Kilmaronaig, so as to give the defender a barony title to salmon-fishings in the Awe; (2) that the defender's title to the barony of Kilmaronaig could not be connected with his possession of salmon-fishings at a distance from it; and (3) that the defender's title to the lands of Ardchonnel with the salmon-fishings specified could not be construed by possession into a general grant of salmon-fishings, but was limited to the pools and cruives mentioned.

Lord Young was of opinion that a grant of barony with salmon-fishings did not imply a grant of salmon-fishings in all waters adjoining the lands of the barony, but that it was a question of fact what salmon-fishings belonged to the barony, and that in the present case the adverse possession of the salmon-fishings in question by another for more than the prescriptive period was sufficient to shew that they did not belong to the barony of Lochow, and therefore that the pursuer had no title to sue.

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M.

IN 1889 the Duke of Argyll raised an action against Archibald Argyll Lochnell Campbell, of Lochnell, for declarator that the pursuer had right to the whole salmon-fishings in the River Awe (with certain exceptions) from the march between the defender's lands of Eachterachine and the lands of Fanans (belonging to the representatives of the late Mr Campbell of Monzie) westwards to the mouth of the Awe, and particularly to the salmon-fishings *ex adverso* of the defender's lands of Eachterachine on the south or left bank of the river, as marked in an Ordnance map produced with the summons—but always reserving to the defender the salmon-draughts of Poulindounan and Polinstuck, and salmon-draught of Cruback, and salmon-draught of Sanluip. The fishings claimed extended about a mile and a-half along the river.

The pursuer was proprietor of the barony of Lochow and of the barony of Lorne. Lochow was bounded on the north or north-east by the Awe, and Lorne was (in part) bounded by the Awe on the south and south-west. He stated that Eachterachine was formerly part of the barony of Lochow, and that the salmon-fishings thereof were still part of that barony, the lands having been given off under reservation of the salmon-fishings.

It was not disputed that, at least since 1846, the defender had by his tenants possessed the fishings in question. The pursuer, however, averred that the defender had no title to which possession could be attributed.

The following was the position of the titles of the parties so far as necessary to be here set forth.

The earliest charter of Lochow was granted by King Robert I. to Colin Campbell, the pursuer's ancestor, in 1315. It erected Lochow into a barony. There was no mention of fishings. A charter of Lochow of 1407 by the Duke of Albany, Governor of Scotland, bore to be *cum piscationibus*. A crown charter of 1540 by James V. granted the barony and other lands "cum piscariis in aquis dulcibus et salsis," as did certain subsequent early charters. The earliest crown title, however, in which salmon-fishings were expressly granted was a charter by Charles II. in favour of the Earl of Argyll, dated 15th October 1667. This was a charter of confirmation and novodamus, bearing to confirm and grant of new to the grantee the barony of Lochow and other baronies, including the baronies of Over Cowal, and Otterinverane and others, as well as of Lochow and Lorne. At the end of the description were the words "cum castris, turribus . . . . lacubus, piscationibus salmonum aliorumque piscium . . . omnibus aliis partibus pendiculis et pertinentibus terrarum, baroniarum, aliorumque prædict." But the defenders contended that this clause was limited to the baronies of Over Cowal and Otterinverane.*

* The description of the lands in the clause of novodamus was as follows,—'Omnes et singulas dictas terras et Baroniam de Lochow una cum advocatione, donatione et jure patronatus eccliarum parochialium et parochiarum Sti. Petri Deaconi de Lochow et Inschael rectoriarum et vicariarum earund. dict. tras de Ardskeodneis, Glenyra, Glenshera, et Letter dict. Burgum de Innerraray infra dict. Baroniam dict. terras et Baroniam de Glenurquhy, totas et integras dict. terras et dominium de Cowall cum dta. Forresta de Benmoir eidem pertinen. et spectan. cum oibus et singulis manerierum locis molendinis silvis forrestis lie heillings, grassinges piscationibus decimis advocationibus donationibus et juribus patronatuum eccliarum beneficiorum, capellaniarum et altaragiorum domibus edificiis hortis toftis croftis partibus pendiculis et integris pertinen. earund. quibuscunq. dtas. tras et Baroniam de Over Cowall dict. tras de Straquhir extenden ad quadraginta unam mercatam et dimidium mercat. trarum antiqui extentus dictas tras de Stratheichie, Glenmassen, Glenlean, Lochstrivan Scheid, Ardinslat Cowart, Fleyming, Innerneill et Glack, Camisse et Achatachevane Dtas. tras. de Ardmernoche Lynsage Darinagerochmoir Glenlair et Darinagerochbeg dict. terras

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The pursuer was duly infeft in the baronies of Lochow, Lorne, and others belonging to him.

The pursuer, though he had not possessed the fishings in dispute, had possessed the salmon-fishings in other parts of the barony of Lochow. This possession was, as stated by the Lord Ordinary, after a proof, of the following nature:—"(1) Salmon-fishing exercised at and near Inverary by the pursuer and his authors; (2) salmon-fishing partly by net and coble, and partly by rod, at various points in Lochawe, by vassals of the pursuer holding parts of the barony of Lochow; (3) salmon-fishing in the River Orchy and at the head of Lochawe, and of the River Awe, also by vassals of the barony of Lochow."

From the defender's title it appeared that in 1529 the pursuer's author, Colin, third Earl of Argyll, made a grant of certain lands in the barony of Lochow to Sir John Campbell, of Calder, among which was the 11½ merk land of Eachterachine. In 1673 this grant was confirmed in favour of Sir Hugh Campbell, of Calder, by the Earl of Argyll, "salva tamen et reservata nobis, heredibus et successoribus nostris, *totali piscatura aquæ de Aw cum pertinentibus.*"

These subjects passed from the Campbells of Calder to the Campbells of Lochnell, the defender's predecessors, and the latest charter containing, *inter alia*, the lands of Eachterachine, and with the reservation first quoted, was a precept of *clare constat*, granted by the pursuer in favour of Duncan Campbell, of Lochnell, on 12th November 1855.

The defender, while admitting that he was proprietor of lands named in the titles Eachterachine, denied that these were the lands described in the summons, and stated that his lands of Eachterachine did not come down to the River Awe, but were separated from it by other lands belonging to him, and forming part of his estate of Lochnell.

Further, the defender averred that the whole fishings on the River Awe *ex adverso* of the lands described in the summons fell within his other titles. He founded upon a crown charter of confirmation, dated 26th July 1727, granted in favour of Sir Duncan Campbell, of Lochnell, and Colin Campbell, his son. By that charter there was disposed and confirmed to them:—"Totas et Integras Terras Baroniam, Balivatum et Regalitatem de Kilmachronag alias vocat Muckairn, comprehenden," *inter alia*, "Totas et Integras illas septem mercat terrarum decem mercat terrarum antiqui extentus de Ardchonniell vulgo nuncupat Ardchonniell Caillen cum salmonum piscatione aquae de Awe vizt. tractus (lie) draughts salmonum de Polindownan et Polinstuck, et tractus (lie) draughts salmonum de Cruback, et tractus (lie) draughts salmonum de Sanluip jacen in aqua et ore ejusdem cum omnibus earundem privilegiis et pertinen, atqe. (lie) cruives super dictam aquam de Awe, omnes extenden

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et Baroniam de Otterinverane dtas. tras. de Glasserie et Ederlin supra et subscripta vizt. dtas. terras de Menard Kilmichaelbeg Gorthinrenoch Knok duas Ardchastells Gallinich Auchinbreck Ballemoir Kilmchell Rozenaw Monearinach Knokalloway Feorling Tungue Garvalt Craignewer Thangannelech Barquheill Torblairain Lagg Auchatahearlich Craigmurthill totas et integras tras. de Craignish et Melphoirt cum castris turribus fortaliciis manerierum locis domibus edificiis hortis pomariis molendinis tris molendinariis multuris silvis forrestis lie Banks parcis pratis insulis lacubus piscationibus salmonum aliorumq. piscium tenen. tenan. libere tenen. servitiis advocationibus donationibus et juribus patronatuum ecclarum parochialium et parochiarum de Kilmairtein et Kilmahew seu Inneraray Kilmorich Dysart Lochguoylshead Kilmelphort et Kilmorew rectoriarum et vicariarum earund. et onim aliarum eccliarum beneficiorum et capellaniarum annexis connexis dependen omibus aliis partibus pendiculis et pertinen trarum Baroniarum aliorumq. predict oia jacen infra dict vicetum. de Argyll," &c.

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ut praefertur et jacen in Baronia de Ardchattan Dominio de Lorn et Vicecomitatu antedict. Una etiam cum officiis et privilegiis liberae Regalitatis Justiciariae et Balivatus omnium praedict. terrarum et terrarum de Muckairn aliorumque terrarum particulariter supramentionat cum molendinis piscationibus, insulis et omnibus earundem pertinen jacen infra omnes bondas hujusmodi cum omnibus feodis commoditatibus, libertatibus privilegiis praeheminentiis, honoribus dignitatibus, immunitatibus et jurisdictionibus quibuscunque ad dict officia pertinen . . . Omnes ab antiquo in unam liberam Baroniam Baroniam de Kilmachronag nuncupand unit. et erect. per illustrissimum Principem Jacobum sextum Scotiae Angliae et Hiberniae Regem fedeiq. Defensorem beatae memoriae virtute cartae et infeofamenti sub magno suo sigillo desuper concess. de data 1st April 1603 in favorem quondam Domini Joannis Campbell de Calder."

The deed set forth a reddendo for Muckairn and Ardchattan, and a separate reddendo for Ardchonnel, and another "pro dict piscatione et tractationibus salmonum dict aquae de Awe."

The charter of 1603 referred to erected into the barony of Kilmacronaig the lands of Muckairn and Ardchattan, but made no mention of the lands of Ardchonell, or of the fishings described in the charter of 1727 as above quoted, and the reddendo for Muckairn and Ardchattan was that specified on these lands in the charter of 1727.

The lands of Ardconnel were ten miles distant from the Awe.

The defender was infeft under titles deduced from this crown charter of 1727. There had been no cruive fishing within living memory, and there was no satisfactory evidence as to the cruives mentioned in the charter. The defender maintained upon the evidence that it was proved that a cruive near the march of Fanans had been erected by one of the Campbells of Lochnell, his predecessor, and in point of fact there were remains of a cruive to be seen. The Court were, however, of opinion on the balance of evidence that these were the remains of a cruive erected about 1760 by the Lorne Furnace Company, a smelting company which had at that time from one of the defender's predecessors a lease of a tract of ground near the Awe at that point, and that it had been abandoned by the company in consequence of objection taken by the other proprietors.

With regard to the possession of the fishings in dispute it was proved, as already mentioned, that from 1846 onwards the defender and his author had, through tenants, possessed them by rod and line fishings. It was also proved that such possession was the most practicable and advantageous. With regard to the earlier possession of the fishings there was documentary evidence applicable to about thirty-five years of the period between 1768 and 1810 in the shape of certain leases to which the predecessors of the defender were parties as well as other proprietors on the Awe. It having been found more profitable that the fishings on this part of the Awe should be let jointly these proprietors executed joint leases, and in these the defender's predecessor, Duncan Campbell, of Lochnell, described his fishings as "All and Haill the said Duncan Campbell's fishings upon the water of Awe consisting of the following pools, viz.:—Trubag, Polinstuck and Pollandinan, with the still net fishings upon Ocheity, near the mouth of the said water, commonly called Sheanluib."

On 19th November 1890 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the pursuer has failed to instruct that he has any title to the salmon-fishings in dispute: Therefore assoilzies the defenders from the conclusions of the summons," &c.*

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* "OPINION.—The question in this case is whether certain salmon-fishings in

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The pursuer reclaimed, and argued;—The Lord Ordinary was wrong in holding that the Duke of Argyll had no title to sue. It was true that the River Awe, opposite a part of the defender's estate of Lochnell, belong to that estate, or, on the other hand, belong to the pursuer, the Duke of Argyll, as part of his barony of Lochow. It is not disputed that the fishings in question have been possessed by Lochnell for more than forty years,—that is to say, it is admitted that since about 1846 the Lochnell tenants have had continuous possession by rod-fishing, and that in the circumstances such possession is sufficient. But the pursuer maintains that the lands opposite which the fishings are situated are certain lands held of him as superior, and parts of his barony of Lochow; that those lands were given off at an early period to the defenders' authors under express reservation of fishings; that the fishings thus reserved include the fishings in question, and that these fishings are accordingly still part of the barony, the defenders having no title thereto, either sufficient by itself, or sufficient as a basis for prescription.

"I may say at once that I think the pursuer has sufficiently proved (1) that the lands opposite which the fishings in dispute are situated are the lands of Eachterachine, feued off by the pursuer's authors to the defender's authors in the year 1529; (2) that these lands formed and form part of the pursuer's ancient barony of Lochow; (3) that they were given off to the defender's authors under express reservation of fishings; and (4) that the pursuer, while he has no express grant of salmon-fishing attached to his barony of Lochow (or at least no grant contained in any original charter or charter of novodamus*), has yet, in virtue of his barony title, possessed by himself and his vassals various salmon-fishings in various parts of the barony for at least the prescriptive period.

"The questions which remain and on which the case turns are (1) how far the pursuer's possession under his barony title applies or can be made to cover the fishings in dispute? (2) how far, in the absence of such possession, the pursuer has a title to challenge the defenders' title? and (3) how far, apart from their Eachterachine title, the defender has a title to fishings comprising or capable of comprising the fishings in dispute.

"1. It is clear that the pursuer's title requires proof of possession. The original charters of the barony of Lochow do not contain any grant of salmon-fishings, and although the charter of 1667 and subsequent charters do include such grant in general terms, these are all charters by progress, and, apart from possession, have no force. Possession therefore is, as I have said, necessary, and that being so, the first observation is that there has certainly been no possession—I mean by the pursuer and his authors—of the particular fishings in dispute. On the contrary, it is common ground that these fishings have for the prescriptive period (and presumably therefore all along) been possessed by the defender, whose possession (as he holds no grant from the pursuer) is necessarily adverse possession. The possession therefore on which the pursuer relies must be not actual but constructive possession, and constructive possession sufficient in some way to override the actual possession of the defender. Now, what is the possession of this sort on which the pursuer relies? It seems to be threefold—(1) salmon-fishing exercised at and near Inveraray by the pursuer and his authors; (2) salmon-fishing partly by net and coble, and partly by rod, at various points in Lochawe, by vassals of the pursuer holding parts of the barony of Lochow; (3) salmon-fishing in the River Orchy and at the head of Lochawe, and of the River Awe, also by vassals of the barony of Lochow.

"Now, it does not appear to me to be possible to hold that possession of those salmon-fishings—all of them discontiguous to and some of them remote from the fishings in dispute—can on any principle of construction be held as possession of the fishings in dispute. The argument of the pursuer was that the salmon-fishings of the barony of Lochow are a *unum quid*, and therefore that possession of a part must be held as possession of the whole. But, as pointed out in the case of *Cathcart*, May 19, 1871, 9 Macph. 744, and elsewhere, the question

* The Lord Ordinary's attention had not been called to the clause of novodamus in the crown charter of 1667.

his earlier charters did not contain an express right to salmon-fishings. The original grant of Lochow in 1315 did not mention fishings. The

always is, what are the salmon-fishings of the barony? Do they, or do they not, include the particular salmon-fishings in controversy? And that depending on the proof of possession, it is a *petitio principii* to establish the possession by assuming that the particular fishings are part of the salmon-fishings of the barony. It is true that a grant of lands with fishing *prima facie* conveys the whole fishings within the boundaries of the lands. But whether and how far fishings include salmon-fishings depends, and must depend, on the extent to which salmon-fishings have been possessed. There is no presumption that because the salmon-fishings, *e.g.*, of one river, are shewn by possession to have been within the grant, therefore the grant includes the salmon-fishings, *e.g.*, of some different river. As expressed by Lord Deas in the case of *Cathcart*, the pursuer in a case like the present is really in the same position as if his charter had borne 'with salmon-fishings so far as possessed.'

"Indeed the case of *Cathcart* appears to foreclose this question, and it did not appear to me that the pursuer's counsel was able to draw any substantial distinction between that case and the present. The only distinction which I can see is one unfavourable to the pursuer, viz., that in *Cathcart's* case there was no element of adverse possession, while here, as already mentioned, there certainly is.

"2. I am accordingly of opinion that the pursuer has failed to shew that he has any title to the salmon-fishings in dispute, and that being so, I am further of opinion that he has no title to challenge the defender's possession or to examine the defender's title. The only ground on which the contrary was maintained was this, that he (the pursuer) being the defender's superior in the lands within which the salmon-fishings in dispute are situated, and having given off those lands reserving the fishings, the defenders are disabled from asserting against him any right of fishing, or of challenging his title to the fishings reserved. I do not think this argument sound. It may be doubted whether the reservation in question applied to salmon-fishing at all. But assuming that it did, I cannot read it as amounting to a contract that the defender should acknowledge the pursuer's right to the fishings reserved. At the utmost it only I think implied this, that the defender should not found as against the pursuer on any title derived from him, and that the defender does not do. He takes his stand, so far as the argument has yet gone, on this, that if the right is not in him (the defender) it is in the Crown, and that the Crown not molesting him, the pursuer has no title and no interest to do so.

"3. But this brings me to the third and remaining question, viz., have the defenders a title of their own? They maintain that they have. They say that, together apart from their title to the lands of Eachterachine, they have a separate and express title to these salmon-fishings, and this they say they have in the shape of a grant from the Crown of certain lands known as Ardchonnell Ardchonnell-Callen, situated on Loch Etive,—'Cum salmonum piscatione quæ de Awe, viz., tractus lie draughts salmonum de Polindowan et Polenstuick tractus lie draughts salmonum de Cruback et tractus lie draughts salmonum unluip jacen. in aqua et ore ejusd. cum omnibus earund. privilegiis et pertinen. que lie cruives super dict. aquam de Awe omnes extenden. ut prædicitur et een. in Baronia de Archattan dominio de Lorn et vicecomitatu antedict.'

"The charters on which the defenders thus found are, it is right to say, charters by progress, the separate title referred to having been derived by the proprietors of Lochnell through the Priors of Ardchattan; but as the defenders have had prescriptive possession of the fishings in dispute, and the only question whether they have a title on which to prescribe, the absence of the original grant does not appear to be material. The same remark applies to the absence of the titles prior to that of 1727 of any mention of 'cruives,' a circumstance on which the pursuer's counsel a good deal commented.

"The question, however, is whether this title to salmon-fishings covers the portion of the river now in dispute, or is, on the other hand, confined to the pools or draughts mentioned, which are quite well identified, and are situated at

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charter from Robert, Duke of Albany, in 1407 only gave the barony of Lochow and others *cum piscationibus*, and even the charter of 1540 only granted the extended barony of Lochow *cum piscariis in aquis dulcibus et salsis*. But apart from the fact that in these times such grants were no doubt intended to carry salmon-fishings, the proof shewed that the pursuer's authors, whose only right to salmon-fishings was what these charters granted to vassals and themselves, enjoyed salmon-fishings in different parts of the barony of Lochow. Besides, the crown charter of novodamus of 1667 expressly gave to Archibald, Earl of Argyll, the barony of Lochow and others *cum piscatione salmonum aliorumque piscium*, and it was immaterial whether this was looked on as merely interpreting the old non-express grants, and giving them full expression in the language of 17th century conveyancing, or as giving *de novo* a right to salmon-fishings. Now, the defender's own title shewed that the barony of Lochow went down to the River Awe, otherwise he would have no title to the lands belonging to him *ex adverso* of the river. The proof also shewed that the Awe divided the baronies of Lochow and Lorne, so that there was a presumption that each extended to the *medium filum*. Accordingly, the fishings in dispute—the fishings *ex adverso* of the lands of Eachterachine—must be held to be included within the express grant to Archibald, Earl of Argyll, in 1667. It was admitted that the pursuer himself had not possessed the fishings in dispute. The reservation in the defender's titles to Eachterachine—*salva tamen et reservata nobis hæredibus et successoribus nostris totali piscatura aquæ de Awe cum pertin.*—shewed, however, that for centuries a right in these fishings had continued to be asserted by the pursuer's predecessors, with the knowledge and assent of the defender's authors. And, moreover, the barony of Lochow must be regarded as a *unum quid*, and the possession of salmon-fishings generally within its limits held to cover the particular fishings now in

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or near the mouth of the river, where it issues into Loch Etive. The defenders say that the grant, at its date, covered the whole water of Awe, and, according to the modes of fishing then practised, was exhaustive,—the lower water being assumed to be fished by net and coble, and the upper water—that in question—where net-fishing was impracticable—being fished by cruives. They say further that, while there is not evidence of cruive-fishing on their side of the river—at least in recent times—there is evidence of the existence in the last century of a cruive at their upper march, which they claim as a cruive used by their authors in virtue of the grant of cruives referred to. The pursuer, on the other hand, denies that there is any evidence of cruive-fishing by the defenders or their authors, and he maintains that the grant of salmon-fishing is limited to the pools mentioned, and that in the absence of proof of possession by cruives, the grant of cruive-fishing cannot extend the right, or at all events support a general right, of salmon-fishing over the area claimed.

"In the view I have expressed as to the pursuer's title, it is not necessary that I should decide the question thus raised; but as it was anxiously argued on both sides, I think it right to say that the inclination of my opinion is with the defenders. I incline to think that a grant in general terms of salmon-fishing over a river (or at all events over a river like the Awe), followed by an enumeration of specified salmon-draughts and unspecified cruives, is at least a sufficient title on which to prescribe if necessary the whole salmon-fishings of the river. In other words, I have not, so far as I have been able to consider the matter, seen any sufficient reason why a proprietor having a grant of cruives on which he is seeking to prescribe, may not, without prejudicing his title, supersede the cruives in favour of a more profitable mode of possession, viz., rod-fishing. As I have said, however, it is not necessary to decide this point. My judgment is for the defenders on the ground that the pursuer has failed to shew that he (the pursuer) has any title to the salmon-fishings in dispute."

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dispute. This was not inconsistent with the decision in the *Lord Advocate* v. *Cathcart*, 9 Macph. 749, or the interpretation put thereon by Lord Blackburn in the *Lovat* case.[1]

Then came the question whether the defender had a preferable title. It was admitted that he and his authors had possessed the fishings in dispute for over forty years, not by net and coble, but by rod and line, a method which might, however, be held sufficient in a river like the Awe. But all this possession had been without a habile title on which prescription could run. He could take no benefit from his title to the lands of Eachterachine, for in it the fishings were reserved. Nor did his separate title to the salmon-draughts help him. Neither the lands of Ardconnel Cailen nor the draughts really formed part of the barony of Kilmaronaig. The charter erecting Kilmaronaig and other lands into a barony in 1603 shewed quite clearly of what that barony was composed. Campbell, of Calder, in whose favour that charter was granted, no doubt owned the draughts at the time, but on a separate title. They did not form part of the original barony, and had never been validly incorporated with it. His own titles shewed that a separate reddendo was still paid for Ardconnel Cailen and for the draughts in addition to that paid for the barony. It was accordingly not a question of prescribing on a barony title. The defender had no barony which touched the Awe at any point, and no barony title which gave him any rights in that river. What he had was a title to certain salmon-draughts mentioned by name and described as in Lorne, not in Lochow, and to nothing more. That this was the view of the defender's authors for a long period of time was clear from the series of leases covering the period from 1768 to 1809, whereby they and the other proprietors of Awe fishings let these to certain tenants. The fishings of each proprietor were let by name, and Campbell of Lochnell's were specially described as consisting of certain pools, the four draughts mentioned by name. Thus, up to 1809 at all events, no claim was made by the Campbells of Lochnell of the kind now put forward. Not merely was the title to the draughts not a habile one on which to prescribe the rest of the fishings in the river, being in reality a bounding title, but such possession as had been had of the rod-fishing was not referable to this title at all, and it was not enough that there be a barony title and possession. These things must be connected.[2]

The defender, however, maintained next that the grant of cruives in his titles gave him by implication the rod-fishings now in dispute. There was no ground for this contention. In the first place he had no valid grant of cruives. The words *atque* (*lie*) *cruives* on which he founded were not in the Calder titles. They appeared first in the charter of 1727 to Sir Duncan Campbell of Lochnell, and that was not a novodamus, only a charter by progress. And there was no evidence that the alleged grant was ever acted on. There probably was an old cruive on the Awe at the Fanans march, but it was not referred to in the leases which let All and Whole the Lochnell fishing, either by way of inclusion or reservation, though the Inverawe cruive or chest-fishing is expressly reserved. And the proof shewed that it was put up by persons who had no right to do so, and was soon discontinued in consequence of complaints as to its illegality. It was not law that a grant of cruives necessarily included all

[1] Lord Advocate v. Lord Lovat, July 12, 1880, 7 R. (H. L.) 165.

[2] Lord Advocate v. Hunt, Jan. 31, 1865, 3 Macph. 426, 37 Scot. Jur. 213, revd. Feb. 11, 1867, 5 Macph. (H. L.) 1, 39 Scot. Jur. 248; Lovat case, *supra*; Christison v. Hope, Nov. 18, 1847, 10 D. 119, 20 Scot. Jur. 29; Duke of Richmond v. Earl of Seafield, Feb. 16, 1870, 8 Macph. 530, 42 Scot. Jur. 246.

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other kinds of fishing.[1] Where cruives had not been granted they remained in the Crown, although it might have entirely divested itself of all rights of net and rod-fishing. And it would seem from *Grant* v. *Duke of Gordon* that it was competent for the Crown to grant cruives to B in water of which it has already granted the whole net and rod-fishings to A. But whether this were so or not the law enunciated by Lord Blackburn in the *Lovat* case[2] applied here. A grant of cruives give a right to fish with that method at a particular spot or spots, not necessarily anything more.

Argued for the defender;—There was no difference, as was supposed on the other side, between the charter of 1603 and that of 1727. What was granted by the former might not now be capable of being exactly identified in all its details, but the charter of 1727 gave a fuller and more accurate description and enumeration. The defender was owner of a barony. His possession of salmon-fishings was undisputed. The possession should be ascribed to the barony title. There was no sufficient indication that it could not be so. With regard to the pursuer's own title, he ascribed his right to his charter of 1667. That was not an original gift, but a novodamus. In any question of doubt it should be construed as giving no more than the original title.[3] Its construction was fully satisfied by applying the grant of salmon-fishings to the baronies of Over Cowal and Otterinverane. Possession by the Duke at one part of his barony of Lochow, even assuming that barony to come down to the Awe—which it did not—was not equivalent to possession of all. Even if *prima facie* on the titles the pursuer had right to the fishings the question was set at rest by the possession.[4] The admitted adverse possession could not in the state of the titles be overcome, and the pursuer had no right to criticise the defenders' title.

At advising,—

Lord Rutherfurd Clark.—The pursuer is infeft under a crown charter in the lands and barony of Lochow with the salmon-fishings. The earliest crown title in which salmon-fishings are given out is a charter of confirmation and novodamus granted by Charles II. on 15th October 1667. In the previous titles the lands are granted with fishings only. For some reason it was not brought under the notice of the Lord Ordinary that the pursuer had a crown title to salmon-fishings, and in consequence his judgment has been pronounced under a misconception.

The charter of 1667 is of course a charter of progress, and is in form a renewal of existing rights. But it may be explanatory of them, and in this case I so read it. It defines the fishings which had been previously given out as being salmon-fishings. Nor was this unmeaning, for under the older law it was doubtful whether an express grant was necessary to give a good title to salmon-fishings, and if the Crown meant to recognise that such a right had been conferred by the previous titles this could be conveniently and competently done by introducing an express grant into the charter of novodamus.

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[1] Heritors of Don, 1665, M. 10,840; Halkerton, 1769, M. 14,293; Grant v. Duke of Gordon, 1778, M. 14,297.

[2] July 12, 1880, 7 R. (H. L.) 163.

[3] Magistrates of Inverkeithing v. Ross, Oct. 30, 1874, 2 R. 48; Earl of Perth v. Lady Willoughby D'Eresby's Trustees, March 9, 1875, 2 R. 538, aff. Dec. 13, 1877, 5 R. (H. L.) 26.

[4] Duke of Richmond v. Earl of Seafield, Feb. 16, 1870, 8 Macph. 530, Lord Cowan, at p. 542, 42 Scot. Jur. 246; Earl of Zetland v. Tennant's Trustees, Feb. 26, 1873, 11 Macph. 469, 45 Scot. Jur. 311.

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But apart from these considerations the charter gives a good title to whatever it expressly conveys. The Crown might challenge it on the ground that the estate of the vassal had been unduly enlarged. But I do not think that the challenge is open to any other. It is true that a charter of novodamus, wherever doubt exists, will be construed as commensurate with the previous title. But when the words are clear they must receive effect according to their terms so long as the charter stands unreduced.

It was urged that according to the true construction of the charter of 1667 the grant of salmon-fishings was limited to the baronies of Over Cowal and Otterinverane. I cannot so read the charter. Several lands and baronies are conveyed, but at the end of the description there is added a general clause which, in my opinion, refers to the whole. It runs thus—"Cum castris . . . piscationibus salmonum . . . . omnibus aliis partibus pendiculis et pertinentibus terrarum baroniarum aliorumque praedict." This is a usual clause in such a charter. It is intended to gather up and enumerate the subordinate rights which are conveyed with the lands. And as it is made applicable to the "lands and baronies foresaid," I do not see on what principle of construction it can be limited. And unless it be read as applicable to the whole there would not be a grant of fishings with the barony of Lochow, though such a grant was contained in the crown charter of 14th March 1540. I am therefore of opinion that a right of salmon-fishing is given along with the lands and barony of Lochow.

The next question is, what is the legal meaning and effect of such a grant? I do not think that the answer is doubtful. A grant of lands with salmon-fishings implies a grant of the salmon-fishings in the rivers within or bounding the lands. If the river runs through the lands the owner of the lands has the sole right of fishing. If the river is the boundary he has the right to fish from his own bank. I take this to be clear and well-settled law, even though the river in which the salmon right exists is not mentioned in the charter. And similarly I hold that a grant of a barony with salmon-fishings confers an exclusive right to the fishings of such rivers as are within the barony, and a right to fish from one bank when the river is the boundary. Of course I am speaking of the effect of the grant itself, and apart from any question which may arise on possession or in regard to a competing title.

And in so holding I am not in any way violating the rule of the case of *Cathcart*. In that case there was a grant of a barony, but without any grant of salmon-fishings. Apart from possession therefore, the owner of the barony could have no right to salmon-fishings. He had a good title on which to prescribe such a right, or to put it otherwise, he might shew by his possession that the barony contained a grant of salmon-fishings. But in either view his right was necessarily measured by his possession. Such fishings as he possessed would be held to form part of the barony and no others, or if the barony is looked on as a title for prescription, he could only acquire by prescription such fishings as he actually possessed. But no such principle can be applied where there is an express grant of salmon-fishings. The right of the grantee depends on the legal construction of the grant, and is effectual without any possession.

I have now to consider whether the barony of Lochow extends to the River Awe, and on this point I do not think that there is any room for doubt. The lands belonging to the defender on the left bank are held of the pursuer, and are described in the titles as forming part of the barony of Lochow. The defender pleads that the lands held by him from the pursuer are not those called in the

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title Eachterachine; that the lands which now go by that name do not come down to the river; and that he possesses other lands called by a different name which lie between the river and Eachterachine. To my mind the plea has no force. The point is I think conclusively determined by the fact that the defender has no other title than that flowing from the Earls and Dukes of Argyll. Everything he possesses is possessed under that title and no other. I cannot therefore attach any importance to mere names which may be more or less accurate and more or less modern. As he has no title to any lands except such as are described as forming a part of the barony of Lochow, and as the lands which he possesses under that title are *de facto* bounded by the Awe, I hold that at this point and along the entire frontage of the defender's lands the barony is bounded by the Awe.

From what I have said the inference is plain. The pursuer has a good title to the salmon-fishings in the Awe *ex adverso* of the defender's lands, and that title must prevail unless the defender can shew that he has a better title to these fishings. This he endeavours to do. But inasmuch as he does not allege a title prior in date to that of the pursuer, he can only prevail by shewing that he has possessed the fishings on a sufficient title and for the prescriptive period.

The defender connects himself with a crown charter granted to Sir D. Campbell of Lochnell on 26th July 1727, by which there was disponed and confirmed to him "Totas et integras terras baronium, balivatum et regalitatem de Kilmachronag alias vocat Muckairn," comprehending, *inter alia*, the lands of Ardchonnell, "cum salmonum piscatione aquae de Awe vizt. tractus (lie) draughts salmonum de Polindownan et Polinstuck, et tractus (lie) draughts salmonum de Cruback, et tractus (lie) draughts salmonum de Sanluip jacen in aqua et ore ejusdem cum omnibus earundem privilegiis et pertinen, atqe. lie cruives super dictam aquam de Awe, omnes extenden ut praefertur et jacen in baronia de Ardchattan dominio de Lorn et vicecomitatu antedict. Una etiam cum officiis et privilegiis liberæ regalitatis justiciariae et balivatus omnium praedict. terrarum et terrarum de Muckairn aliorumque terrarum particulariter supramentionat cum molendinis piscationibus, insulis et omnibus earundem pertinen jacen infra omnes bondas hujusmodi." In these subjects the defender and his predecessors were duly infeft under titles regularly deduced from the crown charter. They have possessed the salmon draughts. Further, they have since 1846 possessed the salmon-fishings *ex adverso* of the lands of Eachterachine by rod-and-line fishing, and have drawn a considerable rental from them. Such possession has been complete and exclusive. There has been no cruive fishing within living memory. There are, however, the remains of a cruive at the eastmost limit of the defender's property. The history of it is very uncertain, and dependent entirely on local tradition. I am inclined to think that the probability is that it was erected by the Lorne Iron Forge Company when they were tenants of the defender's predecessor, and that it was taken down or disused on the objection of salmon-fishing owners on the other side of the Awe. But however this fact stands, we have no proof that the defender or his predecessors possessed any cruive fishing, or that they had any other possession of the fishings in question save by rod and line. At the same time I think that there can be no doubt but that this was the most profitable mode of possession.

There is a fact in connection with the state of possession which it is right to notice. We have before us three leases during the period from 1768 to 1810. They do not cover the entire period. They extend to thirty-five years in all.

To these the predecessors of the defender were parties, along with other proprietors on the Awe. It had been found that it was more advantageous for the several proprietors to let their fishings jointly than to let them separately. Hence the joint leases. In all these leases the fishings let by the defender's predecessors are described with slight variations as "All and haill the said Duncan Campbell's fishing upon the water of Aw, consisting of the following pools, viz., Criebag, Pollanstuickk and Pollandunan, with the stall-nett fishings upon Locheity near the mouth of the said water commonly called Sheanluib."

It is plain that these fishings do not comprise those which are now in question. Nor did the predecessors of the defender at that time assert a right to any other fishings than those which they actually let. For by the leases of 1794 and 1805 the lessors let to their tenants "all and whole the several salmon-fishings upon the water of Awe belonging to them respectively" with the exception of the chest or cruive fishings belonging to Campbell of Monzie. Nor can it be said that river fishings were of no value and could not be let. For Campbell of Monzie let nothing but river fishings, and he drew a third of the entire rent.

From this it will be seen that at a time not long posterior to the charter of 1727, the predecessors of the defender made no claim to the fishings in question as being comprehended within the barony of Kilmaronaig. Further, we have seen that that barony was erected in 1603 by crown charter granted to Sir John Calder. His successor obtained in 1673 from the Earl of Argyll a charter of confirmation applicable to the lands of Eachterachine, but under the reservations in favour of the granter and his successors of their whole fishings in the Awe. It is not conceivable that a charter with such a reservation would have been accepted if the fishings so reserved were claimed as part of the barony.

The title to which the defender ascribes his possession is, as I have said, the charter of 1727. He contends in the first place that he and his predecessors have possessed on a title of barony, and that barony includes *per expressum* the lands of Ardchonnell and the draught fishings and cruive fishings in the water of Awe. If we are to look at the charter of 1727 alone, it is clear that these lands and fishings are comprehended within the barony. But it is a charter by progress, and is not the charter of erection. It recites the charter of erection as being a charter granted by James VI. in 1603. On returning to that charter we find that it does not comprise the lands of Ardchonnell or the fishings above mentioned. It was urged that the charter of 1727 merely contained a fuller description of the same lands. But this cannot be, because the lands of Ardchonnell are held for a separate feu-duty, which is not specified in the charter of 1603. Therefore I cannot hold that the lands of Ardchonnell and the salmon draughts and cruive fishings are part of the barony of Kilmaronaig.

But not the less is the defender the owner of a barony, though it does not comprehend these lands and their pertinents. It is situate at a distance from the Awe, and does not *per expressum* contain any fishings in that river. The question then comes to be whether the defender can ascribe his possession to his barony title.

It is not sufficient for the defender that he has had possession, and that he has a barony title. The two things must be capable of being legally connected.

The case of *Hunt* v. *The Crown*[1] shews that the mere possession of a subject does not establish that it is part of the barony of which the possessor is the

[1] Feb. 11, 1867, 5 Macph. (H. L.) 1.

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owner. For it was held by the House of Lords that though Mr Hunt had possessed the Palace of Dunfermline for the prescriptive period, his possession did not prove that it was part of his barony of Pittencreiff. Their Lordships construed the barony title. They held that it did not contain the palace, and the possession was in consequence of no avail.

We, in like manner, must construe the defender's title, and I am unable to hold that it comprehends, or that it can be read as capable of comprehending, salmon-fishings in the Awe. Such fishings as are given out in general terms are given out with the lands, and such fishings as are specially mentioned are plainly not in that river. I think that we should violate the rules of legitimate construction if we held that such a grant could embrace fishings in a river so distant as the Awe. For the fishings are defined by reference to the lands in connection with which they are given out. I do not say that fishings so granted are necessarily limited to the fishings within or *ex adverso* of the lands. But if it had been intended that fishings so distant as those in question should be included in the barony, I think that they would have been specially disponed. In the absence of any such disposition, I hold that they are not contained in the barony, and that mere possession will not shew that they are comprehended within it. In so holding I am following the opinions of the Lord Justice-Clerk and Lord Gifford in the case of *Lord Lovat* v. *The Crown*. There is nothing to indicate that the predecessors of the defender possessed the fishings contemporaneously with the erection of the barony, or at any time when they were owners of the barony alone. The presumption, and indeed the proof, are entirely to the contrary. For I have shewn that in their title to the lands of Eachterachine, granted in 1673, the fishings are reserved to the Earl of Argyll, and that they made no claim to them when they granted leases in the end of the last century and the beginning of the present. I am therefore bound to deal with the case on the footing that the possession began in 1846. I do not think that I would be justified in ascribing the modern possession to an ancient title which was not followed by possession for nearly two hundred and fifty years, or in other words in holding that the predecessors of the defender began in 1846 to possess the fishings under a charter which was granted in 1603. The case of the defender would have been stronger, and might have been sufficient if the fishings in question could be regarded as an enlargement of the fishings which had been from ancient times possessed under the barony title. But I think that that is impossible. They are different fishings and situate in a wholly different locality. And considering that they have been possessed from the lands of Eachterachine, they seem to be the fishings of these lands and in no sense to be fishings of the barony.

But the defender has yet another title to which he ascribes his possession. He is infeft in the lands of Ardchonnell "cum salmonum piscatione super aquam de Awe"—viz., the three draughts which have been mentioned "atque lie cruivis super dictam aquam."

It is in favour of the defender that these salmon-fishings are not given out in connection with adjoining lands. For the lands of Ardchonnell are not situate on the River Awe, but, as I understand, about ten miles from it. There is not therefore the usual limitation in the grant, and we may the more easily read the defender's title as comprising the whole fishings in the River Awe.

But we can only so read it if the words "cruives on the said water of Awe" can bear such a meaning. The defender indeed contends that he has a general

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grant of all the fishings in the Awe. But I cannot adopt that view. It is neither consistent with the words of the charter nor the possession which has followed on it. I construe the charter as being a grant of particular fishings—viz., the three salmon draughts and the cruives in the water of Awe.

But it is said that the fishing by cruives is the highest mode of salmon-fishing known to the law, and therefore that a grant of cruive fishing means, or may mean, a grant of salmon-fishings, so as to furnish a sufficient title for prescriptive possession.

The Lord Ordinary, without expressing a decided opinion, thinks that the title of the defender is sufficient. He says "that a grant in general terms of salmon-fishing over a river (or at all events over a river like the Awe) followed by an enumeration of specified salmon draughts and unspecified cruives is at least a sufficient title on which to prescribe if necessary the whole salmon-fishings of the river." He seems to think that there is a general grant of salmon-fishings. As I have already said, I do not concur in that opinion. The grant is not general but specific. It consists of certain specified pools and of cruives. The pools are known and have been possessed by the defender. I do not see how a grant to the fishing of these pools is a title for prescribing other fishings. Nor do I think that the grant of cruives can be read as a general grant of the salmon-fishings in the Awe. The most authoritative exposition of such a grant is to be found in the opinion of Lord Blackburn in the case of *Lord Lovat* v. *The Crown*. Without expressing a final opinion on a question which was not necessary for the decision, his Lordship says that a grant of cruives is merely a right to fish by cruives at the places where such engines have been or may be erected. I think that I am bound to proceed on this view of the law, and it seems to be conclusive against the defender's title, in so far as it is founded on a grant of cruives.

But the case does not turn on that consideration alone. For inasmuch as the charter contains a grant of particular fishings followed by a grant of cruives in the same river we would violate the ordinary rules of construction if we were to hold that the latter grant comprised, or was intended to comprise, the whole fishings. There is no meaning in the former grant if the latter is held to include it. I think therefore that I am bound to construe the grant as a grant of particular fishings, and consequently it is not a sufficient title on which to prescribe a right to fishings generally.

But there is another limitation on the defender's title which it is proper to notice. I need not say that the defender cannot prescribe any subject which lies beyond the limit of his title. The whole subjects granted by the charter of 1727 are described as lying within the lordship of Lorne. On the south side of the Awe, this lordship does not extend further eastward than the Nant, while the lands on the north side are within it. It seems to me difficult to hold that salmon-fishings *ex adverso* of the barony of Lochow can lie within the lordship of Lorne. If they had been possessed in conformity with the grant—that is to say, if the defender had possessed cruive fishings—this difficulty might have been overcome. But I cannot attribute any such force to a possession by rod and line only from the lands of Lochow. Such possession indicates that the fishings which have been so possessed are the fishings of those lands rather than fishings lying within the lordship of Lorne.

On the whole, I am of opinion that the pursuer is entitled to our judgment. The grant of cruives not having been followed by possession is unavailing to the

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defender, for the title of the pursuer is prior in date, and comprises the whole fishings *ex adverso* of the defender's lands. A grant of cruive fishings within the fishings previously given to the pursuer would, in my opinion, be invalid, because it would be in derogation of a prior title.

LORD YOUNG.—I understand that your Lordship and Lord Trayner concur in the judgment which Lord Rutherfurd Clark has just delivered. I am obliged to say that I dissent, and I shall state my ground of dissent very briefly. I assume, of course,—indeed it is not disputed—that the Duke of Argyll is proprietor of the barony of Lochow. I shall further assume what is disputed, and is contrary to the view of the Lord Ordinary upon the case as presented to him, that the Duke is also proprietor of the salmon-fishings thereof, that is pertaining thereto. The question is, upon these assumptions, whether he is proprietor of the fishings in question in the River Awe. There is not in his title a specification of salmon-fishings in the River Awe; but it is said that the barony of which, with the fishings pertaining thereto, he is the owner adjoins the River Awe and comes down to the banks of it, and that it is therefore to be assumed that the fishings in the river are fishings pertaining to the barony. I cannot assent to that. A title to a barony is a good title to all the water therein—that is to say, all the land covered with water, such as a lake or river; a title to a barony is a title to the land, including waters and rivers within the bounds and limits of the barony. But the franchise of fishing for salmon in waters which contain salmon is another matter. The franchise of salmon-fishing pertaining to a barony is not at all necessarily limited to waters which are within the bounds and limits of the barony. Salmon-fishings in the sea *ex adverso* of the barony but not within the bounds and limits thereof, and salmon-fishings in the sea not *ex adverso* of the barony at all, may very well be salmon-fishings of the barony and pertaining thereto. On the other hand, the salmon-fishings of a barony and pertaining thereto do not necessarily include the franchise of fishing in all the waters within the barony. On the one hand, as I have stated, the right of fishing pertaining to a barony, and conveyed by a title to the barony with the fishings, may be outwith the bounds of the barony altogether; that is, the franchise, the right may be exercised in waters outside the barony. On the other hand, the franchise of fishing in waters within the barony may be no part of the fishings of the barony. I therefore cannot assent to the proposition that it is to be assumed that the fishings, the right of fishing for salmon in the water of Awe, is the right of salmon-fishing of the barony and pertaining thereto, because the lands of the barony adjoin and extend to the banks of the River Awe; and indeed upon the face of the summons and record here the pursuer assumes that his barony fishings do not include all the fishings in the River Awe, although his barony extends down to the river all along the banks. There may therefore be salmon-fishings in waters to which the barony adjoins, or in waters which are within the barony which are no part of the fishings of the barony at all. I think it is a question of evidence, a question of identification, whether any particular fishing, the right of fishing in any particular water, is a right of salmon-fishing of and pertaining to the barony or not. It is a question of fact, a question of identification, upon which possession is the most material of all evidence. I do not say it is the only evidence, but it is the most obvious and the most common.

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We have not in this case any occasion to consider the question whether a title of barony with the salmon-fishings pertaining thereto does not *prima facie* apply to all waters within the limits of the barony, that is to say, *prima facie*, and in the absence of evidence to the contrary. That may be so, and I shall assume if you please that it is. But possession adverse to that view may have existed for any period you please. Here the possession is adverse to the view that the fishings in question are in fact and as a matter of identification fishings of the barony of Lochow; all the possession which has ever existed is adverse to that view. Lord Rutherfurd Clark has pointed out upon an examination of the evidence that the possession of the particular fishing here,—and that is upon an examination of the defender's title, which I am not considering now,—the possession of these particular fishings has only existed since 1846,—that is a period of forty-five years,—very close upon half a century; and so far as I see the case would have been the same in principle upon evidence, so far as principle goes, if the possession had been for 100 years or 200 years. The proprietor of Lochnell, or anybody else you like, but never the proprietor of the barony of Lochow, has possessed these fishings for a century or two centuries; nevertheless as the Duke has a title to the barony of Lochow, with the fishings thereof, *prima facie* these belong to him. I think upon that evidence they do not. Whoever they may belong to they do not belong to him. The evidence is abundantly sufficient to shew that these are not part of the fishings of the barony. I am exaggerating it into possession for a century or two centuries. Here it is only possession for forty-five years. The party who has possessed (the defender) refers to a title—a variety of deeds and a variety of facts—to shew that he has the right. The titles upon which he relies, and the grounds upon which he relies upon them, are subject to very powerful objections, critical objections. I shall assume that they are strong, and the defender might therefore in a question with the Crown, which, if these fishings have not been given off otherwise, is the party to contend with, find them very formidable. His right, his title to defend the possession which he has had for forty-five years, or for a century or two centuries, may be difficult enough to maintain or easy enough to maintain with the Crown, but the Crown is making no dispute in the matter. It is the proprietor of the barony of Lochow, who has been proprietor of the barony during all that period of possession of forty-five years as it happens,—he might have been, as I have said, for centuries,—and he has never had any possession at all. I am therefore disposed to agree in the view of the Lord Ordinary, independently of his assumption that there is not an express grant of salmon-fishings to the Baron of Lochow —of the salmon-fishings pertaining to the barony.

I am of opinion that the pursuer has failed to shew that he has a title to these salmon-fishings in dispute, and that being so, I am further of opinion that he has no title to challenge the defender's possession, or to examine the defender's title. That is exactly my opinion. He is seeking to disturb a possession which has existed so far back as evidence will reach, and might have been for any period so far as the legal principle is concerned. He is challenging that possession, seeking to disturb it and take it to himself, he never having had it. Now, if the defender had got at any time a title from the Crown, he would have had an excellent good title. The Crown could not have given it if these are part of the fishings of the barony of Lochow, for they had parted with the fishings of the barony of Lochow and conveyed them to the Duke of Argyll. But if

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the Crown had conveyed them to the defender, what would the conclusion have been? Not that they were violating and acting contrary to their grant to the Baron of Lochow, but that these fishings in the River Awe were no part of the barony of Lochow. That is a matter of evidence and identification, and so any adverse possession—for it is adverse possession as the Lord Ordinary somewhat emphatically says—will upon a question of identifying the fishings of and pertaining to the barony be most material, and may be conclusive against the baron with respect to fishings in the waters locally situated within the barony, just as it will be for him with respect to waters locally situated outwith the limits of the barony. The fishings will be identified by possession for him in the one case, against him in the other case. As I suggested in the course of the argument as to the patronage of church livings of the barony, and pertaining to the barony—the identification of these also is a question of fact to be determined most obviously by possession, although there may be other evidence. *Prima facie* you would assume, in the absence of anything to the contrary, that the patronage, church patronage, related to livings, parishes, benefices within the limits of the barony. But it might be shewn by possession, by evidence appropriate to such a subject, that patronage to a living outwith the barony was a patronage pertaining to that barony; and, on the other hand, that the patronage to a living, a parish altogether situated within the barony, was not a patronage pertaining to the barony at all. If, for example, during 100 years another party had always presented to a particular parish church, without challenge or interruption, that would be, I should assume, conclusive evidence that that was not a presentation pertaining to the baron. He might not be able to exhibit a title, one not, at all events, subject to criticism on the part of the Crown or any other having right, if he did not establish his; but for the Baron of Lochow to assert (assuming the right of patronage still to exist) a right of presentation to a church within the barony, to which he had never presented, and to which another had always presented during the period of a century, would be a proposition to which I could not have assented.

And so with respect to these fishings in the Awe. I have pointed out the grounds upon which I am of opinion that the fact that the lands of the barony come down to the margin of the river is not conclusive, and is not sufficient to countervail the possession to the contrary which has been had, it may be, upon an examinable title, and one subject to objections if the Crown chooses to challenge it, for if these fishings are not part of the barony of Lochow they belong to the Crown now, unless they have been given off to some other by a sufficient title; and that they are not part of the barony is the conclusion which I arrive at, upon the grounds which I have just expressed.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred with Lord Rutherfurd Clark.

THE COURT granted decree, in terms of the conclusions of the action.

LINDSAY, HOWE, & CO., W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

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WILHELM KRUUSE AND OTHERS, Pursuers (Appellants).—*Salvesen—Peddie.*

A. B. DRYNAN & COMPANY, Defenders (Respondents).—*Dickson—Deas.*

Ship—Demurrage—Charter-party—Delivery retarded by fault of railway.—A ship with a cargo of pit props, at the port of delivery, was berthed at a

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quay where, by the rules of the harbour, such a cargo could not be deposited. Delay in taking delivery took place in consequence of a railway company failing to provide a sufficient supply of trucks. *Held* that it was no answer to a claim for demurrage that the delay was caused by the fault of the railway company.

2D DIVISION. Sheriff of the Lothians.

WILHELM KRUUSE AND OTHERS, owners of the Swedish steamer "Aage," raised an action in the Sheriff Court at Linlithgow against A. B. Drynan & Company, Bo'ness, for payment of £32 as the amount of demurrage alleged to be due by the defenders at £8 per day, in respect that they, as receivers of a cargo of pit props, had detained the "Aage" four days beyond the period within which she could have been discharged in terms of her charter-party.

The defenders denied liabilty.

By charter-party between the pursuers' agents and Telef Jensen, timber-merchant, Krageroe, the "Aage" was chartered to load a cargo of pit props at Swedsbughten and proceed to Bo'ness, the cargo to be discharged as per bill of lading. The charter-party provided that,—"Cargo . . . to be discharged in Bo'ness as quick as vessel can discharge, . . . and should the vessel over this time be detained, there is payable for every lay-day £8, besides freight."

The "Aage" arrived in Bo'ness Roads on 2d September 1890, and was berthed in Bo'ness Dock early on the morning of 3d September (Wednesday), and was ready for discharge at ten on that forenoon.

The master called on the defenders. They had not received the bill of lading, or any advice as to the cargo; but, acting on telegraphic authority, their agent, Mr Ommundsen, a licensed stevedore, undertook, on the forenoon of 3d September, to take delivery of the cargo.

Discharge was completed on Monday, 8th September, at six P.M.

The pursuers stated;—"Reckoning from ten o'clock forenoon of 3d September 1890, the discharging would have been completed by ten o'clock forenoon of 5th September 1890, had the defenders accepted delivery in terms of the charter-party, so that the said steamship was unduly detained in unloading said cargo and deck load for four days [being Friday 5th, after ten, Saturday 6th, Sunday 7th, Monday 8th September] over and above the said two days in which the said steamship could have been discharged."

The defenders stated that they were entitled, according to general rule, to twenty-four hours' notice from the shipmaster to make arrangements for receiving the cargo, such as providing workers, waggons, and machinery, that discharge began at four o'clock on Wednesday 3d and was continued with all reasonable speed, and was continued on Thursday 4th, "but on Friday 5th no discharge took place, as the North British Railway could not or did not supply" the defenders' agent "with waggons in which to place the cargo, and as the vessel was berthed on the south side of the lock, where timber is not allowed to be laid down, the ship could not on that day deliver any cargo." They stated that twelve hours were thus lost on Friday (5th) and five on Saturday (6th), making seventeen hours in all, and that they discharged the vessel in thirty-two working hours, thus giving the vessel in the circumstances good dispatch. "The usual time to discharge a vessel of her burden and cargo should not be less than four days."

From the proof it appeared that the discharge began on the afternoon of the 3d, and was interrupted by want of waggons, as the defenders stated, on the Friday and part of Saturday. The discharge was completed on Monday the 8th at 6 P.M. The actual time spent in discharging was twenty-six hours. The defenders led the evidence of their agent and the

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harbourmaster to shew that the reason why discharge had to be stopped was that they had not waggons from the railway company, and that the harbourmaster had declined to allow timber to be laid down at that part of the harbour. No custom of the port on that subject was proved. There was evidence that if the ship had been berthed on the north side of the harbour prop-wood might have been laid down.

On 9th January 1891 the Sheriff-substitute (Melville) pronounced this interlocutor:—"Finds that the pursuers' steamship 'Aage' was unduly detained in unloading her cargo and deck load of pit props in Bo'ness harbour for three days, *videlicet*, Friday 5th, Saturday 6th, and Monday 8th September 1890 (excluding Sunday 7th, which was not a working-day), and that the sum of £8 per day is due for demurrage in terms of the charter-party: Therefore decerns against the defenders in favour of the pursuers for the sum of £24 sterling." *

On appeal the Sheriff (Rankine), on 29th April, recalled the judgment of the Sheriff-substitute and pronounced this interlocutor:—"Finds that the pursuers' steamship 'Aage' was berthed in Bo'ness harbour early in the morning of Wednesday 3d September 1890, and was ready for discharge of cargo at ten A.M. on that day; finds that in ordinary circumstances a reasonable period for unloading would have been twenty-six hours; finds that thirteen hours fall to be added in calculating the duration of said period on account of unavoidable delay due to lack of waggons, for which the defenders were not responsible; finds that said period lapsed during the course of Saturday, 6th September 1890; finds that the cargo was not fully discharged till the afternoon of the following Monday; finds that the rate of demurrage prescribed in the charter-party was £8 per day; finds that the defenders are liable to the pursuers in demurrage for two days, being £16, subject to payment of expenses as hereinafter found due." †

* "NOTE.—The Sheriff-substitute is of opinion that the ship might have been discharged on Wednesday 3d, and Thursday 4th, and the morning of Friday the 5th September, while from the evidence it was the following Monday evening before the discharging was completed. He also thinks the pursuers are not responsible for the want of railway waggons, which the defenders allege was the cause of the delay."

† "NOTE.—The charter-party as translated is somewhat obscure, which may be accounted for by the fact that the form used contemplated the fixing down of lay-days, from the close of which the period of demurrage should run, while the gap left for the number of lay-days has not been filled in. It must therefore be assumed that the intention was to allow a reasonable time for unloading at Bo'ness, 'as quick as the vessel can discharge,' and to calculate the demurrage from the lapse of that time. In estimating this reasonable time it is proper (as has been assumed in the proof and argument) to figure on working hours. Again, it appears to be plain that the ship cannot be allowed to suffer from the negligence of the consigners or freighters in not forwarding news by post or telegraph in time to enable the consignees or their agents to prepare for discharging. Lastly, the custom of Bo'ness is expressly incorporated into the contract; and no one seems to have taken exception at the time to the berthing of the steamer at the south side of the harbour, which was probably, on a balance of advantages, the more expeditious discharging place, in spite of the risk of stoppage under the port rule, known to both parties, against unloading pit props on the quay.

"Applying these rules, I cannot throw the point of time at which the duty to commence unloading set in further forward than 10 A.M. on the Wednesday, when, according to the harbourmaster and other witnesses, the vessel was entered at the Custom-House. Secondly, the case being one of those in which lay-days are not prescribed, the rule laid down in such decisions as *Postlethwaite*, 5 App. Cas. 529, and *Wyllie*, 13 R. 92, applies. It must be assumed—though there is

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The pursuer appealed, and argued;—If the defenders could not take delivery for want of waggons the loss fell upon them, not upon the ship, for it was their business to provide them. The case of *Wyllie*[1] relied on by the Sheriff was distinguishable. No custom of the port preventing prop-wood from being laid down was proved. The Sheriff-substitute had erred in not including Sunday, which though not a working-day counted as a demurrage-day.

Argued for defenders;—The case of *Wyllie* was in point. The harbour-master had refused to allow wood to be laid on the quay, and no waggons could be obtained. The defenders were thus prevented by unavoidable causes from taking delivery any faster. They had, excluding such delay, and that of Sunday, which was not a working-day, only taken a reasonable time.

LORD JUSTICE-CLERK.—It appears to me that the judgment of the Sheriff-substitute was right, though he fell into error upon one point which I shall afterwards allude to. This vessel was capable of being discharged in twenty-six hours after she came to her berth. That seems clear, for that was the time which was actually occupied when the operation was once begun, and I think that the causes which led to the delay were not causes for which the defenders can excuse themselves. The main cause which the defenders put forward was that they were prevented from taking delivery by the want of waggons from the railway company. This may have been the fact, but I take it that that was a matter for them to arrange, and with which the ship had nothing to do.

I think that the case of *Wyllie* v. *Harrison* has no application here. There is no proof that there is any custom of port in unloading pit props at Bo'ness. The harbour-master was asked the question, and he could give no evidence of such a custom. I think that in the circumstances demurrage for the whole time sued for, viz., four days, should be charged against the defenders, and that the Sheriff-substitute made a mistake in excluding Sunday. In estimating demurrage-days Sunday ought to be counted.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER.—I concur. I have no doubt that the Sheriff-substitute was right, except in making the mistake of excluding Sunday.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutor of the Sheriff-substitute of date 9th January

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little evidence on the point—that the defenders did all they could in pressing the railway company to furnish sufficient waggons, for they had no contrary interest, and the pursuers do not accuse them of negligence. Mr Ommundsen's estimate of thirteen hours as the amount of delay thus caused is explicit, and, as I think, trustworthy. The nominal period for discharge may, for the purposes of the case, be fixed at twenty-six hours. Adding this period to the thirteen hours of unavoidable delay, the number of working hours after 10 A.M. on the Wednesday from which the defenders cannot be held liable as *in mora* is thirty-nine. This, calculated on a twelve hours' day, beginning at 6 A.M., brings the parties down to 1 P.M. on the Saturday, at which hours, if these views be correct, the whole cargo should have been out. Thereafter the demurrage period commences, and must in terms of the charter-party be calculated by days—*i.e.*, according to a fixed rule of interpretation, running, not working days, since the vessel, if unloaded, might have sailed off in ballast. Saturday was a lay-day, *i.e.*, a day during which discharge might go on without liability for delay, and therefore cannot be counted among the demurrage-days. So that these are two in number—Sunday and Monday—and the sum due is £8 per day, or £16 in all."

[1] Wyllie v. Harrison & Co., Oct. 29, 1885, 13 R. 92.

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1891, and the interlocutor of the Sheriff of date 29th April 1891: Find that the pursuers' steamship 'Aage' was unduly detained in unloading the cargo and deck load of pit props in Bo'ness harbour for four days, viz., Friday 5th, Saturday 6th, Sunday 7th, and Monday 8th September 1890, and that the sum of £8 per day is due for demurrage in the terms of the charter-party: Therefore decern against the defenders in favour of the pursuers for the sum of £32 sterling, to account of which appoint the sum of £20, consigned in the hands of the Clerk of the Sheriff Court on 10th October last, to be paid over to the pursuers," &c.

J. & A. PEDDIE & IVORY, W.S.—BOYD, JAMESON, & KELLY, W.S.—Agents.

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July 9, 1891. Durrant Steuart's Trustees v. Durrant Steuart.

THOMAS GOLDIE DICKSON AND ANOTHER (Durrant Steuart's Trustees), First Parties.—*Wallace.*

MRS ALICE KATHERINE DURRANT STEUART, Second Party.—*Cullen.*

Marriage-contract—Jus relictæ—Implied exclusion of—General words of exclusion.—Terms of antenuptial marriage-contract, executed abroad in foreign form, between a domiciled Scotsman and a foreign lady, from which it was *held* that an exclusion of the *jus relictæ* was to be implied.

1ST DIVISION. C.

MR CHARLES DURRANT STEUART, of Dalguise, Perthshire, was married at Cape Town in 1889 to Miss Alice Katherine Reus, of Cape Colony. Prior to their marriage the parties entered into the antenuptial contract of marriage which is quoted below.* The marriage was dissolved by the

* The antenuptial contract was in the following terms:—"Know, all men whom it may concern, That on this the 27th day of March in the year of our Lord 1889, before me, Murdoch Morison Tait of Cape Town, Cape of Good Hope, notary-public, by lawful authority duly sworn and admitted, and in the presence of the subscribed witnesses, personally came and appeared Charles Horace Durrant Steuart of Dalguise, Perthshire, Scotland, but presently of Wynberg, in the Cape Division, a widower, and Alice Katherine Reus of Rondelosch, in the Cape Division, a spinster, both the appearers being of the full age of majority and upwards, and the appearers declared that whereas a marriage has been agreed upon and is intended to be shortly had and solemnised between them, the said Charles Horace Durrant Steuart and Alice Katherine Reus, they do, by these presents, contract and agree each with the other as follows:—

"(First) That there shall be no community of property or of profit or loss between the said intended consorts, but that he or she shall respectively retain and possess all his or her estate and effects, moveable and immoveable, in possession, reversion, expectancy, or contingency, as fully and effectually as if the said intended marriage did not take place.

"(Second) That the one of them shall not be answerable for the debts and engagements of the other of them, whether contracted before or after the said intended marriage.

"(Third) That all inheritances, legacies, gifts, or bequests which may devolve upon, or be left, given, or bequeathed to either of the said intended consorts shall be the sole and exclusive property of him or her upon or to whom the same shall devolve or be left, given, or bequeathed.

"(Fourth) That each of the said intended consorts shall be at full liberty to dispose of his or her property and effects by will, codicil, or other testamentary disposition as he or she may think fit, without the hindrance or interference in any manner of the other of them, and that the marital power which the husband by law possesses is expressly excluded; and he is hereby deprived of it over the estate of his said intended spouse.

"(Fifth) That for and in consideration of the said intended marriage the said

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death of Mr Steuart at Dalguise on 29th December 1890, leaving a trust-disposition and settlement, dated 6th March 1883. On the death of her husband Mrs Steuart claimed *jus relictæ* in addition to the provision in her favour under the antenuptial contract. This claim was resisted by the trustees under Mr Steuart's trust-disposition and settlement, who maintained that the widow was barred by the marriage-contract from claiming *jus relictæ* in addition to her conventional provision.

A special case was accordingly presented, the trustees being the first parties and Mrs Steuart the second party.

Besides setting forth the facts already narrated, the case stated:—"Mr Durrant Steuart was at the time of his death domiciled in Scotland. The

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Charles Horace Durrant Steuart agrees to, and hereby does, give and grant unto and settle upon his said intended consort, Alice Katherine Reus absolutely, and as her sole, free, and uncontrolled property, the sum of £3000 sterling, to be paid her in cash after the death of him the said Charles Horace Durrant Steuart, out of such funds as may be realised out of the estate left by him at the time of his decease: And for the better securing of the said Alice Katherine Reus the said sum of £3000, he the said Charles Horace Durrant Steuart doth hereby further give, and grant unto, and settle upon her, the said Alice Katherine Reus, all the furniture, pictures, plate, and other moveables (with the exception, however, of the family portraits and such moveables as are or may be made heirlooms) contained in all the houses the property of him the said Charles Horace Durrant Steuart situate on the estate of Dalguise, Perthshire, Scotland; upon condition, however, that should there be sufficient funds realised out of the estate of him the said Charles Horace Durrant Steuart, or from any other source whatsoever, to meet and liquidate the claim of the said Alice Katherine Reus in full, then that this settlement of the furniture, pictures, plate, and other moveables shall forthwith be annulled and of no effect, but that should there be insufficient funds realised to meet the said claim in full, or only sufficient to meet the said claim in part, then that the said furniture, pictures, plate, and other moveables, or such portion thereof as may be necessary, shall be realised for the benefit and on account of the said Alice Katherine Reus in order to meet and liquidate her said claim, or such deficiency thereof as may be due to her: The condition and intent of the whole of this settlement being that the said Alice Katherine Reus shall receive the full sum of £3000 hereby settled upon her, but neither more nor less.

"(Sixth) And the said Charles Horace Durrant Steuart declared the conditions upon which the aforegoing settlements are made to be, that if the said Alice Katherine Reus shall predecease him leaving no issue born of their marriage, then that the settlements hereby made and created shall forthwith cease and determine, and all and everything hereby settled shall revert to him the said Charles Horace Durrant Steuart: But that if the said Alice Katherine Reus shall predecease him, leaving issue born of their marriage, then and in such case the sum of £3000 and the other property hereby settled upon her shall devolve upon and become the absolute property of such issue, but upon the same terms and conditions as are hereinbefore set forth.

"(Seventh) And the said Alice Katherine Reus declared to have accepted the said donation and settlement upon the terms and conditions hereinbefore set forth.

"Upon all which conditions and stipulations the said appearers declared it to be their intention to solemnise their said intended marriage, hereby mutually promising to act up to the tenour of these presents under obligation of their persons and property according to law.

"Thus done, contracted, and agreed at Cape Town, on the day of the month and year first before written, in the presence of the witnesses Matthew Blake and George Marquard Findlay, who, together with the appearers and me the notary, have subscribed to the original hereof now filed and remaining in my protocol."

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clear rental of Dalguise after deducting taxes and interest of debt is £581, and the net personal estate in Scotland left by Mr Durrant Steuart, given up in the inventory thereof, amounts to £5884, after deducting the foresaid provision of £3000 and his other personal debts. He also left real and personal estate at the Cape, valued in said inventory at £2300. The whole residue of his said personal estate is, by his said trust-disposition and settlement, conveyed to the parties of the first part for behoof of his wife and children by a former marriage, other than the child who should succeed to him in the estate of Dalguise. Mr Durrant Steuart was survived by only one child, a son by his first marriage, who is now the proprietor of Dalguise."

The question of law was,—"Is the second party barred by the terms of the antenuptial contract from claiming *jus relictæ* in addition to the special provision of £3000?"

Argued for the first parties;—An antenuptial contract might exclude legal rights by implication, provided the intention of the parties to exclude the right was clear.[1] Such an intention was clear in the present case. It was impossible to read the deed without seeing that the parties intended their legal rights to have no place. No doubt, if the clause of exclusion barred a number of rights specifically and nothing more, without mentioning the particular right in question, it had been held that the particular right would not be regarded as excluded, although the fair inference might be that the parties by mentioning an analogous right in a foreign system intended the Scots right to be excluded also.[2] Here, however, the parties had not confined themselves to a specific enumeration of rights which they knew about; they added general words, which were sufficiently wide to carry the widow's legal rights according to Scots law. At all events, the proviso at the end of clause five made the intention of the parties clear beyond dispute.

Argued for the second party;—The presumption against the exclusion of legal rights by implication was a peculiarly strong one, and had not here been overcome. There was nothing in the deed to shew that the parties had the law of Scotland before them when contracting, and if they had not, the authorities proved that they must be held to have intended the legal rights given by that law to stand. The words at the end of the fifth clause referred to the "settlement" provided by that clause, and not to the deed as a whole.

LORD PRESIDENT.—My first impression was that our judgment must, on pretty clear grounds, be in favour of the first parties. I am still of that opinion, although not so confidently.

The deed before us is in the form of an antenuptial contract of marriage, and although it is not expressed in the usual technical language to which we are accustomed, we must take it as an instrument intended to fix certain points between the parties during their joint lives. The leading idea of the contract appears to be that each of the spouses is to retain his or her own estate independently of the other spouse, and in reference to the question which we have now to determine a great deal depends on the fifth head of the contract, but in order to appreciate the meaning and effect of that head it is necessary to keep in view certain of the other provisions of the deed.

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[1] Fraser, Husband and Wife, p. 1061.

[2] Breadalbane's Trustees v. Chandos, Aug. 16, 1836, 2 S. and M'L. 377. Keith's Trustees v. Keith, July 17, 1857, 19 D. 1040, 29 Scot. Jur. 497.

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The first head begins by declaring "that there shall be no community of property or of profit or loss between the said intended consorts." That, as I read it, means that parties knew of the existence of a legal doctrine of the *communio bonorum* between spouses, and desired to exclude its operation in their own case. Then they go on in very simple language to say "that he or she shall respectively retain and possess all his or her estate and effects, moveable and immoveable, in possession, reversion, expectancy or contingency, as fully and effectually as if the said intended marriage did not take place." The fourth head is also important, for it provides "that each of the said intended consorts shall be at full liberty to dispose of his or her property and effects by will, codicil, or other testamentary disposition as he or she may think fit, without the hindrance or interference in any manner of the other of them, and that the marital power which the husband by law possesses is expressly excluded; and he is hereby deprived of it over the estate of his said intended spouse." Mr Cullen argued that the marital power here spoken of was the husband's power of administration, and I admit that there is a good deal to countenance that view in the mere words of the fourth head taken by themselves, but if the fourth head is to be construed by reference to the first head—as I think it ought to be—I think it is perfectly clear that the marital power which is excluded is not merely the husband's right of administration but every kind of right which a husband may be supposed by law to have.

Keeping these two heads of the contract particularly in view, we come to the fifth head, which is certainly very peculiar in some respects. It is a provision by which the husband settles a sum of £3000 in cash upon his intended wife, to be paid to her after his death, and if she should predecease him this £3000 is, by the sixth head, settled on the issue of the marriage, if there are any. The fifth head further settles certain furniture and other moveables on the wife, in security of the provision of £3000, and only in so far as there should be insufficient funds to meet that £3000 in full. The fifth head then ends with these words:—"The condition and intent of the whole of this settlement being that the said Alice Katherine Reus (that is the wife) shall receive the full sum of £3000 hereby settled upon her, but neither more nor less."

The parties are at issue as to the construction of this fifth head, and particularly as to the words at the end which I have just quoted. The second party maintains that the settlement which is there spoken of is the particular provision of the fifth head itself, and nothing else, and therefore she contends that the meaning is that she is to receive the sum of £3000, neither more or less, as the result of the fifth head, but that none of her legal rights were to be affected. Now, if the estates of the spouses had not been subject to the provisions of the first and fourth heads of the contract, there might have been a great deal of force in that argument, but I am unable to read the fifth head without reference to the other clauses to which I have adverted, for I think the meaning depends on the construction of the three clauses taken together; and taking them together, I do not see how it is possible to say that the provision of £3000 is to be held as additional to any legal rights to which the wife might be entitled by the law of her husband's domicile, for that would be contrary to clauses one and four. I think that there is no room for *jus relictæ* under this contract. Each spouse by the contract retained his or her own estate independently of the other; and there is therefore, by the condition of the contract, no estate out of

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which such legal rights can arise. I am therefore for answering the question in favour of the first parties.

LORD ADAM.—The present question arises on the construction of the antenuptial marriage-contract of Mr and Mrs Steuart. The question is whether Mrs Steuart is entitled to her *jus relictæ* in addition to her provisions under the contract. It appears to me that that is a question as to the intention of the contracting parties. I do not know any reason why effect should not be given to what we may arrive at as having been the intention of the parties, and if we are satisfied that it was the intention of the parties that the *jus relictæ* should be excluded, then I think we must give effect to that intention. Notwithstanding Mr Cullen's very clear argument, I think that it was the intention of the parties to exclude the *jus relictæ*.

The solution of the question appears to me to depend as much upon the first four articles of the contract as upon the fifth. The first article provides that there is to be no community of property between the spouses, but that each is to retain his or her estate as fully and effectually as if the said intended marriage did not take place. I think that even if the deed had stopped there the widow's claim would be excluded, because I cannot see how the husband's reservation of his full right of property in his own estate just as if the marriage had not taken place is consistent with the widow's *jus relictæ* over the same estate. But the deed does not stop there, for the fourth clause provides,—"That each of the said intended consorts shall be at full liberty to dispose of his or her property and effects by will, codicil, or other testamentary disposition as he or she may think fit, without the hindrance or interference in any manner of the other of them, and that the marital power which the husband by law possesses is expressly excluded; and he is hereby deprived of it over the estate of his said intended spouse." Mr Cullen asks us to read this as not referring to the extent of the property, the power of disposing of which is reserved, but only as dealing with the property which each spouse might legally dispose of. In effect his argument came to this, that you are to read into the deed the words "in so far as he or she legally may" as if the reservation by each spouse were of his or her "whole property subject to the provisions of this contract and to the restrictions of law." I cannot so read the deed, because it deprives the words "without the hindrance or interference" of the spouses, of all meaning. But these words must have a meaning, and that meaning I take to be, that the spouses reserve full power each to dispose of his or her whole estates without regard to any legal rights which might be claimed by the other.

I am also disposed to agree with your Lordship's construction of the fifth clause of the deed. So far as I have observed, that clause contains the only provision by way of settlement in the deed, the purpose of all the other clauses being to reserve entire the rights of each spouse over his or her own property; but by the fifth clause the husband settles a sum of £3000 on his wife to be paid to her after his death, and further settles certain furniture on her to be realised for her benefit, but only to the extent to which there may not be sufficient funds to meet the provision of £3000. The clause then goes on, "the condition and intent of the whole of this settlement being that the said Alice Katherine Reus shall receive the full sum of £3000 hereby settled upon her, but neither more nor less." I think the meaning of these words is that the

wife is to get the sum of £3000, and that she is not to get, in any form or shape, more than £3000.

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LORD M'LAREN.—I think that in cases of this kind it is desirable to keep in view the general object of marriage-contracts. A marriage-contract is a deed by which, in general, the contracting parties agree to substitute conventional provisions in place of those accruing by operation of law. Those cases in which the wife has been held entitled to her legal provisions over and above the conventional ones in her favour appear to me to proceed on the ground that the parties have omitted to give expression to their real intention in the deed rather than on the view that they deliberately resolved that the wife should be entitled to the benefit both of her legal and of her conventional provisions, for it is not easy to suppose that parties who have executed a deed intended to regulate their affairs during their marriage should at the same time intend that the provisions which the law makes in the absence of such a deed should also have full force and effect.

The deed which we have here to construe, although operative in Scotland, was prepared in a colony, and it is only by considering it in its general relations that its true meaning can be ascertained. In regard to solemnities,—and probably also in regard to the arrangement of the clauses,—the conveyancer who prepared it followed the system in force in the colony; but in the operative clauses, while he has made use of expressions some of which probably have a technical meaning according to the law in force in the colony, he has taken care—in accordance with the probable intention of the parties—to add general words wide enough to embrace technical words expressive of rights recognised by other systems, with the details of which he was unacquainted. I see traces of this precaution throughout the deed. Thus, in the first clause, it is provided that there shall be no community of property or of profit or loss between the intended consorts, but, in case this should not be sufficient, the clause goes on to provide that the rights of the parties in their respective properties should remain as if the marriage had not taken place. In the same way the latter part of clause 4 is really ancillary to the earlier portion of the clause. And, again, the purpose of the fifth clause was to settle a sum of £3000 on the wife, but in case there should be any doubt, the clause concludes with the general declaration,—"The condition and intent of the whole of this settlement being that the said Alice Katherine Reus shall receive the full sum of £3000 hereby settled upon her, but neither more nor less." Therefore, unless we are to hold that the *jus relictæ* cannot be excluded if it is not excluded by name, it is difficult to imagine a deed expressed in general terms which more clearly excludes that right than the present deed does.

In the case of *Keith's Trustees*, 19 D. 1040, Lord Deas expressed the opinion that general words might be sufficient to exclude the *jus relictæ* if the deed contained general words applicable to it, which the deed in that case, it was held, did not. That opinion is not opposed to the other authorities, and is, I think, founded on good sense. I think that words, if in their meaning applicable to the right in question, will be sufficient, if it appears from the whole scope and purpose of the deed that we are not extending the operation of the general words beyond the real intention of the parties. In this case I do not know whether the conveyancer who drew the deed was at all conversant with the phraseology of Scots law, but I think he was well advised in recommending the parties to

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make use of general words, rather than to attempt to use the particular words of Scots law, which would have expressed specifically the rights which I cannot doubt the parties had in view. I agree in thinking that this deed excludes the widow from all participation in her deceased husband's estate except to the extent of £3000.

LORD KINNEAR.—I am of the same opinion. I agree in thinking that all we have to do is to ascertain the intention of the contracting parties by interpreting the language used according to the ordinary rules of construction. There is no rule of law that particular words must be used in order to produce the exclusion of the *jus relictæ*, and there is certainly no rule of law by which, although we may be satisfied of the intention of the parties in this respect, we are precluded from giving effect to that intention.

In this case I think that what the parties evidently intended was that the wife should have a certain sum of money, and no other claim against her husband's estate in consequence of the marriage. I think that the first and the fourth are the material clauses, and that the second and third clauses are ancillary. The first provides that each spouse is to be the uncontrolled proprietor of his or her own estate, just as if there had been no marriage; and the fourth clause that each is to have full power of disposing of their own property. I think that there is no room for doubt that the power to test reserved in the fourth clause necessarily refers to the same property as is reserved to the spouses in the first clause, and that the parties meant that nothing in the marriage was to prevent them disposing of their respective properties by will as if there had been no marriage. The suggestion pressed upon us to the contrary is, I think, untenable if we consider the effect of that argument, viz., that clause four was not intended by the spouses to define the property over which the power of each was to extend, but to secure their testamentary capacity over what they could by law dispose of. The fatal objection to that construction of the clause is, that there is no testamentary incapacity affecting a husband or a wife requiring to be removed, except the testamentary incapacity which arises from the existence of the legal rights, such as that now in question, and therefore I think that the hindrance or interference referred to in the fourth clause is the hindrance or interference which the exercise of these rights would have produced had the contract not excluded them.

I am therefore of opinion that these four clauses are enough for the decision of the case. But I entirely agree that the fifth clause hangs so well together with the others as to present a complete scheme of marriage-settlement, by which the wife should get £3000, neither more nor less, and nothing in addition which the law would have given her had there been no contract. It is satisfactory to observe that the contract, construed as your Lordships propose to construe it, provides just such a reasonable arrangement as the circumstances themselves would have suggested. It does not disappoint the wife of any reasonable expectation, looking to the amount of the estate and to the fact that there is a child of a former marriage. I see no reason therefore to regret the conclusion at which your Lordships have arrived.

THE COURT answered the question in the affirmative.

THOMSON, DICKSON, & SHAW, W.S.—J. & A. F. ADAM, W.S.—Agents.

JOHN PATERSON AND ANOTHER (John Wyllie's Trustees), Pursuers and Real Raisers.—*Ure.*
JANE BOYD, Claimant (Reclaimer).—*M'Kechnie—Craigie.*
JAMES DICKIE (John Wyllie's Trustee), Claimant (Respondent).—*R. V. Campbell—Lorimer.*

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Marriage-contract—Conveyance of property "now belonging or which shall belong to the husband at his death."—A conveyance by a husband to his marriage-contract trustees of all property "now belonging or which shall belong to him at the time of his decease," includes only property belonging to him at these dates respectively, and does not deprive him during his life of any right in or control over property acquired after the date of the contract, and such property will be liable for his debts.

Marriage-contract—"Property belonging to the husband"—Spes successionis.—A *spes successionis* belonging to a husband at the date of his marriage-contract *held* to be included in a conveyance to the trustees under the contract "of property now belonging to" him, as it appeared from the other parts of the deed that he intended so to convey it.

1ST DIVISION. Lord Kincairney. C.

BY antenuptial contract of marriage, dated 20th October 1874, between James Wyllie, warehouseman, Glasgow, and Agnes Kerr, his intended wife, James Wyllie, on his part, disponed, assigned, conveyed, and made over to James Dickie, solicitor, Irvine, and others, as trustees, and to the survivors and survivor of them, "All and Sundry lands, houses, goods, gear, sums of money, effects, and property of every description, heritable and moveable, real and personal, now belonging, or which shall be belonging to him at the time of his decease, with the whole writs and title-deeds of the heritable property, and the vouchers and instructions of the moveable means and estate, and all that is competent to follow thereon, and without prejudice to the said generality," a certificate or policy of assurance effected by the said James Wyllie on his own life with the Scottish Provident Institution, "and the said James Wyllie has herewith delivered up the said certificate or policy of assurance, to be kept and used by the said trustees as their own proper writ and evident, and the said James Wyllie hereby binds and obliges himself to execute and deliver all writs and deeds necessary for making the above general and special conveyance effectual, but the same is granted for the ends, uses, and purposes following, viz., first, that the said trustees shall, after the death of the said James Wyllie, hold" certain heritable properties which belonged to his first wife, "and also the share to which he is entitled of the trust-estate of his late father, John Wyllie, innkeeper, Fullarton Arms, Fullarton Place, Irvine, and all sums of money which may at the time be in bank at Irvine in connection with the said properties or estate, for behoof of his only child by his former marriage," upon the terms and conditions therein specified; and, failing her and her issue, for behoof of the said Agnes Kerr and the issue of the said intended marriage; "Second, The said trustees shall hold the said policy of assurance and proceeds and produce thereof, with the whole household furniture and other means and effects, of whatever description the same may be, belonging to the said John Wyllie, after payment of all his debts and the expenses of executing the trust, for the liferent use allenarly of the said Agnes Kerr in case she shall happen to survive him, and for the child or children who may be procreated of the said intended marriage or of any other marriage which the said James Wyllie may afterwards enter into, equally among them in fee," on the terms and conditions mentioned in the deed. In consideration of which provisions in her favour, and on the other part, the said

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Agnes Kerr thereby accepted the foresaid provisions in satisfaction of her legal rights; and further, she disponed and conveyed "all sums of money and property of every description, heritable and moveable, real and personal, now belonging to her, or which she may acquire by gift, *mortis causa* deed, or legal succession (but excepting always herefrom the provisions hereby made by the said James Wyllie, or to be made by him, in her favour), to and in favour of the said James Wyllie, in case he shall survive her, but in the event of his predeceasing her, the said whole property, heritable and moveable, which may belong to her, shall be subject to any disposition or division thereof which may be made by her among the children of the said intended marriage, and in the event of there being no such children, or of their failure by death without leaving lawful issue, then the same shall go to and be divided among her own lawful heirs or assignees whomsoever, but this conveyance by her to the said James Wyllie shall be subject always to the liferent use and enjoyment of the said Agnes Kerr, secluding therefrom the *jus mariti*, right of administration, and any other right of the said James Wyllie."

James Wyllie's father, John Wyllie mentioned above, died on 12th May 1872, leaving a trust-disposition and settlement. It was admitted by the parties to the action after mentioned that James Wyllie's interest under this settlement was a mere *spes successionis* at the date of his marriage-contract, but it was further admitted that, on 30th April 1890, he took a vested right.

On 15th May 1890 Jane Boyd, a creditor of James Wyllie under a bond and disposition in security, arrested the trust-funds in the hands of John Wyllie's trustees, and brought a furthcoming. They, in consequence, on 6th August 1890, brought the present action of multiplepoinding, calling as defenders Miss Boyd, James Dickie, as sole surviving accepting and acting trustee under James Wyllie's marriage-contract, and James Wyllie himself.

Claims were lodged by Miss Boyd and by Dickie.

Pleaded for Miss Boyd;—(2) The fund *in medio* having vested in, and being due and payable by the arrestees to the principal debtor at the date on which the claimant's arrestment was lodged, she is entitled to be ranked *primo loco* thereon in terms of her claim. (3) On a sound construction of the said antenuptial contract of marriage, the funds arrested are not conveyed thereby, and, *separatim*, not so conveyed as to defeat the arrestment of the claimant. (4) Said contract of marriage not having been on record, or duly and validly intimated to the real raisers in the present action, and, *separatim*, any intimation thereof having been made by a party or parties not *in titulo* to intimate it, the present claimant ought to be preferred and ranked in terms of her claim.

Pleaded for Dickie;—(1) The share of the estate of the said John Wyllie senior falling to the said James Wyllie under the foresaid trust-disposition and settlement, having been validly and effectually assigned by him to the trustees under the said antenuptial contract, and the said contract having been duly intimated, the right thereto is now vested in the claimant as the surviving and accepting trustee under that deed. (2) The pretended arrestment used by the said Jane Boyd in the hands of the trustees of the said deceased John Wyllie senior being posterior in date to the said antenuptial contract and intimations thereof, the same is inept and ineffectual, and did not attach or affect the foresaid share of the said estate, or any part thereof. (3) The claimant having exclusive right to the fund *in medio* as the surviving and accepting trustee under the said contract of marriage, he is entitled to be ranked and preferred in terms of his claim.

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A proof was allowed, the questions of fact in dispute being whether the trustees under the marriage-contract had ever truly accepted, and whether the marriage-contract had ever been intimated to the trustees under John Wyllie's settlement. The import of the proof on these questions will be found in the Lord Ordinary's opinion.

On 7th March 1891 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds that the share of the estate of the deceased John Wyllie destined by his trust-disposition and settlement to his son James Wyllie was effectually assigned to the trustees under the contract of marriage of the said James Wyllie, dated 20th October 1874, and that the assignation thereof was intimated to the pursuers, John Wyllie's trustees, before the date of the arrestments founded on by the claimant Miss Jane Boyd: Finds that the claimant James Dickie is sole surviving trustee under the said marriage-contract: Therefore, ranks and prefers the said James Dickie, as trustee foresaid, in terms of his claims, and decerns: Finds the said Miss Jane Boyd liable in the expenses of the competition," &c.*

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* "OPINION.— . . . The questions are (1) whether prior to her arrestment James Wyllie's interest in John Wyllie's estate had been effectually assigned to James Wyllie's marriage-contract trustees; and (2) whether, if so, that assignation was completed by intimation to John Wyllie's trustees before the date of the arrestment. If both these questions are answered in the affirmative, Miss Boyd's claim is excluded. If either were answered in the negative, she would be entitled to be preferred in terms of her claim.

"With regard to the former question it was contended (1) that James Wyllie's interest in his father's estate was not included in the conveyance to the trustees in the marriage-contract. The deed bears that James Wyllie conveyed all the effects then belonging to him, or which should belong to him at the time of his death. It was contended that this was not a conveyance of *acquirenda*, but a conveyance of the estate which belonged, or might belong, to James Wyllie at two specified dates, the date of the deed, and the date of his death,—and in support of that contention the case of *Champion* v. *Duncan*, 9th November 1867, 6 Macph. 17, was referred to. It was maintained that the share of John Wyllie's estate could not be carried as estate belonging to James Wyllie at the date of the marriage-contract, because his right to it had not then vested, nor as estate belonging to him at his death, because he was, and is still alive. I am inclined to regard the conveyance as equivalent to a conveyance of *acquisita et acquirenda*. The same words occurring in the marriage-contract under consideration in the case of *Buchanan's Trustees* v. *Whyte*, 25th February 1890, 17 R. (H. L.) 53, appear to have been so regarded. Still I think it would be difficult to hold that if this right was not carried at the date of the marriage-contract, it could be held to be carried at any later date, for instance at the date of vesting, and accordingly that was not maintained by the marriage-contract trustee, whose contention was that it was carried at the date of the marriage-contract, and I have come to think that contention well-founded.

"At that date it is true that James Wyllie had no vested right to any part of his father's estate. His interest in it was of the nature of a *spes successionis*. But it was not disputed that as such it was assignable.—*Kirklands* v. *Kirkland's Trustee*, 18th March 1886, 13 R. 798. An express assignation of a *spes successionis* would be effectual, and, when duly intimated, would place the assignee in the place of the cedent, entitled to be paid when the period of payment arrived. But in this case the *spes successionis* is not expressly mentioned. There is nothing but the general conveyance of the whole estate. That, I think, is capable of being construed as including a *spes successionis*, but could not, in my opinion, be held to do so according to its ordinary and primary import; and, accordingly, if the question depended on the words of the conveyance to the

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Miss Boyd reclaimed, and argued;—The *spes successionis* which James Wyllie had at the date of his marriage-contract was not carried by the trustees alone, I would have held that James Wyllie's share in his father's estate was not included.

"But the marriage-contract trustee referred, and I think legitimately, to the purposes of the trust. It is provided by the first purpose that the trustees are to hold certain heritable property specified, and 'also the share to which he (James Wyllie) is entitled of the trust-estate of his late father, John Wyllie,' for the purposes specified; and by the second purpose it is provided that they are to hold a policy of insurance effected with the Scottish Provident Institution, which is specially conveyed, and the proceeds of it, with the household furniture, 'and other means and effects of whatever description the same may be, belonging to the said James Wyllie,' for the said Agnes Kerr in liferent, and the children of the marriage in fee.

"It was argued, and I think rightly, that these provisions shew that James Wyllie intended to convey his share in his father's estate to his marriage-contract trustees, and meant to include that share under the general terms of the conveyance, either in the knowledge that his interest was only a *spes successionis*, or, what seems more likely, because he supposed that he had, or might have, a vested interest in it. In either case it appears to me that the conveyance of the whole effects belonging to him at that date would carry his interest in his father's estate, whatever it might be, if his intention that it should be so carried sufficiently appears from the deed itself. On the whole, on this point I think that the contention of the marriage-contract trustee, that James Wyllie's share in his father's estate was meant to be included, and was included, in the general conveyance to the marriage-contract trustees in the contract, is well founded.

"But it was contended (2) that the conveyance to the trustees was really as yet wholly ineffectual, because it was entirely testamentary and inoperative until the death of James Wyllie, the truster. I think there is difficulty about this point also, but I have come to the conclusion that it was intended to be operative from its date, and that the trust-disposition in the contract is not testamentary only. It has of course, like every marriage-contract, provisions regulating the succession to the estates; but the peculiarity which, as it appears to me, most favours the argument that the trust-conveyance is only testamentary is this, that there seem to be no trust purposes at all during James Wyllie's life. It is provided by the first purpose that the trustees shall after his death hold the heritable subjects specified, and the share of his father's estate, for the purposes specified. They are not directed or empowered to hold for him at all—in liferent, or fee, or otherwise—nor are they expressly directed to hold for anyone during his life. This strikes one as a singular peculiarity in a marriage-contract. But notwithstanding this peculiarity, I think that the deed must be regarded as being what it bears to be, a deed coming into operation and having effect from its date. It is expressed in words of *de præsenti* conveyance. The conveyance of Agnes Kerr's estate is not to trustees, but directly to James Wyllie, and there is no reason to question its immediate effect. The trust-conveyance comprehends, besides the general estate, a policy of insurance on James Wyllie's life. This is conveyed to the trustees by the same words which convey the general estate, and in reference to it the deed bears that James Wyllie 'has delivered up the said certificate or policy of assurance to be kept and used by the said trustees, as their own proper writ and evident.' It is difficult to hold that the policy did not pass immediately by the conveyance, and difficult to hold that, if it did, the same words of conveyance would not carry James Wyllie's whole estate. Considering the deed as a whole, I am of opinion that the conveyance to trustees was, according to its sound construction, a conveyance *inter vivos* which included James Wyllie's share in his father's estate. Analogous questions arose in the case of *Buchanan's Trustees* v. *Whyte*, where provisions in a marriage-contract, which were held in this Court to be testamentary, were held in the House of Lords to be operative from the date of the deed.

"(3) It was contended that the deed was ineffectual because undelivered. This

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conveyance in that contract. It was not specifically conveyed, and in this respect was in marked contrast with the policy of insurance, which

argument was pressed somewhat anxiously, but I feel some doubt whether I have correctly apprehended it, because the deed is an onerous bipartite contract, effectual according to its true extent without delivery. Besides, I apprehend that intimation would operate as delivery.—*M'Lurgs* v. *Blackwood*, 28th February 1680, M. 845, where an assignation intimated, but otherwise undelivered, was preferred to an arrestment. This question is therefore involved in the second general question, whether the assignation has been completed by intimation to John Wyllie's trustees.

"(4) It was contended that the trust in the marriage-contract never came into operation or existence at all, and was a mere unreality or pretence. To this point the proof has in part been directed, and the result is easily expressed.

"There were three trustees nominated, of whom two are dead, and James Dickie is the sole survivor. There was no written acceptance or meeting of trustees, no sederunt of the trust, no entry about that trust in Mr Dickie's books as agent of the trust. Nothing whatever was done in it unless it were the intimations after referred to. The reason was, as Mr Dickie explained, that the trustees had no duties and nothing to do during James Wyllie's life.

"Mr Dickie depones that he prepared the marriage-contract on the instructions of James Wyllie, that one of the trustees—John Wyllie, the truster's brother—had expressed his willingness to act, and that he had reason to believe that the other trustee was communicated with by James Wyllie, who, however, has not been examined as a witness, I hardly know why. This is certainly a singular state of matters, but I do not see that the deed would be inoperative, even if no trustees accepted. Whether a difficulty would arise as to intimation is a different question.

"But, seeing that Mr Dickie prepared the marriage-contract as James Wyllie's agent, I am disposed to think that, in the circumstances, his acceptance of the trust is to be presumed, and that he is entitled to hold himself forth as a trustee, and as now the sole remaining trustee, under the marriage-contract, as he is now doing.

"On these grounds, I answer in the affirmative this first question, Whether James Wyllie's share in his father's estate was effectually conveyed to his marriage-contract trustees?

"The second question is, Whether this conveyance was completed by intimation to John Wyllie's trustees before the date of Miss Boyd's arrestments?

"There is annexed to the marriage-contract a docquet, dated 25th February 1875, signed by the secretary of the Scottish Provident Institution, acknowledging intimation of the contract. The docquet does not state by whom the intimation was made, but Mr Dickie depones that he made it on behalf of the trustees under the marriage-contract. He does not say that he got any instructions from anyone to do so. There is an entry about it in Mr Dickie's ledger under the name of Mr James Wyllie, and I rather think that he considered that his instructions to prepare the marriage-contract included authority to make the assignations in it effectual by the necessary intimations, and if he thought so, I think that in the circumstances of this case he was right.

"It was not expressly maintained by Miss Boyd's counsel that the intimation to the insurance company was ineffectual. It is true that he had no concern with that intimation, but his argument seems to infer that it was inept. But I understand that such an acknowledgment by the debtor of intimation is probably the most ordinary way in which intimation is effected, and by which the debtor is interpelled from paying to the cedent, or to anyone in his right, and by which the assignee is effectually put in place of the cedent. *Newton Company* v. *Callogan & Company*, 23d November 1785, M. 850; Menzies' Lectures, 257.

"There are two entries in the sederunt-book of John Wyllie's trust which are referred to as proving intimation of the marriage-contract to John Wyllie's trustees. The one is dated 1st March 1875. It is averred in the record that the intimation was made by 'James Dickie, as agent for the trustees under

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was specifically mentioned in the dispositive clause; nor was it conveyed generically as a right of succession, and in that respect the conveyance on the wife's side was in contrast with it. It was conveyed only if a *spes successionis* could be described as "property now belonging" to Wyllie. But a *spes successionis* was not in any accurate sense "property," —it was not attachable by creditors,[1]—nor could it be accurately described "as now belonging to" anyone. The Lord Ordinary had interpreted the

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the marriage-contract, of whom he was one,' and the acknowledgment bears to be by James Dickie, as agent for the trustees of John Wyllie.

"The sederunt-book of John Wyllie's trust seems to have been irregularly kept, and this entry appears to be somewhat out of its proper date. A great part of the evidence is devoted to an attempt to expiscate this irregularity, quite idly, I humbly think, because nothing turns on the exact date of this intimation, or of the entry, and I see nothing whatever suspicious about it. It is said, however, that this intimation was never communicated to John Wyllie's trustees. I do not think it necessary to inquire into this point, because the marriage-contract trustee points to another minute, dated 3d October 1889, which bears that the agent directed attention to the prior entry, and proceeds, —"This entry had not been referred to since Mr Orr was assumed a trustee, and it was now brought to his knowledge, so that the intimation to the trustees may be complete.' This minute is signed by Mr Orr and Mr Paterson, then the surviving trustees of John Wyllie. The minute bears that a copy of the marriage-contract had been deposited with the papers of John Wyllie's trust.

"It thus appears that, at all events at 3d October 1889, which is early enough for the case of the marriage-contract trustee, the marriage-contract had been formally brought under the notice of John Wyllie's trustees.

"It was contended that there could be no effectual intimation, because there were no trustees of James Wyllie who could make the intimation. But I do not concur in that argument. It is not essential that the intimation shall be by the assignee. Reference was made to the case of *A* v. *B*, 25th January 1540, M. 843, in which it was expressly decided that intimation by the cedent was sufficient, although there had been no intimation by the assignee; and I may notice that the statutory schedule of a notarial intimation appended to the Transmission of Moveable Property Act, 1862 (25 and 26 Vict. cap. 85), does not bear on whose behalf the notary acted. Besides, I do not see any sufficient reason for denying to Mr Dickie the character of a trustee under James Wyllie's marriage-contract, and if he was a trustee, he was in 1889 the sole surviving trustee.

"I cannot distinguish between the intimation to the Scottish Provident Institution and the intimation to John Wyllie's trustees.

"If I could hold that at the date of these intimations there was no trustee under the marriage-contract trust, there might be a difficulty of another kind, because it might be said that there was no assignee who could take in the place of the cedent. I think that any such difficulty might be overcome, but it does not arise if I am right in holding that James Dickie was a trustee.

"It appears to me therefore that the effect of the conveyance and the intimation has been to place Mr Dickie, as sole trustee under James Wyllie's marriage-contract, as the creditor of John Wyllie's trustees, to whom they became bound to pay the share of the estate destined to James Wyllie when that share vested and was payable—that is, on 30th April 1890.

"It follows that Miss Boyd's claim, which is founded on the assumption that John Wyllie's trustees are debtors of James Wyllie and not of James Wyllie's marriage-contract trustees, falls to be repelled, and that these trustees are entitled to be preferred.

"It does not follow from this judgment that James Wyllie's estate has been placed beyond the reach of his creditors by the marriage-contract. No question of that kind has been argued or could have been raised in this case. I am only anxious to make it clear that I do not indicate any opinion on that point."

[1] Trappes v. Meredith, Nov. 3, 1871, 10 Macph. 38, 44 Scot. Jur. 25.

words of conveyance by reference to the purposes of the deed. But the first purpose, which was the one referred to, did not deal with a *spes successionis*, but with a "share" of Wyllie's father's estate; and necessarily so, because if Wyllie died before the interest, which at the date of the marriage was merely *in spe*, became vested in him, nothing would pass to the trustees or to Mrs Wyllie, and it was the assumption of this, as of the second purpose of the deed, that Wyllie should have died before it became operative. Obviously, therefore, the first purpose dealt with a vested right, not a *spes*. No doubt the conveyance was also of all property which should belong to Wyllie at his death, but it was settled that such words did not exclude the diligence of the husband's creditors as regarded property acquired by him after the date of the contract,[1] and an interest which, although it may have belonged to him at the date of the contract, had not been conveyed to him at that date, was plainly, in this respect, in the same position as property subsequently acquired by him. But admitting that the conveyance in point of form included this *spes successionis*, the conveyance was truly illusory; or rather, although it was in point of expression *per verba de præsenti*, it was in reality intended to have no operative effect until the dissolution of the marriage. The trustees had no duties whatever until then, and they would have no duties at all if Wyllie survived his wife and daughter, for the wife's conveyance was to him direct in the event of his surviving her. They were not even directed to pay the liferent of his estate to Wyllie. The real meaning of the contract was that until the dissolution of the marriage each spouse should remain *dominus* of his or her estate, which consequently remained open to the diligence of creditors, notwithstanding the formal conveyance to trustees.[2] At anyrate, the first purpose, that which was said to deal with the *spes successionis*, was testamentary only, not pactional, for the primary object of that purpose was a child of Wyllie by a former marriage.[3] Further, the marriage-contract trust had never come into existence —none of the trustees had accepted, not even Dickie, who truly had done nothing except prepare the deed. No doubt it might come into existence by the trustees accepting now, but the possibility of its existence was no bar to the diligence of creditors. Lastly, there had been no intimation to John Wyllie's trustees of the assignation to the marriage-contract trustees. It had not been proved that intimation had been made in point of fact, and, secondly, the marriage-contract trust being non-existent at the date of the alleged intimation, there was no assignee to take the place of the cedent.

The argument for Dickie sufficiently appears from the opinions of the Lord Ordinary and Lord Kinnear.[4]

At advising,—

LORD KINNEAR.—The first question we have to consider in this case is, whether the share of the estate of the deceased John Wyllie was effectually assigned to the trustees under James Wyllie's contract of marriage. And upon that question I agree with the Lord Ordinary.

James Wyllie was entitled to a certain share of his father's estate, but the parties are agreed that the right did not vest until the 30th April 1890. James

[1] Champion v. Duncan, Nov. 9, 1867, 6 Macph. 17, 40 Scot. Jur. 17.
[2] Grant v. Robertson, June 15, 1872, 10 Macph. 804, 44 Scot. Jur. 547.
[3] Costine's Trustees v. Costine, March 19, 1878, 5 R. 782, March 20, 1879, 6 R. (H. L.) 13.
[4] *Additional authority.*—Forrest v. Robertson's Trustees, Oct. 27, 1876, 4 R. 22.

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Wyllie's marriage-contract was executed in 1874, while the right was still *in spe*, but it is settled law that an expectancy of this kind may be effectually assigned so as to give a valid title to the assignee when the right comes to be vested. The only question therefore is, whether upon the construction of this marriage-contract there is an effectual assignation of the expectant right in question? Now, the husband by the terms of the marriage-contract assigns and conveys to the trustees the real and personal property of every description now belonging or which shall belong to him at the time of his decease. I cannot say that I altogether agree with the Lord Ordinary in thinking that that is a conveyance of *acquisita et acquirenda* in the ordinary technical signification of these words, because that would mean that the husband had given the marriage-contract trustees not only everything of which he was possessed at the date of the contract, and everything in addition which he might leave behind him at his death, but also anything which he might acquire in any manner of way during the intermediate period between the marriage and his death, so as to deprive himself of all right of property and all power of control over other property that might come to him during that intermediate period. I do not think that is the meaning of the conveyance. It is said that these words, which are of not infrequent occurrence, have a technical meaning in our law, but it appears to me that although their significance is perfectly well fixed, it is simply the natural meaning of the words, as words of ordinary language, and when the marriage-contract settles everything now belonging to him and also everything that shall belong to him at his death—he conveys exactly what he says—the property that belongs to him at the date of the contract and also what shall be found to belong to him at his death, but he does not deprive himself of any right of property or power of control in subjects he may acquire after the date of the marriage-contract during his lifetime, and accordingly the property which belongs to him at his death and which he has acquired after the date of the marriage-contract will be subject to all the debts which he may have contracted during his lifetime. Therefore it is quite indispensable that we should consider in this case whether the *spes successionis* now in question is carried to the marriage-contract trustees under the description of property belonging to the husband at the date of the contract, or only under the description of the property which shall be found to belong to him at the date of his death, because if the latter were the true construction of the words, then it would be impossible to sustain the right of the marriage-contract trustees in the meantime to carry off the fund to the exclusion of the husband's creditors.

Now, that appears to me to be a question of construction which must be considered by the ordinary rules for construing a contract. It is said that the words "property now belonging to me" cannot cover any interest which is not vested at the time the granter of the deed is supposed to be speaking. It appears to me that the words are words of ordinary language, and are quite effectual to cover any interest of the kind which it appears, upon the construction of the whole contract, and of this clause taken with the context, the party intended them to convey. Now, it is clear enough that the husband in this case supposed himself to be dealing with his interest in his father's succession as a right which he was entitled to dispose of, and in that respect he was perfectly right, because although it could not become finally vested in him until his survivance at a particular date, still it was a right which was undoubtedly subject to disposal. Reading the purposes to which the trustees are to assign the subjects conveyed

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to them, it would appear to me that the natural inference from the words employed in that clause is that the husband did intend to convey this particular right, because when he comes to direct the trustees as to what they are to do with the subjects assigned to them, he says, first, that the said trustees shall, after the death of the said James Wyllie, hold certain properties, which undoubtedly belonged to him at the time—heritable properties—and also the share to which he was entitled of the trust-estate of his late father, for certain purposes expressed, and therefore he begins by tying up these two properties together—his right of succession to his father's estate, which he assumes he is entitled to convey, and the property which did undoubtedly belong to him. But then it is said—and it is a point that requires consideration—that when he goes on to tell his trustees what they are to do with the property conveyed to them, it is clear enough that he does not contemplate that anything is to be done with it until after his death, and therefore it is said it cannot be supposed that he could make an immediate conveyance of it to his trustees at all. The trust purposes are that they are to hold these two estates together for behoof of his daughter, and to give her the income so long as she shall be in minority after his death, and then, upon her majority or marriage, to settle the fee upon her under certain conditions; and in the event of her dying without leaving children, or the issue of such children before receiving a conveyance of these properties, then to hold the properties in question for behoof of his second wife, with whom he was making this contract of marriage. The only importance of that consideration is as an indication of intention to postpone the conveyance until the death of the husband.

If the intention to make an immediate assignation during his life is clearly expressed, then no practical difficulty arises from the limitation of the trust purposes to a period occurring after his death, because it is a settled doctrine of the law that where funds are put in trust for limited and defined purposes which do not exhaust the fund, the unexhausted portion results to the granter of the trust and his representatives, and therefore if the husband in this case intended to assign his share of his father's succession to the trustees by an immediately effectual conveyance, and yet told them only how they were to dispose of it in favour of his daughter or his wife after his death, there would necessarily arise a resulting trust for him so far as regards the income accruing from the estate during his lifetime. The point which is here made upon this peculiarity of the trust is certainly, as I have said, one that requires consideration, but I think the inference which might otherwise have been drawn from it is entirely displaced when one reads the whole purposes of the trust together, because when the first purpose and the second are read together it is perfectly clear that the truster intended that the two estates which he places together under the trust are to be treated as separate and distinct subjects, to be kept free from any debts he may contract during his life, and that the rest of his property which is to come to his trustees at his death under the conveyance of what shall then belong to him is to be the only property which will remain in his own hands subject to debts contracted by him during his life. I think that is clear enough. In the first place, he begins by making a specific direction that the trustees shall hold—that is, of course, from the moment of the assignation to them becoming effectual—the two properties which he specially mentions, and then he goes on to say that the trustees are to hold a certain policy of insurance and the proceeds and produce thereof, and the whole other means and effects of whatsoever descrip-

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tion which may belong to James Wyllie after payment of his debts and the expenses of the trust; and therefore it seems to me to be clear that he makes a *de præsenti* assignation of two estates,—the estate which belongs to him at the time of the contract, including his expectant right in his father's estate, to become immediately effectual and free from any power of control or interference of his, and another estate,—whatever belongs to him at the date of his death, including the policy of insurance, which will remain in his hands subject to the debts he may contract during his life.

I therefore agree entirely with the Lord Ordinary in the conclusion at which he has arrived as to the meaning and effect of the marriage-contract; but there are a number of other points which have been raised, which his Lordship considers very minutely and carefully in his opinion, upon the effect of this contract, assuming it to bear the interpretation which he puts upon it. It is said, in the first place, that it has never been delivered, and I think the Lord Ordinary's answer to that is quite conclusive, because a mutual contract requires no delivery. But then it appears to have been argued, and it was also argued before us, that upon other grounds it was ineffectual as an assignation. It was said that the trustees had never accepted, and, as the Lord Ordinary puts it, that the trust was really never effectual upon that ground. Now, it does not appear to me necessary to consider at all the various grounds upon which the Lord Ordinary, quite satisfactorily, I think, meets that argument, because there is one point which is very conclusive. It is of no consequence that the trustees accepted the trust so committed them, because it is quite certain the surviving trustee has now accepted it, and makes this claim in the performance of his duty for the purpose of making it effectual, and I cannot see how the question of the time at which the trust may have been accepted previously to the institution of this action has any bearing at all upon the question of its validity and effect now that we know that the trustees are seeking to enforce it. But then a third point remains, because it is contended for the reclaimers that although the trust is effectual the assignation to the trustees cannot prevail against the other claimants' arrestments, because it has never been duly intimated. Upon that question also it appears to me that there are a good many points which have been suggested as points of difficulty, and which the Lord Ordinary deals with, which really create no difficulty at all. It is quite sufficient, as his Lordship points out, that the sederunt-book of John Wyllie's trust bears that the attention of the trustees had been directed by the agent to a certain previous intimation, so that it might now be brought to the knowledge of a new trustee that the assignation in question had been intimated, and in order that that intimation might be complete. I am speaking of course of the trustees of the deceased John Wyllie, who were the debtors in this obligation, which was to be made effectual by intimation to them of James Wyllie's assignation of his right as against them. I entirely agree with the Lord Ordinary in what he has said upon that question, and I am therefore of opinion that the claim of the trustees in respect of an assignation which has been duly intimated has been rightly sustained by his Lordship.

Their claim, or rather the claim of the sole surviving trustee, is of course to hold the money for the purposes of the trust, and that is so expressed. No question was raised before us as to the right of the arresting creditor to any portion of the estate except the entire fee or capital of the right of succession, and therefore no question of that kind appears to arise, but it may be well to

observe that nothing that is done by this judgment can affect in any way the right of the husband's creditors to the income coming due to him during his life. Of course the ground upon which we proceed is this,—that he has effectually conveyed the fund to trustees for certain purposes, but that one trust purpose is during his own lifetime to make good the income of the estate to himself.

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LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

THE COURT adhered.

DOVE & LOCKHART, S.S.C.—JAMES RUSSELL, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

GENERAL JAMES CLERK RATTRAY AND ANOTHER (Sir James and Lady Stewart Richardson's Trustees), Petitioners.—*Sym.*
JOHN RANKINE, Compearer.—*Cosens.*

No. 211.
July 11, 1891.
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Writ—Authentication—Conveyancing Act, 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 39.—The testing-clause of a recorded disposition of heritage bore, *inter alia*, that the disposition had been subscribed by Hugh James Rollo (one of the granters) "before these witnesses, William Robertson, apprentice, and John Alexander James, clerk, both to me, the said Hugh James Rollo." The subscription of one of the witnesses to what bore to be Rollo's subscription was "William Roberton, witness." A proof, allowed in a petition under the 39th section of the Conveyancing Act, 1874, established that William Roberton, apprentice to Rollo, had attested Rollo's subscription by subscribing the words "William Roberton, witness," appearing on the disposition in question. *Held* that, the discrepancy between "Robertson" and "Roberton" was an informality of execution within the meaning of the 39th section of the Act, that that section therefore applied, and, looking to the proof, that the petition fell to be granted.

THIS was an application for a declarator under sec. 39 of the Conveyancing Act, 1874,* presented in the following circumstances, as appearing from the petition:— 1ST DIVISION. C.

By disposition and conveyance dated 27th November and 7th December 1874, and 10th March 1875, Sir James Horn Burnett, of Leys, and Hugh James Rollo, W.S., the trustees under the trust-disposition and settlement of the late Dean Ramsay, disponed and conveyed certain heritable subjects in Ainslie Place, Edinburgh, to the trustees under the marriage-contract of Sir James Stewart Richardson, of Pitfour, and Lady Richardson. The testing-clause of the disposition bore, *inter alia*, that the deed was subscribed "by me, the said Hugh James Rollo, at Edinburgh, the 10th day of March 1875 years, before these witnesses, William Robertson, apprentice,

* The Conveyancing Act, 1874 (37 and 38 Vict. cap. 94), sec. 39, enacts,—"No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution; but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same; and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

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and John Alexander James, clerk, both to me, the said James Rollo." The subscription of one of the witnesses to the signature of Mr Rollo was "William Roberton, witness," as to the other there was no dispute. Richardson's trustees having sold the subjects conveyed to them, the purchaser objected to the title offered in consequence of the discrepancy between the surname "Robertson" in the testing-clause, and the surname "Roberton" in the signature; and the present application was accordingly presented by Richardson's trustees. Sir James Burnett and Mr Rollo were both dead by this time.

A proof was allowed.*

Argued for the petitioners;—It might be that had this case occurred before the Conveyancing Act of 1874, the present objection would have been fatal to the deed, because it might be said that there was a substantial variance between the name in the testing-clause and the name subscribed.[1] It was, however, nothing more than an informality of execution; the case therefore was within the Act, and the proof having established that William Roberton had in fact subscribed as instrumentary witness to Mr Rollo's signature, the petition ought to be granted.[2]

Cosens appeared for Mr John Rankine, the purchaser, and stated that he did not desire to offer any argument.

LORD PRESIDENT.—As no argument was offered to us on behalf of the purchaser, we may take it that he is quite satisfied with the title offered, if he has a declarator by the Court in terms of the Act. I have no doubt that the Act applies to a case like the present, and looking to the evidence, I think that we should grant the declaration prayed for.

LORD ADAM.—I am of the same opinion. I think that the petitioner has proved that this deed was subscribed by the granter or maker thereof, and by the witnesses by whom it bears to be attested. That being proved in point of fact, the Act says that the Court may declare that the deed was subscribed by such granter or maker and witnesses. I am therefore disposed to think that the case falls within the Act. The objection which has been stated is a very technical one. It is, that the Act was intended to remedy informalities of execution only, and that what we have here to deal with is not an informality of execution but a discrepancy—a discrepancy between the signature of one of the witnesses and the statement of his name in the testing-clause. It is therefore said that the Act does not apply. Now, I do not think that is a substantial objection. If there had been no testing-clause at all, the petitioner would have

* William Roberton deponed that he had been in the office of Mr Rollo in 1875,—"I remember generally the disposition being sent to Sir James H. Burnett, and coming back to Mr Rollo. I knew Mr Rollo's signature well. I signed as one of the instrumentary witnesses to Mr Rollo's signature. The subscription, 'Wm. Roberton, witness,' is mine. It was appended by me at the time Mr Rollo executed the disposition, which he did in my presence. I produce the draft of the deed having the instructions of the testing-clause. My name is properly spelt in the directions for filling up the deed. The schedule of directions, so far as applicable to Mr Rollo's signature, was filled up by me. There was no William Robertson in Mr Rollo's office at that time."

John Alexander James corroborated the evidence of this witness.

[1] M'Dougall v. M'Dougall, June 15, 1875, 2 R. 814, per Lord Justice-Clerk Moncreiff, at p. 821.

[2] M'Laren v. Menzies, July 20, 1876, 3 R. 1151; Addison, Feb. 23, 1875, 2 R. 457; Thomson's Trustees v. Easson, Nov. 2, 1878, 6 R. 141.

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been entitled to take advantage of the Act, and I do not see now how he can be in a worse position by reason of its being a mistake in the testing-clause.

LORD M'LAREN.—This is a remedial statute. In the absence therefore of any clearly limitative words, it must be interpreted so as to make the remedy co-extensive with the mischief which it is intended to remedy. Two different cases may be figured. The first is where the granter of the deed is himself looking after the due execution of the deed—in that case he will himself take care that the testing-clause is properly filled in. But the other, and by far the more common case occurs where the deed is presented by the granter's solicitor for signature, and is taken away by him after it has been subscribed, so that it is never seen by the granter after he has subscribed it. Everything has been done so far as the granter is concerned, yet, under the operation of our older law, the deed might have been annulled, if there had been a failure to supply a testing-clause. The statute applies to remedy the evil resulting from the omission of a testing-clause, and I can see no reason why it should not also apply to the case of a blundered testing-clause. It seems to me that a blundered testing-clause is an informality of execution within the meaning of the Act, assuming that a blunder such as we have here would have invalidated the deed at common law.

LORD KINNEAR.—I entirely agree. I cannot see any reason to doubt that the statute applies to the present case.

THE COURT pronounced the following interlocutor:—"Declare that the said disposition and conveyance was subscribed by the said Sir James Horn Burnett [the interlocutor then set forth the portion of the testing-clause as to which there was no dispute], and by the said Hugh James Rollo, at Edinburgh, the 10th day of March 1875 years, before these witnesses—William Roberton, apprentice, and John Alexander James, clerk, both to the said Hugh James Rollo, being the witnesses by whom the said disposition and conveyance bears to be attested: Further, grant warrant to the Keeper of the General Register of Sasines to record in said register the declaration now granted."

COVENTRY & ROBERTON, W.S.—ROMANES & SIMSON, W.S.—Agents.

No. 212.
July 14, 1891.
Adamson's Trustees v. Adamson's Executors.

DAVID FAIRWEATHER AND OTHERS (Adamson's Trustees), First Parties.—*Macfarlane—Graham Stewart.*
DAVID FAIRWEATHER AND OTHERS (Adamson's Executors), Second Parties.—*Macfarlane—Graham Stewart.*
MRS ELIZABETH M. FAIRWEATHER OR ADAMSON, Third Party.—*Guthrie.*
MRS ELIZABETH THOMSON OR ADAMSON, Fourth Party.—*Shaw—Salvesen.*
DAVID FAIRWEATHER AND OTHERS (John Adamson's Tutors and Curators), Fifth Parties.—*Macfarlane—Graham Stewart.*

Succession—Will—Revocation—Conditio si testator sine liberis decesserit.—*Held* that the *conditio si testator sine liberis decesserit* did not apply to a will in respect (1) that it was executed by the testator in the knowledge that his wife was pregnant, and (2) that it was not a general disposition disposing of the *universitas* of his estate.

Succession—Annuity—Preference.—A testator left to his wife an annuity of £400, and to his mother, "if my estate will permit," an annuity of £100. He left no other testamentary provision. *Held* that both annuities were payable out of capital, but that the annuity to the wife was preferable to that of the mother.

Succession—Partnership—Payment of profits, so far as necessary, to execu-

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tors of deceased partner for behoof of widow and children.—A contract of copartnery provided that if either of the two partners should die during the continuance of the partnership "leaving a widow, child, or children" surviving him, the surviving partner should, for a period of six months from the date of the deceased partner's death, pay to the latter's executors, "for the benefit of his widow, child, or children, the share of profits to which the said deceased partner would have been entitled had he lived."

One of the partners having died leaving a widow and one child, *held* that the share of the profits payable under the contract of copartnership did not form part of the deceased partner's executry estate, but fell to be equally divided between his wife and child.

2D DIVISION. C.

BY antenuptial contract of marriage, executed in Scotland in 1889, John Adamson, of the British India Steam Navigation Company at Negapatam, bound himself to pay to his wife, in the event of her surviving him, a free liferent alimentary annuity of £200. He also bound himself to pay to her certain sums for furniture and mournings. In security of these obligations Mr Adamson conveyed certain estate to the trustees to be held by them, *inter alia*, for securing and paying the foresaid annuity and other provisions for his wife, if she should survive him, and subject to these purposes, the trustees were to hold the capital of the trust funds for behoof of the child or children of the marriage. The wife on her part made certain provisions. The deed further contained this clause,—"And which provision by the said John Adamson, hereinbefore written, in favour of the said Elizabeth Mary Fairweather, she hereby accepts as in full of all terce of lands, half or third of moveables, and every other claim or provision which she could by law ask or demand upon his death if she survive him: And further, the provisions before written in favour of the child or children of the marriage are hereby declared by the contracting parties to be in full satisfaction to all and each of such child or children of all legitim, executry, bairns' part of gear, and everything else he, she, or they could claim upon the death of the said John Adamson and Elizabeth Mary Fairweather, or either of them, excepting only their goodwill; and that the said issue may succeed to them, or either of them, in any estate or property at their or his or her disposal at death, and not otherwise disposed of."

Mr Adamson died on 19th May 1890 survived by his wife and mother. At the time of his death there were no children of the marriage, but a posthumous child, John Adamson, was born on 15th August 1890.

Mr Adamson left a will, dated 21st May 1889, which was in the following terms:—"I, John Adamson, residing in Negapatam, considering that by marriage-contract I have provided for my wife, Mrs Elizabeth Mary Fairweather or Adamson, in case she shall survive me, a free yearly annuity of £200 sterling per annum, and now, for certain good causes, I desire to make a farther provision for her, in the event of her surviving me, I hereby by these presents leave and bequeath to her a farther sum of £200 sterling per annum, and that in addition to above mentioned provision and all others narrated in our marriage-contract: I desire also and do by these presents leave and bequeath to my mother, Mrs Elizabeth Thomson or Adamson, in case she shall survive me, a free liferent use of Clydesdale Cottage, Brechin, presently occupied by her, with the whole furniture therein belonging to me, and in addition thereto, if my estate will permit, a free yearly annuity of £100 sterling as long as she shall live," &c.

At the time of his death Mr Adamson was in partnership with Mr Henry Mactaggart under a contract of copartnership, dated 1st January 1887, by the 22d article of which it was provided as follows:—"If either

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f the said partners shall die during the continuance of the said partnership leaving a widow, child, or children him surviving, the surviving artner shall, for a period of six months from the date of decease of said artner, pay to the executors or administrators of said deceased partner, or the benefit of the widow, child, or children, the share of profits to which he said deceased partner would have been entitled had he lived (in addition to the monies to which they will be entitled under article twentieth)" *i.e.*, the share to which the deceased partner would be entitled out of the artnership effects at the winding-up of the partnership], "such payment o be made as soon after the expiry of the six months from the date of lecease of said partner as a proper account can be made up."

After Mr Adamson's death doubts arose as to the true effect and neaning of the settlements and as to the legal distribution of his estate.

A special case was accordingly presented to the Court by (1) the marriage-contract trustees, (2) the executors under the will, (3) Mr Adamson's widow, (4) his mother, and (5) the tutors and curators of his posthumous son.

The following statements appeared in the case:—"At the date when the said will was executed the third party was pregnant, and was known by her husband to be so. She was delivered prematurely of still-born twin children on 21st August 1889. . . . Mr Adamson's domicile at the time of his marriage was in Scotland, and it continued so until his death. . . . Mr Adamson's estate, with the exception of the house called Clydesdale Cottage, mentioned in the will of 21st May 1889, is entirely moveable. The estate conveyed in trust by the marriage-contract, and now held by the trustees, amounts, after deducting the widow's claims for mournings and furniture, to about £5200, and is thus barely sufficient to meet the expenses of management and the annuity therein provided to the third party. The testamentary estate is almost wholly situated in India, and has not yet been realised. It is estimated at the present rate of exchange to amount to about £7500, and it is thus doubtful whether it will be sufficient to meet out of income the annuities in favour of the third and fourth parties provided by said will. The value of Clydesdale Cottage is estimated at £650."

The following questions were put:—"3. Is the will of 21st May 1889 revoked by the birth of said child? 4. In the event of the third question being answered in the negative, do the annuities thereby provided in favour of Mr Adamson's widow and mother rank *pari passu*, or is the annuity in favour of his widow preferable; and are either or both of said annuities payable only out of income, or, if that prove insufficient, may they or either of them be paid out of capital? 5. Do said profits of copartnership form part of the deceased's general executry estate; or do they fall to be divided between the third and fifth parties, and if so in what proportions? 6. In the event of the third question being answered in the negative, and of its being held that part of said profits fall to be paid to the third party, does said part fall to be attributed *pro tanto* towards payment of the annuity provided for the third party by the will of 21st May 1889?"

Argued for the fifth parties;—The *conditio si testator sine liberis decesserit* came into operation upon the birth of the child, and its effect was absolutely to revoke the will.[1] No doubt in the earlier cases such as *Yule* v. *Yule*[2] there were *dicta* to the effect that the presumption arising

[1] Colquhoun v. Campbell, June 5, 1829, 7 S. 709, 1 Scot. Jur. 248; Dobie's Trustee v. Pritchard, Oct. 19, 1887, 15 R. 2; Munro's Executors v. Munro, Nov. 18, 1890, 18 R. 122.

[2] Yule v. Yule, Dec. 20, 1758, M. 6400.

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from the *conditio* might be rebutted where two elements concurred, viz.:—(1) Where the testator survived the birth of his child for a sufficiently long time; and (2) where his settlement was only a partial one, and did not dispose of a substantial portion of his estate. It had been doubted, however, whether the first element could receive consideration at all,[1] and as regarded the second element it could not be here said the testator had not disposed of a substantial portion of his estate, for if the annuities were payable out of capital and the estate failed to realise well, the annuities might carry away the whole estate from the child. The fact that there were provisions in the child's favour in the marriage-contract did not exclude the application of the rule, for such provisions existed in *Dobie's Trustee* v. *Pritchard* and *Munro's Executors* v. *Munro*. The will then being revoked, the whole means and estate of the deceased fell to the son as sole heir of his father.

The fifth parties maintained alternatively in the event of its being held that the *conditio* did not apply and that the will stood, that the annuities were only payable out of the income of the estate, and that the profits of the copartnership were part of the general executry of the deceased, and fell to be apportioned between the widow and the child according to the ordinary rules of intestate succession, the widow's share, however, falling to be attributed towards payment of her annuity.

Argued for the third party;—The *conditio* was a mere presumption founded on the *pietas paterna*, and yielded to facts and circumstances from which the testator's intention to retain his will unaltered could be inferred. There were such facts and circumstances here. It was admitted that the testator knew his wife was pregnant when he executed his will, and the will was only a partial settlement of his estate.[2] The judgments in the cases of *Colquhoun, Monro's Executors*, and *Dobie's Trustee* proceeded on the footing that the will made by the testator was a general disposition of his whole estate executed at a time when he had not before his mind the possibility of his ever having children.

Upon question 4, the third party argued that the annuity payable to her was upon the terms of the will preferable to that to the testator's mother, and in the event of the income proving insufficient it fell to be paid out of the capital.[3]

Question 5. There was no mention in the contract of copartnership of any principle of division, and the profits fell to be divided equally between her and her child.

Question 6. She was entitled to receive her share in addition to the annuities payable to her under the marriage-contract and the will.

The fourth party adopted the argument submitted by the third party as to the operation of the *conditio*, and further maintained that her annuity and that of the widow fell to be paid out of capital if the income proved insufficient to meet both annuities. On the sixth question, she maintained that the copartnery profits fell into the general executry of the deceased for the benefit of the widow and child, and that the widow's share must be imputed towards payment of her annuity.

At advising,—

LORD JUSTICE-CLERK.—The third question is, whether, in respect that the testator's wife bore a child after the execution of the will of 21st May 1889, that settlement is thereby revoked? The peculiar circumstance in the case is

[1] Dobie's Trustee v. Pritchard, per Lord Rutherfurd Clark, 15 R. p. 4.

[2] Bell's Lectures on Conveyancing, vol. ii. p. 981; Yule v. Yule, *vide supra*, p. 1135, note 2.

[3] Thomson v. Thomson's Trustees, July 10, 1868, 5 S. L. R. 742.

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that Mrs Adamson, who had previously given birth to still-born twin children, was at the date of the testator's death six months advanced in pregnancy, the child in question being born three months after his father's death.

It is first necessary to consider what is the nature of the settlement of 1889. Was it a settlement which disposed of the testator's whole estate, and which in its essence and effect ought to be affected by the subsequent birth of a child to the testator?

The deed contains two provisions, both essentially of the nature of legacies. The testator provides a further annuity to his wife in addition to the annuity already provided to her by the marriage-contract, and also expresses the desire that his mother should have the free liferent use of a cottage belonging to him, and if his estate would permit of it, a free yearly annuity of £100. The testator does not dispose or intend to dispose of the *universitas* of his estate, but makes certain provisions of the nature of legacies, namely, an additional annuity to his wife, and a reasonable provision for the support of his mother. It is admitted in the case that at the time he executed this will the testator was aware that there was an immediate likelihood of his having a child, and I imagine that he did not think that he was by the execution of this will depriving his child of its interest in his estate. The mother was the child's natural guardian in the event of his death, and as she had a good income provided to her under the marriage-contract and the will, in addition to the sum to be received by her from her husband's partner, which I shall have afterwards to mention, he might fairly conclude that the child's interests would be well taken care of.

I am therefore of opinion that the will was not revoked by the subequent birth of the child, and that we must answer this question in the negative.

With regard to the next question, I may explain that the annuity to the testator's mother is provided only if the estate permit of it—that is to say, after carrying out the provisions otherwise directed—and that the trustees would not be justified in trenching on the annuity to the testator's widow in order to pay the annuity to his mother.

With regard to the fifth question, it was provided by the contract of copartnery between the testator and his partner in business, that if either of the partners should die during the continuance of the partnership, leaving a widow or children surviving him, the surviving partner should, for a period of six months from the date of the deceasing partner's death, "pay to the executors or administrators of said deceased partner, for the benefit of the widow, child, or children, the share of profits to which the said deceased partner would have been entitled had he lived." The amount of the fund payable under this article is, we are told, about £800, and the question is how it is to be dealt with. Is it to fall into executry, or to be disposed of in a particular manner? It appears to me, that looking to the terms of the clause in the contract of copartnery, it comes into the hands of the deceased partner's executors for the benefit of his widow and child, and falls to be divided into two equal portions, and that one of these portions must be paid to the widow and the other to the child.

The last question is, whether the widow's share of the sum to be paid under the clause of the contract of copartnery is to be impounded by the executors in order to be added to the fund out of which the annuity provided to her by the will is payable, or whether she is entitled to her share of this sum in addition to that annuity? I am of opinion that the latter is the true answer, and that

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the widow is entitled to have her share of this sum paid over to her, and that it does not fall to be impounded by the executors to form part of the fund out of which her annuity is payable.

LORD YOUNG.—I agree in regard to the answer to be given to the third question. I think the will is not revoked either as to the increased annuity thereby given to the testator's wife or as to the provisions to the mother.

With respect to the fourth question, my view is that the widow is entitled to the annuity of £200, increased to £400, absolutely, and that the whole estate, income and capital, must go to meet that in the first instance.

In regard to the annuity provided to the testator's mother, I see nothing to limit that provision and make it payable only out of the income of the estate. The words "if my estate permit" mean that the annuity to the widow is to be paid first, and that till it is paid the estate can afford nothing; but if after meeting the widow's annuity and the testator's debts, there is enough left to provide an annuity of £100 to the testator's mother, she is entitled to have it, and we are informed that there will be no difficulty about it, the estate being sufficient to meet both annuities.

On the other questions I agree with your Lordship.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER was absent.

THE COURT pronounced this interlocutor:—"Answer the third question in the negative: Find in answer to the fourth question that the third party's annuity is not liable to be diminished should there not be sufficient funds to meet both the annuities to the third and fourth parties; also that the payment of the annuities is not limited to the income of the estate, but may, to the extent to which that may be necessary, be paid out of capital: Answer the first alternative of the fifth question in the negative, and the second alternative in the affirmative, and find that the property in question falls to be divided equally between the third and fifth parties: Answer the sixth question in the negative."

JOHN CLERK BRODIE & SONS, W.S.—DUNCAN & BLACK, W.S.—CAIRNS, M'INTOSH, & MORTON, W.S.—Agents.

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Home's Trustees.

THOMAS RIDDELL AND ANOTHER (Home's Trustees), First Parties. ISABELLA CATHERINE RUSSELL OR HOME (William Home's Executrix), Second Party.—*C. S. Dickson—C. K. Mackenzie.* JOHN WADDELL AND OTHERS (Patrick Home's Next of Kin), Third Parties.—*Lorimer.*

Succession—Vesting—Trust—Direction to convey to beneficiary on occurrence of a certain event.—A testator directed his trustees to pay certain legacies and annuities, and to pay the interest of the residue, "after deducting the foregoing bequests and annuities," to his widow during her life, "and at the death of the said" widow and the other annuitants, "I request my trustees to divide the said residue into nine equal shares, and to pay one ninth share to" a nephew, and the remaining shares to other persons. The nephew predeceased the widow. *Held* that the share of residue had vested in the nephew at the testator's death.

2D DIVISION. M.

PATRICK HOME died on 16th August 1879 survived by his wife. He had no children. He left a trust-disposition and settlement by which he conveyed his whole means and estate to Thomas Riddell and James Honeyman Smith, as trustees. The purposes of the trust were, *inter alia*,

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for payment to Mrs Home of certain marriage-contract provisions, and an additional annuity of £340, and of a liferent of the testator's house and furniture. After directing payment of certain legacies and annuities, the testator provided, in the ninth purpose, "I ordain my said trustees to pay the interest of the residue of my means and estate, after deducting the foregoing bequests and annuities, to the said Catherine Home, my wife, during all the days of her life; and at the death of the said Catherine Home and the other annuitants above named, I request my said trustees to divide the said residue into nine equal shares, and to pay one ninth share to the said William Home," a nephew of the testator.

The remaining equal shares were to be conveyed to certain other legatees.

William Home died on 3d February 1885 leaving a will. The truster's widow, the liferenter, survived till 29th January 1891. All the annuitants had predeceased the testator.

After her death a question arose between William Home's executor, on the one hand, and the next of kin of Patrick Home, the testator, on the other hand, as to whether the one-ninth share of the residue of Patrick Home's estate, directed to be conveyed to William Home, had vested in him, or had lapsed in consequence of his predeceasing the liferenter.

A special case was stated putting this question,—"Did the one-ninth share of residue bequeathed to William Home vest in him *a morte testatoris*, or did it lapse by reason of the said William Home having predeceased the liferenter?"

Argued for William Home's executor;—The share vested in William Home. The presumption was for vesting, and there was nothing to restrain its effect. It was true that the division of residue into shares and the payment of them were to be made "at the death of the said Catherine Home and the other annuitants," but that was simply to ensure that the annuities should not be defeated. The doctrine of *Bryson's Trustee* v. *Clark*[1] could not, as explained in *Hay's Trustees*, apply, for it applied where there were two elements—(1) nothing expressed in favour of the beneficiary except a direction to convey on the occurrence of a future event, and (2) failing him, to other persons as substitutes.[2] The latter element was here absent.

Argued for Patrick Home's next of kin;—The provision lapsed by William Home predeceasing the event on which only he was entitled to a conveyance. Not the time of conveyance, but the right itself was conditional upon that event. As was said in *Bryson's Trustees*, which was recently followed in *Forbes' Trustees* v. *M'Condach's Trustees*,[3] "nothing was expressed in favour of the beneficiary," William Home, "except a direction to convey to him on the occurrence of" Mrs Patrick Home's decease. He predeceased that event, and therefore nothing vested in him.

THE COURT, holding that the case of *Bryson's Trustees* v. *Clark* did not apply, found that the ninth share of residue bequeathed to William Home vested in him *a morte testatoris*.

GRAHAM, JOHNSTON, & FLEMING, W.S.—SIMPSON & MARWICK, W.S.—Agents.

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[1] Nov. 26, 1880, 8 R. 142.
[2] Hay's Trustees v. Hay, June 19, 1890, 17 R. 961.
[3] Dec. 12, 1890, 18 R. 230.

No. 214. EDINBURGH NORTHERN TRAMWAYS COMPANY, Pursuers (Respondents).—*Murray—Salvesen.*

G. V. MANN AND ANOTHER, Defenders (Reclaimers).—*Johnston—Ure.*

July 14, 1891.* Edinburgh Northern Tramways Co. v. Mann.

Company—Preliminary expenses—Promotion-money—Liability to account—Personal bar.—A public company, formed for the purpose of introducing a new system of tramways in Edinburgh, entered into an agreement with contractors for the execution of the works at a certain price, one provision being that the expenses of procuring the Act should be met by the contractors. M. and B., the company's solicitor and engineer, who had also been its chief promoters, on the next day executed a second agreement with the contractors on their own behalf, by which they undertook to relieve the contractors of their obligation for expenses in consideration of a sum of £17,000.

The company having brought an action some years afterwards calling M. and B. to account for any moneys received by them under that agreement, the defenders pleaded, *inter alia*, that the transaction had been known to the company, or to all who were members of it at the time, and that the company was therefore barred from now challenging it.

Held that the defenders' fiduciary relation to the company precluded them from deriving any private advantage from the agreement, and that they were bound to account to the company for sums received by them under it.

Appeal—Leave to appeal.—Circumstances in which the Court (*dub.* Lord M'Laren) *refused* leave to appeal to the House of Lords, on the ground that there was a probability of a second appeal should leave be granted.

1st DIVISION. Lord Trayner, C.

THE EDINBURGH NORTHERN TRAMWAYS ACT, the object of which was the introduction of a cable system of tramways in Edinburgh, received the royal assent in August 1884. Its principal promoters were Mr William Hamilton Beattie, architect and surveyor, Edinburgh, and afterwards engineer of the Edinburgh Northern Tramways Company, and Mr George V. Mann, S.S.C., solicitor for the bill, and afterwards of the Company. A bill for the same purpose had been introduced in the previous session of Parliament, but had then failed to pass. The capital of the company was £90,000, divided into 9000 shares of £10 each. It was specially stipulated by the Corporations of Edinburgh and Leith, and the stipulation was incorporated in the Act, that the contract for the making of the lines should be advertised for public competition.

Prior to the passing of the Act, the Patent Cable Tramways Corporation, Limited, which had been recently incorporated, had made overtures to the promoters with the view of obtaining the contract for the construction of the line, with the result that a tender was afterwards made and accepted by the company, and embodied in an agreement, dated 24th October 1884, between the company and the Cable Corporation. Another agreement was executed on 25th October 1884, between the Cable Corporation and Mann and Beattie.

By the agreement of 24th October it was provided, *inter alia* (1) that the Cable Corporation should, at their own cost, purchase and convey to the company certain heritable subjects in Edinburgh; (2) that they should construct the tramway lines authorised by the company's Act; (3) that they should pay or provide for the whole costs, charges, and liabilities incurred by the company in obtaining their Act. It was further provided that the consideration to be paid therefor should be a sum of £93,000, payable to the extent of £5000 by the issue to the Cable Corporation, or their nominees, on signing the contract, of 500 fully paid £10 shares of the pursuers' company, and as to the balance, in monthly instalments, on the certificates of the engineers, under the condition that, failing payment in cash, the Cable

* Decided June 26, 1891.

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Corporation should be bound to accept Lloyd's bonds, or fully paid shares, or mortgage debentures of the company.

By the agreement of 25th October, which proceeded upon the narrative of the previous agreement of 24th October, and of the undertaking by the Cable Corporation to pay the costs and liabilities incurred in obtaining the Company's Act, and "with a view to fixing the amount they may be called upon to pay under the said contract," it was agreed (1) that Mann and Beattie should relieve the corporation of the liability it had undertaken for the expenses of the Act, and (2) that the corporation should pay to Messrs Mann and Beattie the sum of £17,000 (£5000 in cash, on the execution of the agreement, £8500 by the issue of debentures of the Cable Corporation, payable on the opening of any part of the company's line, and £3500, by the transfer to Messrs Mann and Beattie of 350 fully paid-up shares of the company). The £5000 was paid on 20th September 1884, a month prior to the date of either agreement, and prior to an advertisement for tenders for the works. The £8500 of debentures were not issued until 1886, and the £3500 in shares were transferred by the Cable Corporation, or their nominees, by transfers dated 28th May 1886.

In February 1889 the Tramways Company brought an action against Mann and Beattie, concluding, *inter alia*, for an accounting by them in regard to all moneys, shares, or debentures received by either of them as promoters of the Tramways Company, or in virtue of the agreement of 25th October 1884. The persons who acted as the first directors of the company, and assisted to promote it, five in number, were also called as defenders.

The pursuers alleged, *inter alia*;—(Cond. 7) "The said sum of £17,000 greatly exceeded the actual cost of the Act of Incorporation of the Edinburgh Northern Tramways Company, and the legitimate expenses of the promotion of the company; and the form of agreement whereby Messrs Mann and Beattie undertook to relieve the Cable Corporation of their obligation to pay the costs of obtaining the Act was a mere device to conceal the fact that they were getting a large bonus for their services as promoters at the expense of the Edinburgh Northern Tramways Company. The said sum had been fixed by agreement between the Cable Corporation and Messrs Mann and Beattie, as promoters, as the sum for which they were willing to practically transfer the bill to the Cable Corporation. The sum in question (£17,000) was taken into account by the Cable Corporation in fixing the contract price at £93,000, and the Cable Corporation stipulated for the issue to them of 500 shares of the company to be delivered on the execution of the contract between them and the company, in exchange for the £5000 in cash which they had to pay to Messrs Mann and Beattie at the same time. The tender lodged by the Cable Corporation was for £93,000, and this sum was acquiesced in without any independent inquiry being made on behalf of the pursuers, the Edinburgh Northern Tramways Company. The pursuers have thus suffered damage to the extent of £15,000 or thereby by the enhanced price which they were charged in order to admit of the bonus being given to the defenders Mann and Beattie. . . ."

They also stated that it was only upon the retirement of the first directors, on 28th February 1888, after a meeting had been called by requisition of the shareholders (the principal of whom at that date were Messrs Dick, Kerr, & Company, the subcontractors for the works, as afterwards narrated), that the above stated facts became known and that they were in a position to call the defenders to account.

The defenders admitted that it had been originally arranged by the company to adopt the patent cable system of traction, and that no other

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tender than that of the Cable Corporation was received by the company, but they explained that they were free to accept any offer. They denied that the £17,000 exceeded the actual cost of the Act, and the legitimate expenses of the promotion of the company, and stated that the whole actings of the defenders in regard to obtaining the Act were well known to the pursuers, as well as to the Cable Corporation. They further explained that the pursuers "are barred from taking the objection here indicated, as the whole shares in the pursuers' company, other than those held by the defenders, are in the hands of the representatives of the Cable Corporation, and of their nominees, who, being a majority of the company, nominate and control the directors, and have instructed the raising of this action."

It was also stated in defence that the pursuers' company had never truly become a public company, that its formation had never been advertised, that its prospectus had never been published, nor any of its shares issued to the public.

The pursuers pleaded, *inter alia;*—(1) The defenders Mann and Beattie having, by means of their position as promoters of the company, received the said bonus of £17,000, they are bound to count and reckon therefor, and to communicate to the company any benefit gratuitously received by them at the company's expense.

The defenders pleaded, *inter alia;*—(2) No moneys, shares, debentures, or other considerations having been received by or agreed to be paid or performed to Mr Mann and Mr Beattie as promoters of the said company, they ought to be assoilzied from the first conclusion of the summons. (3) The pursuers' company are barred by their actings and acquiescence, as condescended on, from pursuing the present action. (5) The second and remaining conclusions of the summons being based on the ground that the defenders Mann and Beattie occupied a fiduciary relation to the company when they entered into the agreement of 25th October 1884 and compromise of 31st May 1886 [referred to below], and the whole persons who have at any time been interested, either directly or indirectly, in the shares of the pursuers' company, having been parties to or being bound by said agreement, these defenders should be assoilzied from these conclusions.

Proof was led.

In support of their contention that the agreement of 25th October 1884 had been confirmed by the company, the defenders led evidence to shew that drafts of the agreements of 24th and 25th October 1884 had been submitted to a meeting of the directors of the company, held on 19th August 1884,* but this allegation was negatived by the Court.

The defenders also founded upon proceedings in the English Court, which were taken at their instance by request of the directors of the com-

* At this meeting four of the five original directors and Mann and Beattie were present. Two other gentlemen attended, but it did not appear in what capacity. The minute bore,—" . . . It was remitted to Mr Mann and Mr Beattie to make such inquiries in London or elsewhere as they may consider necessary, with a view to determine the best system of traction to be adopted for the undertaking, and to obtain such information as is necessary with reference to the raising of the capital. Mr Mann and Mr Beattie were instructed to confer on the subject with Mr Waddell and Mr Couper on behalf of the board, with power to solicit offers from persons likely to enter into suitable arrangements both as regards construction and capital, advertise for tenders, and take such other steps as they may think necessary, with power to employ such financial, legal, or other personal assistance in London as they may deem requisite. . . ."

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pany to enforce their rights under the agreement of 25th October 1884, and to restrain the Cable Corporation from dealing with the 500 shares which had been issued to them in terms of the agreement of 24th October 1884 in such a way as to prejudice the company's rights. These proceedings resulted in the completion of "Heads of Compromise," dated 31st May 1886, between the Cable Corporation, the company, and Mann and Beattie, and in an order by the English Court, in both of which the agreement of 25th October was dealt with. It appeared that the origin of this litigation was that there had been considerable delay on the part of the corporation in beginning the works under their contract, but that the company could not take legal proceedings, as the time for completing the works had not expired, and that they had accordingly applied to Mann and Beattie to insist in performance of the agreement of 25th October in order to bring matters to a point.

The compromise of 31st May 1886 was also embodied in an agreement, dated 22d July 1886, between the Tramways Company and the Cable Corporation, modifying to some extent the agreement of 24th October 1884. The Cable Corporation thereafter proceeded to construct part of the works, but, so far as carried out, they were really executed by their subcontractors, Messrs Dick, Kerr, & Company, and it was not until 28th January 1888 that the sections under construction were opened for public traffic.

In payment of the works the Tramways Company issued shares and mortgages of the company to the Cable Corporation. Of 4500 shares issued out of the 9000 shares which constituted the capital of the company, all except 152 were issued to the Corporation. Of the 152, 150 were issued to the first directors of the Company, and 2 to the first auditors. The mortgages issued were in favour either of the Cable Corporation or of creditors of the company in payment of working expenses.

On 14th January 1888 the Cable Corporation was ordered to be wound up, and Messrs Dick, Kerr, & Company, who were large creditors in respect of the work done by them, subsequently purchased their whole assets, including their interest in the shares and mortgages in and over the Tramways Company, which the corporation had come to hold in trust for the Assets Realisation Company, Limited (who had advanced them funds), under an assignment which was made subject to and under the burden of the agreement of 25th October 1884. Messrs Dick, Kerr, & Company also gave an undertaking to pay the amount due by the Cable Corporation to the Assets Realisation Company on the condition that they were to have the contract for the construction of the remaining unexecuted portion of the works. These conditions were carried out in the form of two agreements between the liquidator of the Cable Corporation, the Realisation Company, and Messrs Dick, Kerr, & Company, in one of which, dated 22d May 1888, it was provided that the purchasers should accept such title as the Cable Corporation and the Assets Company had to the property agreed to be sold, and in a schedule to it, headed "Documents relating to the Undertaking of the Edinburgh Northern Tramways Company," there were set forth a number of deeds, including those of the 24th and 25th October 1884.

It appeared from the proof that Mr Turnbull, one of the original directors, who had since died, had been absent from the country in October 1884, and had subsequently demanded explanations from Mr Mann in regard to the expenses attending the passing of the Act. These Mr Mann had declined to give, because he considered that the agreement of 25th October was "one with which the directors had nothing to do." Mr Turn-

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bull had subsequently resigned his directorate, and disposed of his holding in the company to Mann and Beattie.

The Lord Ordinary (Trayner), on 18th July 1890, pronounced the following interlocutor:—"Finds that the defenders George Villiers Mann and William Hamilton Beattie are bound to account to the pursuers for the whole sums of money, debentures, shares, or other considerations received by them under and in virtue of the agreement entered into between them and the Patent Cable Tramways Corporation, Limited, dated 25th October 1884: Appoints the said defenders to lodge in process by the first sederunt day of next session an account of all sums of money, debentures, shares, or other considerations received by them under said agreement, as also an account or accounts of all sums which they claim respectively to be entitled to set against the before-mentioned sums of money, debentures, shares, or other considerations, with the vouchers of such account or accounts: *Quoad ultra* continues the cause: Grants leave to reclaim." *

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* "OPINION.— . . . These two documents,—the contract of 24th October 1884 and the agreement of the following day,—although bearing to be executed of different dates, were in reality parts of one transaction arranged and agreed upon by the corporation and the said defenders, the purposes of which were, on the one hand, to secure to the corporation the contract for constructing the authorised tramway lines in Edinburgh, and, on the other, to secure to the said defenders payment of the sum of £17,000. This transaction presents several objectionable features. In the first place, it was in violation of the stipulations made by the Corporations of Edinburgh and Leith in giving their consent to the construction of the tramways (consents without which the Act obtained by the company would not have passed) to the effect that the contract for the construction of the lines should be offered for public competition. These stipulations—stated as plainly as language could state them in the agreements which were scheduled to the Act—were stipulations which the corporations who made them had an undoubted interest to enforce. The transaction between the Cable Corporation and the defenders Beattie and Mann was entered into with these stipulations fully in view, and the pretence they made—for it was only pretence—of advertising the contract as one open for competition, only shews that the violation of the foresaid stipulations was deliberate and intentional. (Secondly) The transaction was in violation of the duty which the defenders owed to the pursuers' company. The defender Mann was the solicitor of the company, and Beattie was its engineer; and they were charged with the interests of the company, whom (and at whose expense) they were in London representing. The interest of the company clearly was to have the construction contract given to the contractor who would undertake it at the lowest price. Instead of this, however, without competition, and indeed without any honest inquiry as to the amount for which any other contractor would undertake the construction of the line, the defenders agreed to give, and did give, the construction contract to the Cable Corporation at a price agreed upon between themselves, that price including a sum of £17,000 to be paid to the defenders. (Thirdly) If the defenders had claimed from the company, for whom they were acting, the amount due to them for work done and disbursements made in connection with obtaining the company's Act, it is plain that they would have required to have given a detailed and to some extent a vouched account of such work and disbursements. By including the £17,000, however, in the contract price of £93,000 the defenders were adopting a course by which the rendering of any such account would be made unnecessary, and all examination of such an account avoided. That this was the purpose and intention of the defenders in entering into this transaction becomes to my mind clear enough from the attitude which the defender Mann assumed towards Mr Turnbull, one of the company's directors, when he demanded from Mr Mann 'particulars of the amounts which had been paid towards expenses.' I think this purpose and intention is

The defenders reclaimed.

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Argued for them;—An agreement for "promotion-money," in the

further evidenced by the mode in which the transaction was carried out. It being one transaction, it could easily, and would naturally, have been embodied in one deed, if nothing more was intended to be done than to give expression to the agreement which had been concluded. It would have been as easy in the construction contract to have said that the Cable Corporation had undertaken out of the contract price to pay Mann and Beattie £17,000 in full payment of the expenses incurred in connection with the obtaining of the company's Act, as to say that they, the corporation, undertook to relieve the company of liability for such expenses. To have done so, however, would have brought the bargain between them and Mann and Beattie before the consideration of the company, and would probably have led to the inquiry, which the defenders, I think, desired to avoid. Accordingly the second deed, in the form of an agreement between the Cable Corporation and the defenders, was executed, as a deed embodying a bargain with which, as Mr Mann expresses it, 'the directors had nothing to do.' (Lastly) The sum of £17,000 to be paid to the defenders was not fixed upon a consideration of any account of what charges were due to them, or of what disbursements they had made,—it was a mere guess.

"It is not enough, however, to entitle the pursuers to the accounting which they seek that the transaction I have been dealing with presents features which are objectionable, or that the circumstances surrounding it throw some discredit upon its character. It may still be a transaction of which the defenders are entitled to take any benefit which it confers, and one which the pursuers cannot now effectually challenge. This is the position which the defenders now maintain; and I proceed to notice the grounds on which they maintain it.

"First. It is said that the £17,000 is not 'promotion-money' in the usual sense of that term, which the defenders are bound to refund. This may be so, but it does not seem to me to be material by what name the £17,000 may be called. The defenders may be bound to account for the £17,000 although it was not in the ordinary sense promotion-money.

"Second. The defenders plead that the pursuers are barred from insisting in the present action by reason of their actings and acquiescence. So far as I can gather from the proof, there have been no 'actings' on the part of the pursuers which would bar their present demand. As regards acquiescence, it is plain enough that the pursuers could not acquiesce in a matter of which they had no knowledge, and therefore it has to be considered, first, what knowledge they had of the agreement in question, and when they obtained it.

"There is evidence given by Mann and Beattie to the effect that the construction contract and the agreement were both submitted in draft to a meeting of the directors of the pursuers' company held on 19th August 1884, and this is corroborated by Major Boulton, one of the directors who was present. I am of opinion that this evidence does not prove the fact. (1) The evidence of Mr Mann and Mr Beattie is open to the observation that it is the evidence of interested parties, and I say no more about it than this, that it is insufficient to satisfy me if not supported. (2) While I say nothing against the truthfulness of Major Boulton, it is plain that his recollection is not good. He admits that in another action he gave evidence recently to an effect quite different from and contradictory of that which he now gives. (3) There are two other persons who were present as directors at the meeting referred to, available as witnesses for the defenders, who were not called. (4) The minutes of that meeting make no reference whatever to the construction contract or the agreement having been produced, read, or exhibited at the meeting. On the contrary, the minutes contained an authority to certain persons (including the defenders) 'to solicit offers from persons likely to enter into suitable arrangements, both as regards construction and capital, advertise for tenders,' &c., which could scarcely have been done if the deeds I have mentioned had been before the meeting, shewing that the 'construction' had already been arranged for, and that further advertisement

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usual sense of the term, if incorporated in the prospectus of a company, would not be illegal. It was necessary to attend to the facts of the case, for although Mann and Beattie had come to be regarded as the sole promoters of the company, they had originally a number of others associated with them, and what they did was to interpose and take the whole risk themselves. They were the servants of the company, and they made the agreement in the knowledge of everyone, their object being to take upon themselves the whole burden of starting it. Accordingly, assum-

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'for tenders' was consequently unnecessary. (5) Mr Turnbull was present at this meeting, and if the agreement had been read and explained then, he would not have made the demand which he subsequently made on Mr Mann for information regarding the amount paid as the expenses of obtaining the Act—information which Mr Mann refused to give. And (6) it is difficult to understand why Mr Mann should have refused the information sought by Mr Turnbull on the ground that it was a matter with which the directors had nothing to do if that information had already been given, even partially, to a meeting of directors as was stated. I am of opinion, for the reasons I have given, that it is not proved (not to put it higher) that the agreement between the Cable Corporation and the defenders was submitted or brought to the knowledge of the directors of the pursuers' company at their meeting of 19th August 1884. If not brought to their knowledge then, it is not proved that it was brought to their knowledge until long after it was concluded and partly implemented by the payment of £5000 in cash. Even when brought to the knowledge of the pursuers' directors it was never approved or adopted, and it is certain that the directors never had before them, and never asked, the necessary information to enable them to determine whether they should approve of the agreement or not. If the directors had approved of the transaction embodied in the agreement as one which authorised the defenders to charge the company, or take payment out of its funds of a sum of £17,000 in name of expenses for obtaining the Act, without the production of an account or a single voucher shewing how that expense had been incurred, I should have held any such approval or adoption of the agreement in such circumstances as *ultra vires* of the directors and in no way binding on the company. I do not take into account in this connection the question whether the then directors were independent of the defenders, or whether the defenders furnished the directors with their qualification. But there is enough proved to shew that the directors were at least to a large extent indebted to the defenders for their qualification; and the pursuers' suggestion that the defenders' generosity to the directors was not quite disinterested does not strike me as being improbable. . . .

"The fifth plea brings me to what I think is the real point in the case. It appears to me to be established that the defenders, while occupying a fiduciary relation to the pursuers' company, entered into an agreement to their own advantage and to the detriment of the company, to which effect should not be given. As I have already stated, the defenders, at the date of the agreement in question, were the one the solicitor and the other the engineer of the company. Not only so, but they were, when the agreement was made, in London, specially charged with watching over the interests of the company. They took advantage of their position to arrange that they should be paid out of the company's funds (the amount which the company were to pay for the construction of their lines) a sum for their expenses in promoting and carrying the company's Act through Parliament, which included, as is now admitted, expenses not incurred with reference to that Act. So far as the advantage thus obtained by the defenders was gratuitous, they were bound to communicate it to the pursuers. I think the defenders must now account for the £17,000 which they received under that agreement in cash or securities. Whatever they can shew was really due to them in connection with the passing of the company's Act of 1884 they will be entitled to retain. But I think they cannot charge against the pursuers' company any expense incurred in connection with the bill of 1883, which did not pass."

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ing that the £17,000 was rightly termed "promotion-money," a state of circumstances existed in this case which brought about the same legal result as if the agreement had been embodied in the prospectus. The five first directors and the two defenders at that time really constituted the whole company, for there was no public issue of the shares, and the directors could not but have known of the agreement of 25th October. The minute of meeting of directors of 19th August 1884 shewed that they were cognisant of the transactions with the Cable Corporation. The Lord Ordinary criticised this minute adversely. But the answer to these criticisms was that in any view a sufficient *prima facie* case had been made out to lay upon the pursuers the *onus* of shewing that the agreement was not known, and they had failed to discharge it. The Lord Ordinary had also failed to advert to the fact that the litigation in the English Courts at the instance of the defenders Mann and Beattie made the existence of the agreement public to everyone concerned. This was a litigation which Mann and Beattie were asked by the directors to institute and undertake. It was impossible that they should have been invited to do so unless the directors had fully known of the existence of the agreement. It was at anyrate conclusive as regarded all the members of the company at that date. The position of Mr Turnbull, one of the directors, which was founded on by the Lord Ordinary, was explained by the fact that he had been absent in America in September and October 1884, and that he had not therefore been present when the agreements of October were entered into. He had afterwards been allowed to leave the directorate, and his shares were taken over by Mann and Beattie. It was very important that there had been no public allotment or issue of the shares of the company. The share capital, so far as issued, had all along been entirely held by nominees of or persons who represented the promoters and Messrs Mann and Beattie on the one hand, and by the Cable Corporation and their successors on the other. It was said that Messrs Dick, Kerr, & Company were not in that position. But they were transferees with notice of the agreement in question, a notice which appeared on the face of the documents under which they became transferees, for the agreement of 25th October was specially mentioned. Although, therefore, the defenders would be bound to account for any profit they had made under the agreement, if they had made a secret of it,[1] no secret had been made here. The Cable Corporation and their nominees, Messrs Dick, Kerr, & Company, who were the real pursuers of this action, held along with the defenders all the shares of the company, so far as issued, and constituted really the whole company. The pursuers were therefore barred from challenging their own agreement.[2]

Argued for the respondents;—The facts dealt with by the Lord Ordinary did not appear to be seriously challenged, but it was said that his Lordship had failed to deal with one of the defenders' pleas. It was said that the Tramways Company had no separate existence or independent position apart from the Cable Corporation and Mann and Beattie, the two parties to the agreement, and that that fact constituted a difference

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[1] Henderson v. Huntington Copper Co., Jan. 12, 1877, 4 R. 294, affd. Nov. 29, 1877, 5 R. (H. L.) 1.

[2] *In re* Gold Company, 1878, L. R., 11 Chanc. Div. 701; Peak v. Gurney, July 1871, L. R., 13 Eq. 79, affd. H. L., 6 Eng. and Ir. Apps. 377; Ambrose Lake Mining Co., *ex parte* Taylor, 1880, L. R., 14 Chanc. Div. 390; British Seamless Paper Box Co., 1881, L. R., 17 Chanc. Div. 467; New Sombrero Phosphate Co. v. Erlanger, 1876, L. R., 5 Chanc. Div. 73, Jessel, M. R., 113; Spackman v. Evans, 1868, L. R., 3 Eng. and Ir. App. 171, Lord Cranworth, p. 190.

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between the present case and that of the *Huntington Copper Company*.[1] The only asset of value at the date of the agreement was the Act itself, which was surely the property of the Tramways Company, and the return for it—for the £17,000 really represented the price of the Act—could not go into the private coffers of the defenders. It might be that the £17,000 was legitimately earned, and that the pursuers' case was bad upon its merits; but all that was asked was an accounting. It was said that the directors of the company knew of the existence of the agreement. If they knew they could only have assented to it as *participes fraudis*. The real constituents upon whom the fraud was perpetrated were surely the future shareholders of the company. There was no authority for holding that a company could be barred from challenging such an agreement, unless it were proved that all present and possible future shareholders had consented to it. The company had power to issue shares to subsequent shareholders, for there was capital remaining unissued. The agreement could not be effectually ratified until the whole capital had been issued, and if the interest of future allottees was prejudiced they would have a right to set the agreement aside as having been entered into to their prejudice and to the advantage of those who occupied a fiduciary position towards the company.[2] The reclaimers' argument turned upon two questions of fact. In the first place, it was said that no shares had been issued to the public,—that it was not contemplated that there should be any issue to the public,—and accordingly that all who were concerned in the matter were fully cognisant of it; and in the second place, that no members of the public had become allottees. But, in the first place, at the time of the execution of the agreement, there was an intention of issuing the shares to the public, and the indifference of the Cable Corporation as to the amount to be paid to the defenders was explained by this fact. In the second place, an allottee of shares was in a different position from a transferee. When the whole members of the company allotted shares among themselves without any consideration, anyone who came in afterwards might challenge the proceedings in the name of the company. There might be future allottees here who would not take in any way subject to the infirmity which attached to the Cable Corporation and its transferees. All the cases quoted by the reclaimers supported the respondents' contention. In the *Gold Company's* case,[3] the whole unissued capital had been ultimately issued among existing shareholders, and there was notice to anyone joining the company that the directors might allot shares among the shareholders without any consideration. There was no fraud by the company there. In the *Ambrose Lake Company's* case,[4] it was a ground of judgment that there were no future allottees, and that there could be none. The *British Seamless Paper Box Company's* case[5] was very special, as the Court held that all parties had concurred in the arrangement which was challenged. There was no case in which it had been held that a future allottee was barred. Further, the knowledge of individual shareholders did not transmit to onerous transferees so as to bar the company from challenging the agreement in the interest of the latter. Even assuming that Dick, Kerr, & Company were bound to know of the agreement, knowledge of it was not enough without assent.

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[1] 4 R. 294, affd. 5 R. (H. L.) 1.

[2] Buckley on Sec. 38 of the Companies Act (6th ed.) 570; Society for the Illustration of Practical Knowledge v. Abbott, June 1840, 2 Beavan, 559.

[3] L. R., 11 Chanc. Div. 701.

[4] L. R., 14 Chanc. Div. 390.

[5] L. R., 17 Chanc. Div. 467.

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LORD PRESIDENT.—The defenders and some other persons having conceived the project of constructing tramways in Edinburgh upon the cable principle, which are now called the Edinburgh Northern Tramways Company, presented a bill to Parliament in the year 1883 for the purpose of incorporating themselves, and of obtaining powers to construct the lines. They did not succeed in obtaining their bill in the year 1883, but in 1884 there was an Act passed incorporating the defenders and other persons, for the purpose of exercising the powers therein conferred and constructing these tramways. It does not appear very clearly who promoted—I mean in the way of personal engagement or employment—the bill of 1883, but undoubtedly in the year 1884 the management of the bill in its passage through Parliament was entirely in the hands of the two reclaimers, Mr Mann and Mr Beattie, and they stand therefore towards the incorporation which was created by that bill in the relation of fiduciary persons.

The object of the present action is to call Mr Mann and Mr Beattie to account for certain moneys to the amount of £17,000 which it is said came into their hands in the course of conducting that business in London, and one question which has been considered by the Lord Ordinary is, whether that £17,000 is of the nature of promotion-money. His Lordship hesitates to call it by that name, but I confess I do not see any difficulty as to the name from the nature of the moneys which were received by the reclaimers. They were vested by their co-promoters with the whole management of the bill, and they received from the contractors for the work the sum of £17,000, half in cash, and the other half in shares and debentures of the company which was to be brought into existence. Now, I have no other name for that than promotion-money, but whether it be called by that name or not, I quite agree with the Lord Ordinary that it is of the same illegal character as promotion-money, and must be dealt with in the same way.

Having obtained the bill, and so brought the Tramways Company into existence, they proceeded to deal with another corporation called the Cable Corporation, who were in the habit of contracting for the construction of such works, and their agreement with them was that they should receive as the contract price of the work to be done by them the sum of £93,000. The agreement is dated 24th October 1884, and there is another agreement dated upon the following day, 25th October 1884, by which it is arranged that the reclaimers, Messrs Mann and Beattie, are to receive £17,000, the sum I have already mentioned. These two agreements, although dated respectively the 24th and 25th October, are really one transaction, and the nature of it, I think, may be very easily described. It was an arrangement by which the sum nominally payable to the Cable Tramways Corporation was £93,000, but it was stipulated that there should be deducted and paid over to the reclaimers the sum of £17,000, which is the sum now in question.

The Lord Ordinary has appointed the defenders, Messrs Mann and Beattie, to render an account of this £17,000 by the interlocutor which is now under review. The ground upon which his Lordship proceeds, I think, is plain enough, that this is either promotion-money or something equally illegal, and therefore that there must be an accounting between the parties, and in that conclusion I entirely acquiesce. I think it is out of the question altogether to say

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that these parties are to receive £17,000 without accounting in any way for the manner in which the expenditure was made, and for the services for which the remainder of the sum of £17,000 was supposed to be paid.

That is the short and simple view of the case which I have taken, and which agrees substantially with the judgment of the Lord Ordinary, and I therefore move your Lordships to adhere to his interlocutor.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR.—I am of the same opinion. I think the statement which the Lord Ordinary has given of the facts, and also the exposition of the law of the case, with which your Lordship concurs, was not very seriously traversed by the reclaimers' counsel, but they said that the grounds of judgment were displaced by a consideration to which they thought the Lord Ordinary had not adverted.

It appears to me to be clear, entirely concurring with your Lordship, that the reclaimers occupied a fiduciary position towards the company—that is to say, not towards the existing members only, but towards the company itself, and all its members, present or future. They were certainly in a fiduciary position in executing for the company the contract with the Cable Corporation which is now in question. One of them was the solicitor of the company, and the other was the engineer, and was also in the position of acting as managing partner of the whole adventure. Apart altogether from that, they had undertaken to make a contract for the company; and they were therefore acting as trustees in that matter, and so became subject to the inflexible rule by which trustees are not allowed to take any benefit or advantage, however reasonable, from a contract which they are making on behalf of those with whose affairs they are entrusted. It therefore seems to me, that, apart altogether from the question whether the money for which they are required to account may be properly called promotion-money or not, the reclaimers have made a bargain for their own advantage which cannot stand. It was their duty to make the best bargain they possibly could for the company; and it was quite inconsistent with that duty to make any collateral bargain or any stipulation by which a part of the price to be paid by the company to the corporation should come into their hands. I assume that they were acting in perfectly good faith in making that arrangement. I assume also that they were entitled to adequate remuneration and reimbursement for all the expenses that they had incurred, and it may very well be that the bargain which they made was quite a reasonable one in itself, but being made through the Cable Corporation, and as part of the transaction between the Cable Corporation and the company with whose affairs the defenders were entrusted, it must be held that any benefit which could come to them through that bargain was obtained for the company and not for themselves.

Now, the ground upon which it is said that the general rule of law is displaced in this case, as I understood the argument, was this—that the whole transaction between Messrs Beattie and Mann and the Cable Corporation had been ratified and confirmed by the company. There is no ratification of the agreement by the direct action of the company. I do not think anything can be pointed to which can be suggested as being a direct confirmation. But then it is said that there is an implied confirmation by reason of an agreement for the compromise of certain actions between Messrs Beattie and Mann on the one hand and the Cable Corporation on the other, and between the Cable Corporation and the pursuers' company. It appears to me that there was no interest involved in the actions which form

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the subject of that compromise except the interest of the parties whom I have mentioned. Questions between Messrs Beattie and Mann and the Cable Corporation, and questions between the Cable Corporation and the company, were raised in these actions and settled by the agreement for compromise, but the question whether the defenders could retain for themselves the full benefit of the £17,000, which they were to receive from the Cable Corporation, or whether they were bound to account for it to the Northern Tramways Company, was not raised or involved in the litigation, and could not be affected by its settlement.

It was maintained on a somewhat different plea, that if the agreement in question was not confirmed by the company, it was confirmed by the members of the company then existing, or at all events, that all the existing members acted in such a way as to bar them from challenging it; and it was urged further that there is nobody now in the company who does not represent some one of those persons that were so barred, and therefore that there is no interest to be protected by the present administrators of the company of persons who are not precluded from challenging the agreement. It was maintained that this company was really in the position of a private copartnery, that there had been no publication of any prospectus, no shares issued to the public, and that everybody really interested in the matter was in the full knowledge of the transaction now in dispute and agreed to it.

I do not think that that was the position of the company. It is a corporation created by Act of Parliament for the purpose of carrying out a public undertaking. It does not consist of its present corporators, or the corporators who formed part of it at any one time, and it appears to me that the directors at the time that the transactions in question were carried through, and now, are trustees, not for the existing members alone, but for all the future members of the corporation also. If that be so, I confess I am unable to see how the conduct of individual shareholders, as distinguished from the action of the company itself, can bar the company as it now exists from challenging a transaction of this kind, and from calling the defenders to account for money which is alleged to be theirs. But I think that even amongst the present shareholders there are persons who would not be affected by the supposed plea in bar, which is said to affect the directors and members of the company at the time of the compromise, or at any other period prior to the raising of this action.

I do not think it necessary to examine the whole list of shareholders, because it appears to me that Messrs Dick, Kerr, & Company, whose case was specially pressed upon us as shewing that the existing members of the company could not be allowed to challenge this transaction, would have been in no way barred from challenging it if they had been the only members of the company now in existence. In the first place, I think they hold shares which they did not receive though the Cable Corporation, and the ground upon which the plea in bar is taken against them, as I understand it, is that they are in exactly the same position as the Cable Corporation, and that the Cable Corporation, who had themselves made the agreement in dispute, could not be allowed now to find fault with it. But then, apart altogether from that first consideration, and admitting that the Cable Corporation could not, as shareholders, after they had acquired shares in the company, challenge the agreement which they had previously made with Messrs Beattie and Mann before they acquired such shares, I see no ground for holding that the same disqualification would attach to numerous transferees. The transfer of shares makes the transferees liable to all

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the conditions by which they may be affected in consequence of transactions that have been validly carried out by the company, but there is no principle, so far as I know, and no authority for holding, that the transferee of shares takes them also subject to personal pleas in bar that may be stated against the transferor. The case of *Peak* v. *Gurney*, which was referred to as an authority for that principle, and which was decided in the House of Lords, affords no countenance to it whatever. It appears to me therefore that transferees for onerous causes obtain a statutory title, and take their title subject to those conditions only which affect the shares themselves, into whose hands soever they may fall, and not subject to any mere personal pleas in bar, by which the transferors from whom they acquired might have been affected. Nor do I see that there is anything in the special terms of the agreement between Dick, Kerr, & Company, the Assets Company, and the Cable Corporation, which could deprive Dick, Kerr, & Company, as shareholders of the Northern Tramways Company, of any right which would be competent to other transferees for value. It is said that the agreement contains a stipulation for the acceptance of such a title as the vendors might be able to give, and that it also contains a reference to a number of previous agreements, one of which is the agreement now in dispute. Now, it does not appear to me that there is anything expressed or implied in that stipulation which can at all affect the right of Dick, Kerr, & Company, having become shareholders of the Northern Tramways Company, to take any objection which might be competent to other shareholders to such a transaction as that now in dispute. They obtained a perfectly good and unqualified title to the shares, and the reference to the agreement now in dispute and the other agreements would appear to me to have no other effect than this, that it might bar them from maintaining as against the party from whom they acquired, that they were relieved of their obligation to accept the title by the discovery of these agreements. They cannot plead ignorance of the agreement as an objection to the title. But I do not think their knowledge of the agreement can affect their position as shareholders of the Northern Tramways Company after they have acquired their shares, or prevent their participating in funds which the company may be entitled to recover from the defenders. I see nothing, therefore, in the position of these shareholders, or in the conditions under which they acquired, which can bar the company from calling upon the defenders to account for any moneys truly belonging to the company which may be found to be in their hands.

These were the arguments upon which it was maintained that the grounds of the Lord Ordinary's judgment were displaced, and I am of opinion that they are not well founded, and I therefore agree with your Lordship that the interlocutor should be affirmed.

THE COURT adhered.

On 15th July the defenders petitioned for leave to appeal.*
The pursuers opposed the application.

LORD PRESIDENT.—An application of this kind is always an appeal to the discretion of the Court, and in dealing with such applications the Court are influenced by a variety of considerations according to the circumstances of each particular case; but there is one consideration which is always present to the

* *Defenders' Authority.*—Gardner v. Beresford's Trustees, July 17, 1877, 4 R. 1091. *Pursuers' Authority.*—Stewart v. Kennedy, Feb. 26, 1888, 16 R. 521.

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mind of the Court in disposing of such a question, and that is that there must not be, if possible, two appeals in the same case. Now, from what we have heard here it is, I think, obvious that if we should grant leave to appeal now there would be the risk of there ultimately being two appeals instead of one, for there cannot be any doubt that in the accounting which has been ordered questions of importance may arise which may be made the subject of a second appeal, if an appeal at the present stage is allowed. On the other hand, what will be the position of the parties if the case is allowed to remain here? The parties will have an opportunity of going on with the accounting, and of obtaining our judgment on any questions that arise with reference to it, and so exhausting the cause, before it is taken to appeal. I think it will be for the advantage of both parties that it should be so exhausted, and I am therefore for refusing leave to appeal.

LORD ADAM.—I am of the same opinion. The question of granting leave to appeal is a question of discretion in each case, but in exercising that discretion one of the main things to be kept in view is whether or not it is probable that there will be a second appeal, if leave should be granted. It appears to me to be very undesirable that there should be two appeals. I think that every cause should be exhausted in this Court before it goes to the House of Lords, except in very special circumstances. Here the interlocutor which we pronounced is to be followed by an accounting, and it is said that it is desirable to have the questions of law finally determined before going into that accounting. Now, it does not appear to me, as far as I understand the facts, that this accounting will involve any very grave or prolonged inquiry. It therefore does not seem to me to be any ground for allowing leave to appeal. On the other hand, it is said that it may involve questions of principle which may be considered important enough to take to the House of Lords, so that if we should grant the leave which is here prayed for, there would, in that event, be a second appeal. I therefore agree in thinking that leave to appeal should be refused.

LORD M'LAREN.—If this matter were now arising for the first time, I should be inclined to think that the only question for consideration would be this, whether the judgment which it is sought to appeal involves a question of such a character as to be a proper subject of appeal at the particular stage at which the case stands—the object of requiring leave being to prevent frivolous appeals. But I see from the cases which were cited that one ground for refusing leave to appeal is found in the probability of there being a second appeal. Now, I must say for myself that I am totally unable to form an opinion as to the probability of there being a second appeal, for that depends on the reasonableness of the parties quite as much as on the importance of the case. If I may form any opinion from my knowledge of the present case, I should say that no question remains which might suitably form the subject of a second appeal. I should incline therefore to grant leave to appeal at this stage. At the same time, I do not wish to express dissent, but rather to suggest whether it may not be possible to lay down a better canon for the determination of these questions than the probability of a second appeal.

LORD KINNEAR concurred with the Lord President and Lord Adam.

THE COURT refused the petition.

GRAHAM, JOHNSTON, & FLEMING, W.S.—A. & G. V. MANN, S.S.C.—Agents.

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ANDREW LAWRIE, Petitioner (Respondent).—*D.-F. Balfour—Kennedy.*
MRS M. C. FIRTH or INGLIS AND OTHERS, Respondents.
WILLIAM JACKSON, Compearer (Appellant).—*Shaw.*

Process—Appeal—Competency—Dean of Guild.—An interlocutor by a Dean of Guild refusing to sist as respondent a person who alleges a material interest to appear in a petition for authority to take down and rebuild a house is a final interlocutor *quoad* that person, and therefore appealable.

Dean of Guild—Petition for authority to erect new buildings—Right of neighbouring proprietor to be sisted as a party to the process.—Circumstances in which the Court (*diss.* Lord M'Laren) *recalled* an interlocutor of a Dean of Guild refusing to sist as a respondent to a petition for authority to erect new buildings a proprietor whose property did not immediately adjoin that on which it was proposed to erect the new buildings.

1ST DIVISION. Dean of Guild, Edinburgh. C.

ON 10th April 1891 Andrew Lawrie, surveyor, Edinburgh, presented a petition in the Dean of Guild Court, Edinburgh, for authority to take down a villa belonging to him in Viewforth, and on the site thereof, and the garden ground attached thereto, to erect three tenements, comprising in all ten shops and twenty-nine dwelling-houses. The petitioner called as respondents the three immediately adjoining proprietors, viz., James Barclay, Mrs Reid, and Mrs Inglis, Mrs Inglis being the proprietor of the nearer half of a semi-detached villa adjoining the petitioner's property on the south. The half of that villa which was farther from the petitioner's property belonged to William Jackson, who was not called as a respondent. None of Jackson's property touched the petitioner's, the nearest point being ten feet distant.

Mrs Reid and Mrs Inglis lodged answers (along with another neighbouring proprietor named Currie, who had been sisted as a respondent), and pleaded that the proposed alterations would be a violation of conditions in the feu-contracts which they had a right to enforce.

Thereafter, but before the record had been closed, Mr Jackson lodged a minute, in which he craved to be allowed to be sisted as a party to the process, "he having not been called as a party, although he is the proprietor of the one-half of the double villa immediately adjoining on the south the ground on which the petitioner proposes to erect said tenements."

On 28th May the Dean of Guild refused the prayer of this minute, and on the same day closed the record.

Jackson appealed to the Court of Session.

On 26th June, in Single Bills, the petitioner objected to the competency of the appeal, on the ground that the interlocutor appealed against was neither an appealable interlocutory judgment nor a final interlocutor.[1]

Argued for Jackson;—The interlocutor was final *quoad* him, for if it stood he would be for ever shut out of the process.

LORD PRESIDENT.—I am quite unable to see any objection to this appeal. The appellant alleges that he has an interest to be sisted. Are we to decide that he has no interest without hearing him, as the Dean of Guild appears to have done? I apprehend not. I have heard no objection to the competency of the appeal that I can give effect to. I am for repelling the objection.

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* Decided July 11, 1891.

[1] 50 Geo. III. cap. 112, sec. 36; A. S., Nov. 12, 1825, part iii., cap. 1, sec. 1: Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 65.

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LORD ADAM.—The Dean of Guild's jurisdiction is a somewhat peculiar jurisdiction. This is a process of lining, and the Dean of Guild may have thought himself entitled to decide that this gentleman had no real interest to intervene in this process. That this is a final interlocutor I have no doubt. The appellant can never be heard again in the Dean of Guild Court so long as that interlocutor stands. I think therefore that being final *quoad* the appellant, it is appealable. I only wish to add that if this had been an ordinary Sheriff Court process, I should not necessarily have decided the competency of a similar appeal in the same way. I desire to reserve my opinion on that point.

LORD M'LAREN.—The competency of this appeal depends upon whether it is an interlocutory judgment, for the 36th section of the Act Geo. III., cap. 112, discharges the right of appeal only in the case of interlocutory judgments. It appears to me that this is not an interlocutory judgment, because it determines finally that this party is not entitled to be sisted as a party to this process.

LORD KINNEAR concurred.

THE COURT repelled the objections to the competency of the appeal, and sent the case to the Summar Roll.

On 11th July the case was heard.

Argued for the appellant;—The appellant had a clear interest and title to object. His title was the same as that of Mrs Inglis, but it was no answer to his claim to be heard that she was in the process. The Dean of Guild might no doubt have a discretion to refuse to sist parties who had no colour of a title or interest, but it could not be said that that was the appellant's position. The minute did not profess to be an exhaustive statement of his case. He could only make such a statement if he was allowed to appear. In any case, even if his title and interest were less obvious than they were, his appearance would have caused no delay, for the record had not been closed when his minute was lodged. The whole delay was due to the petitioner's objections.

Argued for the petitioner;—A party not called in a process like the present had no absolute right to compear, but if he shewed a *prima facie* case, it was in the discretion of the Court to allow him to compear: if he were not allowed, he had his other legal remedies. Here the Dean of Guild had exercised a wise discretion in refusing to admit the appellant, for he was represented by parties in the process whose interest was exactly the same as his own, assuming that in law he had any interest at all. But his minute stated no case; it merely said that he was an adjoining proprietor who had not been called. In a summary process there must be some limit to the number of parties entitled to appear, and the natural limit was to admit, as matter of right, only those immediately adjoining the buildings which were to be altered, and beyond that limit only to admit parties if they made out a special case for indulgence. Here the appellant had made out no such case; at anyrate the Dean of Guild thought he had not, and the Court would not lightly interfere with the discretion of the Dean of Guild.

LORD PRESIDENT.—The prayer of this petition in the Dean of Guild Court asks for warrant to the petitioner to take down his present villa and on the site of it, and on the garden attached to it, to erect three tenements containing in all ten shops and twenty-nine separate dwelling-houses, and the space of ground upon which it is proposed that all this should be done is certainly not very

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extensive. The only parties who were called to answer the petition were a Mr James Barclay, a Mrs Mary Inglis, and a Mrs Reid, and the two last named lodged defences along with a Mr Currie. But before the record was closed Mr Jackson, the present appellant, put in a minute, in which he craved leave to be sisted "as a party to the process, he not having been called as a party, although he is the proprietor of the one-half of the double villa immediately adjoining on the south the ground on which the petitioner proposes to erect said tenements." Now, as I have said, this minute was lodged before the record was closed, and I really cannot see why the Dean of Guild refused to allow this gentleman to sist himself, and, if necessary, put in defences. It ought to be the object of the Dean of Guild to hear all parties who have any interest in the proposed building. But he has taken his own course, and has thought fit to put the case into such a shape that he should hear only the petitioner and some of the parties interested, whom the petitioner has chosen to call, but who are, I think, plainly not the only parties interested. I cannot say that I think the Dean of Guild has acted wisely in this respect. On the contrary, I think that he has been in too great a hurry to get this proceeding finished. It was said that the minute does not disclose grounds sufficient to entitle Mr Jackson to be heard in the Dean of Guild Court. I think that the minute is quite sufficient. I do not mean, of course, that it contains a detailed statement of the grounds upon which he desired to appear and be heard. It would have been quite irregular in a minute of that sort to give any such detailed statement. But I think the minute discloses enough to shew that he has a perfectly distinct and substantial interest in the determination of this question. It was also said that the result of refusing to allow this gentleman to sist himself was not to deprive him of all redress, seeing that he had the remedy of interdict or declarator open to him. I do not think that it is all desirable that we should encourage litigation of that kind in this case. On the contrary, it appears to me that this case is perfectly suited to the determination of the Dean of Guild Court, which is the Court appointed to decide as to buildings proposed to be erected within the municipality, and I do not see why the parties should be left to a remedy which, besides being very expensive, may be quite unnecessary. As I have said, I think that the Dean of Guild has gone too fast, and I am for remitting to him to allow the appellant to be sisted.

Lord Adam.—I concur with your Lordship, but at the same time I sympathise with a great deal of what Mr Kennedy said. It is, I suppose, a matter of discretion for the Dean of Guild whether any proprietors ought to be called other than those immediately adjoining the proposed building; but at the same time we cannot shut our eyes to the fact that proprietors may have a considerable interest in the proposed proceedings, although their houses may not be in immediate contact with that which it is desired to alter. It is said that the appellant Jackson's land comes within ten feet of the ground on which it is proposed to erect these tenements in place of a single villa with a garden round it. In these circumstances it appears to me very difficult to say that the appellant has not a title and a substantial interest to appear. I quite understand that the Dean of Guild should set his face against feuars dropping in one after another and insisting on being sisted merely by saying that they had an interest. I quite concede that the Dean of Guild has a discretion to exclude parties whose sole object is to obstruct the proceedings. The question is,

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whether there is such a state of affairs here as to justify the Dean of Guild in refusing to allow this appellant to appear and say what he has to say. Now, as far as I can gather, the Dean of Guild does not appear to have gone on the ground that the appellant had no interest or title to appear, but that his title and interest were identical with those of someone who had appeared. That seems to me a somewhat novel ground for refusing to allow a party to be sisted, and therefore I agree with your Lordship.

LORD M'LAREN.—I regret that I am unable to agree with your Lordships. It appears to me that the petitioner has complied with all the requirements of the Burgh Court Act of Sederunt by calling the immediately conterminous proprietors, and that no other persons are entitled to appear as of right. Where others than the immediately conterminous proprietor apply to be sisted as defenders they may, as a matter of convenience, be allowed to appear. I do not doubt that it is in the discretion of the Dean of Guild to admit other parties, but it seems to me that one condition of the exercise of that discretion must be that the person seeking admission should be able to shew that he has some interest of a nature fitted for trial in the Dean of Guild Court. The exclusion of a person from the Dean of Guild Court does not in any way prejudice him, for he has other remedies open to him. If he thinks he has a right of servitude with which the contemplated operations will interfere, his proper remedy is by way of interdict.

Now, Mr Shaw has explained that the appellant's only title is one which is identical *mutatis mutandis* with that of an immediately conterminous proprietor. It appears to me to be plain on the face of that title that it does not entitle the appellant to appear in the Dean of Guild Court as of right, because the defence proposed to be stated involves a question of heritable right cognate to one which was lately the subject of adjudication by the House of Lords. If the party has no legal right to appear in that Court, it appears to me, speaking generally, that he ought to be left to his remedy in this Court. I cannot see any advantage in having such questions tried in the Dean of Guild Court. These questions of building restrictions involve very delicate and perplexing questions of law, upon which the highest legal authorities have sometimes arrived at opposite conclusions. In my opinion the Court of the Dean of Guild is a tribunal which, by its constitution and mode of procedure, is utterly unfitted for the trial of such questions. I think that opinion is shared pretty generally in the profession. Its president is not a lawyer but a builder. He is assisted by a legal assessor, but that gentleman occupies only an honorary position, and does not act under official responsibility. I cannot see any advantage in encouraging the conversion of the Dean of Guild's Court into a Court for the determination of questions of heritable right, which have always been considered appropriated to the Court of Session.

LORD KINNEAR.—I am of the same opinion as your Lordship and Lord Adam. My only doubt was whether this question of sisting an adjoining proprietor was not a question entirely for the discretion of the Dean of Guild. It is the duty of a petitioner in a process like the present to call all the immediately adjoining proprietors, but if others more remote desire to be heard, it rather appears to me to be very much a question of discretion whether they should be allowed to appear or should be left to their other legal remedies. My doubt has been

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removed mainly by this consideration, that the appellant craved to be sisted before the record was closed, and his appearance therefore would not have been the cause of any delay in the proceedings. I quite assent to the view that feuars are not entitled to drop in at any time, and so delay proceedings which are in their nature summary, but I do not think that the appellant is in that position. On the whole therefore I agree in thinking that the appellant ought to have been admitted.

THE COURT recalled the Dean of Guild's interlocutor, and remitted to him to sist the appellant, and proceed with the cause.

T. J. GORDON & FALCONER, W.S.—CURROR, COWPER, & CURROR, W.S.—Agents.

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DAVID M'KETTRICK (Hairsten's Judicial Factor), Pursuer (Real Raiser). MRS ANNIE MILLER M'GOWAN or DUNCAN AND OTHERS, Claimants (Reclaimers).—*Johnston—W. Campbell.* MRS JESSIE LITTLE or MARTIN AND OTHERS, Claimants.—*Martin.* JAMES M'WHIR HAIRSTEN AND OTHERS, Claimants (Respondents).—*Jameson—C. N. Johnston.*

Succession—Construction—"Survivors."—A testator directed his trustees upon his death to secure and lend upon good and sufficient bonds, payable to themselves, the sum of £700 in trust for behoof of each of his five daughters in liferent allenarly, and the lawful issue of each in fee. The deed provided that "in case any one or more of my said daughters shall die before me, or die without leaving lawful issue of her or their bodies, the sum or sums provided and intended for them and theirs as aforesaid, not only the original sum so provided, but the sum or sums accrescing to her or them by virtue of the present clause, shall appertain and accresce to the survivor or survivors of my said daughters in liferent for their liferent use allenarly, and to their issue and children, share and share alike, in fee. . . ." The deed further provided that at the request of any of his daughters, the trustees were to invest her £700 in the purchase of lands or houses, and were to take the titles to her in liferent allenarly and her issue in fee, "whom failing, to my said other daughters in liferent, and their respective issue and children in fee, in case of their death or their dying without leaving such issue and children, as in manner before mentioned." The testator left the residue of his estate to his sons.

Held that on the death of a daughter without issue her provision fell to her surviving sisters in liferent and their respective children in fee (children of predeceasing sisters being excluded), and that on the death of the last surviving sister without issue, the fee of the fund liferented by her fell into residue.

Forrest's Trustees v. *Rae*, Dec. 20, 1884, 12 R. 389, *followed.*

2D DIVISION. Lord Kincairney. M.

THOMAS HAIRSTENS of Maxwellton, died in 1827, leaving a trust-disposition and settlement dated 26th December 1822, and a codicil thereto dated 22d September 1823.

By his trust-disposition and settlement he disponed to trustees his whole estate, heritable and moveable. In the fourth place, he directed his trustees to pay to each of his five daughters by name a sum of £700 on their attaining majority. In the sixth purpose, he directed his trustees, as soon after his death as was prudent, and after payment of his debts, &c., and after payment or proper security obtained for the daughters' provisions, to pay and convey the residue of his estate equally among his three sons, Thomas, John, and James, always under burden of the annuities to his widow and brother.

The codicil, after narrating the provisions previously made in his settlement in favour of his daughters, bore,—"Upon farther consideration it has occurred to me that the provisions therein granted in favour of my

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said daughters should be destined and left in a different manner, therefore I have recalled, and hereby revoke and recall, the foresaid provisions conceived in their favour, with the whole conditions and declarations thereunto attached, and in place thereof I have provided for them as follows, viz.: I hereby direct and appoint my said trustees and their foresaids, immediately upon my decease, and from the first and readiest of my funds, to secure and lend out upon good and sufficient bonds payable to themselves the sum of £700 sterling, in trust for the use and behoof of my said daughter Agnes Hairstens, and the like sum of £700 sterling for use and behoof of each of my other said daughters Jane Hairstens, Barbara Hairstens, Margaret Hairstens, and Ann Hairstens, and for each other daughter which may be procreated of my present marriage, in liferent respectively for their liferent use allenarly, and for the use and behoof of the lawful issue and children of each of my said daughters, share and share alike, in fee, with interest thereof from the first term of Whitsunday or Martinmas that shall occur after my decease, to which interest I hereby declare they and each of them shall be entitled: And in case any one or more of my said daughters shall die before me, or die without leaving lawful issue of her or their bodies, the sum or sums provided and intended for them and theirs as aforesaid, not only the original sum so provided, but the sum or sums accrescing to her or them by virtue of the present clause, shall appertain and accresce to the survivor or survivors of my said daughters in liferent, for their liferent use allenarly, and to their issue and children, share and share alike, in fee,—that is, the issue and children of each daughter shall receive no more than an equal share of what would have fallen to the issue and children of the daughter or daughters predeceasing or dying without issue and children: Declaring always that my said daughters shall be consulted by my said trustees and their foresaids, not only in effecting the loan of the foresaid several sums for behoof of themselves and their respective families, but also that the same when secured shall not be uplifted or discharged without their consent: Providing and declaring nevertheless that my said trustees and their foresaids shall, when demanded, and at the request and with the advice and consent of my said daughters, or any of them, for their and their families' respective interest in the premises, be bound and obliged to invest each of the several principal sums provided to them and their aforesaids in the purchase of lands or houses, and that my said trustees and their foresaids shall be bound and obliged to take the rights and investitures of the lands or houses so to be purchased in liferent to my said daughter or daughters, for her or their liferent use allenarly, and to her or their lawful issue and children in fee, and whom failing, to my said other daughters in liferent, and their respective issue and children in fee, in case of their death, or their dying without leaving such issue and children, as in manner before mentioned."

Mr Hairstens was survived by the five daughters, and after his death the provisions in their favour were invested on heritable security by the trustees, and the interest on these provisions was paid over to them as it fell due in terms of the settlement.

The daughters died upon the following dates:—Jean (Mrs M'Gowan), in 1864, Agnes in 1867, Margaret (Mrs Martin) in 1881, Barbara in 1889, and Ann in 1890.

Mrs M'Gowan and Mrs Martin left issue, the others dying unmarried.

In an action of multiplepoinding raised on 15th January 1891 by David M'Kettrick, judicial factor on the trust-estate, in order to ascertain to what persons the funds liferented by the three unmarried daughters of the testator was payable, claims were lodged for the issue of Mrs M'Gowan

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and Mrs Martin on the one hand, and for certain representatives of the testator's three sons, the residuary legatees under the settlement, on the other.

The former claimants maintained that the fee of the shares liferented by the unmarried daughters was carried to them by the destination in the codicil. The latter claimants maintained that the fee was destined only to the issue of daughters who survived the predeceasing daughters, and that therefore the fee of the shares liferented by the testator's unmarried daughters fell into residue, with the exception of one-third of the share of Agnes, which fell to the issue of Mrs Martin, who had survived Agnes.

On 20th May 1891, the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds that, on a sound construction of the trust-disposition and codicil, the fee of the provision of a daughter of the truster dying without issue is destined to the issue of daughters of the truster surviving the daughter so dying, to the exclusion of the issue of daughters predeceasing her: Therefore repels the claim of Mrs Annie Miller M'Gowan or Duncan and others: Sustains the first claim for Mrs Jessie Little or Martin and others [as regards a third part of the provision of the truster's daughter Agnes], and repels that claim *quoad ultra*: Finds that the fund *in medio*, except so far as the claim of Mrs Jessie Little or Martin and others thereto has been sustained, falls to be paid to the truster's three sons, Thomas Hairstens, John Hairstens, and James Hairstens, being his residuary legatees; and appoints the cause to be enrolled for further procedure."*

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* "OPINION.— . . . I was at first strongly under the impression that the truster's intention was to secure the whole of the five sums of £700 to his daughters and their issue, and to exclude the residuary legatees from the whole sum of £3500 so long as there existed issue of any of the daughters. That appeared to me to be in accordance with the scheme of the trust-deed, of which the codicil is merely a modification; and it seemed *prima facie* reasonable to suppose that the testator would favour equally the issue of daughters predeceasing and the issue of surviving daughters. That impression has not been wholly removed; but on more careful consideration of the words of the codicil I have come to think that it is impossible to give effect to it consistently with any fair interpretation of the codicil.

"I think there can be no doubt that the term 'survivor' in the clause of accretion which has been quoted has reference to the unmarried daughter who is supposed to have died, and whose provision is in question. It is her survivor who is intended. But it seems to me that there is at first sight a possible or apparent ambiguity in the clause, because the antecedent to the latter relative, 'their,' may possibly be either the word 'daughters' or the words 'survivor or survivors of daughters,' and, therefore, it is not impossible to read the clause as importing either a destination to the survivors of the daughters in liferent and the issue of these survivors in fee, or a destination to the survivors of the daughters in liferent and to the issue of all the daughters, whether surviving or predeceasing, in fee. Out of that ambiguity the present question has apparently arisen. Had the words used been 'surviving daughters' instead of the survivors of daughters, there would have been no ambiguity at all, and perhaps this question might not have arisen.

"But on careful consideration I have come to think that there is no substantial ambiguity and no real doubt as to the manner in which the clause must be construed, and that the latter interpretation is really inadmissible.

"Although it is not wholly impossible to construe the destination 'to the survivors of my daughters in liferent and their issue in fee,' as a destination of the fee to the issue of all daughters surviving and predeceasing, such a construction would be extremely forced and strained. According to any natural or ordinary

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The issue of Mrs M'Gowan reclaimed, and argued;—The testator's obvious intention was that shares of the daughters who died without construction the words 'their issue' must bear reference to the individuals previously specified on whom the liferent had been conferred, that is to say, to the survivors of the daughters. The truster contemplated five separate investments, one in favour of each daughter, and it is plain from the codicil that he regarded the sums which would accresce on the death of a daughter without issue simply as additions to the original provision, and as falling under the destination which governed that provision. I think it clear that he meant that the sum, whether original or accrescing, of which a daughter should have the liferent, should stand destined to her issue in fee. But that could not happen if the liferents accresced to the surviving daughters only, and the fee to the issue not only of surviving daughters but of predeceasing daughters also. For example, there is no doubt that on the death of Agnes the liferent of her provision was divisible into three parts, and Mrs Martin was entitled to the liferent of a third, but the fee if not confined to the issue of surviving daughters would be divisible into four parts. So that Mrs Martin would have the liferent of one-third, but her issue the direct right to the fee of a fourth only. That would be a result which appears inconsistent with the language of the codicil and with the idea that the accrescing funds should be simply an addition to the original provision. On the whole, I think that the exclusion of the issue of predeceasing daughters is expressed so plainly in this clause that that view of it must of necessity be adopted unless the indications of a contrary intention are unmistakeable.

"It was argued on behalf of the issue of Mrs M'Gowan and Mrs Martin that this was a case in which the word 'survivor' should be read as synonymous with 'other.' But I confess I have not been able to see the force or application of that suggestion. It is no doubt not only possible, but absolutely certain, that the words 'survivor' and 'other,' when used in this deed in reference to daughters, are absolutely synonymous, because what is conferred on a daughter is a liferent; but the effect of that identification is not to enlarge the meaning of the word 'survivor,' but to restrict the meaning of the word 'other.' It shews that daughters may, or rather must, mean surviving daughters, but it does not shew that surviving daughters or other daughters can include daughters who were not survivors.

"Up to this point I can see no difference between this case and the case of *Forrest's Trustees* v. *Rae*, 20th December 1884, 12 R. 389, where the Court dealing with a destination in all points similar refused to hold that the words 'issue of survivors' could include issue of predeceasers. The reported argument in that case is almost the same as the argument which was addressed to me, and I would be bound to follow that case as a precedent unless this case could be distinguished.

"Counsel for the issue referred to the case of *Ramsay's Trustees* v. *Ramsay*, 21st December 1876, 4 R. 243, which also bears a very striking resemblance to this case, and where the Court preferred the issue of predeceasing legatees, notwithstanding that the destination was to the issue of surviving legatees in a question with parties pleading intestacy. In that case the provision dealt not as here with specific sums, but with the whole estate, and the only alternative against the claim of the issue was intestacy, which was said to be inconsistent with the manifest plan of the truster's settlement. Here, by reason of the residuary clause, there is no question about intestacy. It was said by the Judges in *Forrest's* case that their judgment was not inconsistent with the judgment in the case of *Ramsay's Trustees*. I am not sure that I see the exact grounds on which the apparent conflict between the two cases is satisfactorily displaced. But I think that I must regard the case of *Forrest* as the more binding on me, both because it seems to me to come closer to the present case, and also for the simple reason that it is the later judgment.

"There are, however, two passages in the codicil in this case which did not occur in the settlement under consideration in *Forrest's* case. The one is a kind of explanatory clause which comes immediately after the clause of accretion,

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issue were to be divided equally among the families of the whole of his daughters. Under the clause at the end of the deed any daughter might demand that the trustees should invest her £700 in the price of a house or in land. Supposing Agnes had done this, the trustees would have had to take the title to her in liferent allenarly, and to the whole of her sisters in liferent, and to their respective issue in fee. Under such a destination, the issue of Mrs M'Gowan would have taken as well as the issue of Mrs Martin. The case of *Forrest's Trustees*[1] had no such clause to shew that the word "survivor" was not meant to have its literal meaning. Further, the competition was not as here between the issue of predeceasing daughters and residuary legatees, but between the issue of surviving and predeceasing children. It was quite open in such a case

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and it is as follows:—'That is the issue and children of each daughter shall receive no more than an equal share of what would have fallen to the issue and children of the daughter or daughters predeceasing or dying without issue and children.'

"There was not much said in argument about this clause, which is certainly surprisingly obscure, and of which no very satisfactory interpretation was suggested. It is manifestly defective, because while the words 'no more than an equal share' imply a comparison with something else, the other term of the comparison is not expressed at all, and the clause has no meaning without supplying it. If it could be held to be intended that the share of the issue of one child should not exceed the share of the issue of any other child, such a construction would strongly support the case for the issue. But I am not prepared to read the clause in that way, and so to overbear the much more distinctly expressed clause of accretion. I think it is easier to suppose that the object of the clause was to provide that the family of one surviving daughter should take no more than the family of another surviving daughter, whatever difference there might be in the size of the families; in other words, to declare that the division should be *per stirpes*, which would be consistent with the clause of accretion.

"The other clause in the codicil is to the effect that if any of the daughters should desire it, the trustees should invest her £700 in the price of a house or in land, and if they did so, they should take the title to the daughter in liferent allenarly and her issue in fee, whom failing, to the truster's 'said other daughters in liferent, and their respective issue in fee, in case of their death without leaving such issue and children as in manner before mentioned.' That is to say, that if, for example, a house had been bought with the £700 provided for Agnes, the title would have been taken to Agnes in liferent allenarly, and to Jean (Mrs M'Gowan), Margaret, Barbara, and Anne in liferent, and to their respective issue in fee. It was argued that the case fell to be decided as if such investments had been made and titles taken; and in that I agree,—and that under such a destination the issue of Mrs M'Gowan would have taken as well as the issue of Mrs Martin. But the whole codicil must be read together, and having regard to the distinct declaration in the primary clause of accretion in favour of the issue of survivors—to which this latter clause refers back—I am disposed to think that under such a clause the issue of Mrs M'Gowan could not have taken.

"On the whole, I am driven unwillingly to the conclusion that in this case I must follow the decision in the case of *Forrest*, from which I cannot see that this case can be safely distinguished. I come to this conclusion with hesitation and some regret, because I cannot resist the suspicion that it may not be the conclusion which the truster himself would have reached. . . .

"I think it follows that the third part of the provision of Agnes which fell to Mrs Martin and her issue became part of the original provision to her and them, and was on Mrs Martin's death payable to her issue along with the capital of the original £700. . . ."

[1] Forrest's Trustees v. Rae, &c., Dec. 20, 1884, 12 R. 389.

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as this, in order to avoid defeating the truster's plain intention, to read "survivors" as equivalent to "others," as had been done in *Ramsay* v. *Ramsay's Trustees*.[1] The matter has been subject of much discussion in England, and although the Courts there had sometimes given a strict meaning to the word "survivor," while suspicious that such was not meant by the testator, they had frequently taken the merest sign of a contrary intention in order to evade a strict construction.[2] The issue of Mrs Martin concurred in the above argument.

Argued for the representatives of the residuary legatees;—The general rule was that the words of a settlement were to receive their ordinary natural meaning unless there was a very strong reason to the contrary. The argument of the parties representing Mrs M'Gowan and Mrs Martin was founded solely on the clause in the deed as to the daughters' right to have their share of the fund settled on them *nominatim*. That clause, however, fell to be read along with the prior and fuller declaration contained in the clause of accretion. There was no difference between this case and *Forrest's Trustees*. The case of *Ramsay's Trustees* was inapplicable. The *dicta* there had reference to the circumstances of that particular case which would have been one of intestacy, had the decision been otherwise. The word "survivors" must then receive its ordinary natural meaning, and therefore the issue of the predeceasing daughters fell to be excluded.[3]

At advising,—

LORD JUSTICE-CLERK.—Mr Hairstens of Maxwellton died in 1827, and directed the trustees under his trust-disposition and codicil to invest £700 in trust for behoof of each of his daughters in liferent allenarly, and of their issue in fee.

The provision applicable to this, and which requires construction, is as follows:—"In case any one or more of my said daughters shall die before me, or die without leaving lawful issue of her or their bodies," the sum provided for her and her issue "shall appertain and accresce to the survivor or survivors of my said daughters in liferent for their liferent use allenarly, and to their issue and children, share and share alike, in fee."

Now, what happened was this—One of the daughters, Mrs M'Gowan, died in 1864, leaving issue; Agnes died unmarried in 1867; Mrs Martin died in 1881, leaving issue; and two other daughters, Barbara and Anne, died unmarried in 1889 and 1890, respectively.

The question raised here is one between the issue of Mrs M'Gowan and Mrs Martin and the representatives of Mr Hairstens' residuary legatees under his trust-deed, these legatees being his three sons.

The former maintain that under the above destination the fee of the several sums of £700 is carried to the issue of Mrs M'Gowan and Mrs Martin, although Mrs M'Gowan predeceased all her unmarried sisters, and Mrs Martin only survived one of them. On the other hand, the residuary legatees maintain that the fee is destined only to the issue of such of the daughters who survived the predeceasing daughters, and that therefore the issue of Mrs M'Gowan, who prede-

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[1] Ramsay v. Ramsay's Trustees, Dec. 21, 1876, 4 R. 243.

[2] Jarman on Wills, 4th ed. ii. pp. 689 *et seq.*

[3] Benn v. Benn, 1885, L. R., 29 Ch. Div. 839; King and Others v. Frost, 1890, L. R., 15 App. Cases, 548.

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ceased Agnes, Barbara, and Anne, are wholly excluded, and that the issue of Mrs Martin, who survived Agnes, but predeceased Barbara and Anne, are entitled only to one-third of the £700 destined to Agnes and her issue; and they maintain that all the rest is carried by the residuary clause to the residuary legatees.

The real question is as to the meaning of the words "to the survivor or survivors of my said daughters in liferent for their liferent use allenarly, and to their issue and children, share and share alike, in fee." Do they mean what they express in language, "the survivors of predeceasing daughters," or do they mean that a fee is destined to the issue of all daughters whether surviving or predeceasing?

The Lord Ordinary has gone into the legal question in an elaborate judgment, and he has come to be of opinion that he is bound to follow the case of *Forrest's Trustees* v. *Rae*. That case was decided after full deliberation, and favours the view maintained by the representatives of the residuary legatees as against that maintained by the issue of Mrs M'Gowan and Mrs Martin.

I agree with his Lordship that this case is ruled by *Forrest's Trustees*, and whatever may have been decided in the case of *Ramsay's Trustees* v. *Ramsay* does not in my opinion rule this case. The case of *Ramsay's Trustee* was earlier in date than that of *Forrest's Trustees*, and indeed it was referred to in the latter case, and was therefore before the Court, and was distinguished by the Judges from *Forrest's* case.

I am, then, for adhering to the Lord Ordinary's interlocutor, and I agree in the reasons contained in his opinion.

LORD YOUNG.—I am of the same opinion. I think that the whole stands upon the very obvious fact that the last survivor of any number of daughters does not leave behind her a surviving sister.

LORD RUTHERFURD CLARK.—I agree.

LORD TRAYNER was absent.

THE COURT adhered.

J. & J. GALLETLY, S.S.C.—SCOTT & GLOVER, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

No. 217. July 14, 1891. Darling v. Gray & Sons.

JANE WOOD OR DARLING, Pursuer (Appellant).—*Rhind.*
. WILLIAM GRAY & SONS, Defenders (Respondents).—*C. N. Johnston.*

Reparation—Executor—Solatium—Competency of new action where pursuer died from his injuries after action brought.—A workman who had received injuries while working in his master's employment raised an action against him for damages. The record was closed, and issues were adjusted. Thereafter he died intestate and unmarried, and his mother was appointed his executrix, and was sisted in the action in his room. She raised against the employer another action for damages and *solatium* for her son's death, which she alleged to be due to the accident, and craved to have that action remitted to the same jury who were to try the first action. *Held* that the second action was incompetent.

2D DIVISION. Sheriff of the Lothians. I.

ON 23d June 1890 Alexander Darling, a mason in the employment of William Gray & Sons, builders, Edinburgh, raised, in the Sheriff Court at Edinburgh, an action of damages against Gray & Sons, aver-

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ring that he had received injuries while at his work by the breaking of the jib of a crane, for the defective state of which his masters were responsible.

The record in that action was closed, and, after proof was allowed, it was appealed to the Court of Session for jury trial. Issues were adjusted, and the action was remitted to Lord Low for trial.

Thereafter Darling died on 6th January 1891. He was unmarried and intestate. His mother, Jane Wood or Darling, a widow, was sisted pursuer as his executrix.

On 30th April 1891 Mrs Darling raised another action against William Gray & Sons at common law, and under the Employers Liability Act, 1880, for damages and *solatium* for the death of her son. She averred that his death resulted from the effects of the accident, and that the accident occurred through the fault of the defenders.

The defenders narrated the raising of the previous action by Darling himself, and stated—"The said action is still pending in the Court of Session before Lord Low, Ordinary." They pleaded (1) *lis alibi pendens*, (2) the action is incompetent.

On 6th June 1891 the Sheriff-substitute (Hamilton) allowed a proof before answer.

The pursuer appealed for jury trial, and proposed an issue. She moved the Court to approve the issue, and to remit the action to Lord Low (Ordinary), to be tried before the same jury as should try the first action.

Argued for the pursuer;—It was admitted that one who had recovered damages for an injury could not have a second action tried simply because the injury had proved worse than he at first averred. But here the second action was to recover damages for the death of the deceased. In the other action the jury could only give to his executrix the damages which he himself had suffered. The claims were therefore different and independent. The fact that the deceased was prosecuting one of them at his decease was not a good answer to the claim made for satisfaction of the other.

Argued for the defenders;—The mother's action was incompetent in respect of the depending suit founded upon the same cause of action. The principle was the same as was applied in the case of *Stevenson*.[1] There could be no new action because a new result had emerged. That was well settled in England also.[2]

LORD YOUNG.—The question has been argued as one of interest and of importance. I think it is so, but I think it is not difficult, and I have come to a clear opinion upon it. It seems that this man Darling was injured through the fault, as he alleged, of the defenders. He brought an action against them upon that footing. It was in dependence at his death—the record having been closed. When he died his executrix, his mother, was sisted as pursuer in that action. There is no doubt of her right to continue it as he might have done if he had lived.

But she has also brought a second action, on the ground that she has suffered loss as an individual by his death. In considering that, I take no account of the peculiar circumstances in which the death occurred. I am assuming that the

[1] Stevenson v. Pontifex & Wood, Dec. 7, 1887, 15 R. 125; M'Master v. Caledonian Railway Co., Nov. 27, 1885, 13 R. 252.

[2] Addison on Torts, 54.

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death is to be referred to the accident, and I take the general case that the sufferer from an accident having died after raising the action his executrix brings an action upon the footing that she who is suing the action raised by the deceased is entitled also to sue a second action as being individually a sufferer by the death. It is a question of novelty whether that is competent. I am clearly of opinion that it is not.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

LORD TRAYNER was absent.

THE COURT dismissed the action as incompetent.

D. HOWARD SMITH, Solicitor—T. & W. A. M'LAREN, W.S.—Agents.

No. 218.
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Heritable Reversionary Co., Limited, v. M'Kay's Trustee.

THE HERITABLE REVERSIONARY COMPANY, LIMITED, First Parties.—*Johnston—Shennan.*

ROBERT COCKBURN MILLAR (M'Kay's Trustee), Second Party.—*Lorimer—Hunter.*

Bankruptcy—Vesting of heritable estate in trustee—Latent trust—Tantum et tale—Bankruptcy Act, 1856 (*Act* 19 *and* 20 *Vict. cap.* 79), *sec.* 102.*—*Held* (*diss.* Lord M'Laren) that a sequestration vests in the trustee for behoof of the creditors heritage to which the bankrupt holds an unqualified feudal title in his own name, although he holds it only in trust for the true owner.

1ST DIVISION. C.

THE HERITABLE REVERSIONARY COMPANY, LIMITED, was incorporated under the Companies Acts in 1880, its object being, *inter alia*, to acquire land or houses or other property for the purpose of holding or reselling it.

Daniel Smith M'Kay acted as its manager down to February 1886. On 17th May 1882 he bought certain tenements of houses for £2150, and they were subsequently conveyed to him by disposition, on which he was infeft on 14th September 1882. The purchase was made for

* The 102d section of the Bankruptcy Act, 1856, enacted as follows:—"The act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following:— . . . 2. *Vesting of Heritable Estate in Scotland.*—The whole heritable estate belonging to the bankrupt in Scotland, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground as hereinafter provided; and the right of the trustee shall not be challengeable on the ground of any prior inhibition (saving the effect which such inhibition may be entitled to in the ranking of the creditors): Provided always that such transfer and vesting of the heritable estate shall have no effect upon the rights of the superior, nor upon any question of succession between the heir and executor of any creditor claiming on the sequestrated estate, nor upon the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence); and if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach."

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behoof of the Reversionary Company, but *ex facie* of the disposition they were not parties to the purchase. Neither were they parties to a bond and disposition in security which M'Kay granted over the subjects for part of the purchase price.

M'Kay's estates were sequestrated in December 1890, and Mr R. C. Millar was appointed trustee.

In these circumstances, the questions arose whether the subjects in question, being absolutely vested in him, formed part of his sequestrated estate and passed to the trustee for his creditors, or whether the Reversionary Company were entitled to vindicate their right to the property.

In a special case to which the Reversionary Company were first parties, and M'Kay's trustee was second party, these questions were put:—"(1) Whether the second party, as trustee on the sequestrated estate of the said Daniel Smith M'Kay, took said subjects which were vested *ex facie* absolutely in the bankrupt, free of the latent trust in favour of the first parties, and whether the first parties are entitled only to rank on the sequestrated estate for the value of the subjects, or were entitled to recover said subjects from the second party as their own property? (2) Whether the surplus price of said subjects belongs to the second party as trustee foresaid, or to the first parties?"

The case stated;—The purchase was made by M'Kay for behoof of the Reversionary Company, and on the instructions of the directors of that company. This appears from the minutes of meeting of the shareholders of the company held on 21st June 1882, and in accounts of intromissions kept by M'Kay as manager of the company, periodically rendered to the directors, and engrossed in the minute-book of the company. Further, M'Kay, shortly after he ceased to act as manager of the company, executed a declaration of trust, dated 17th May 1886, to the effect that he held the subjects in trust only for behoof of the Heritable Reversionary Company.* The purchase price of the subjects was provided as follows:—(First) M'Kay granted a bond and disposition in security over the subjects, in ordinary form, in favour of certain lenders for £1450, dated 3d August 1882, and 14th September 1882; and (secondly) the balance of the price, amounting to £700, was provided by the Reversionary Company out of rents collected by the company, and sums deposited on loan with the said company by certain of its shareholders. The Reversionary Company were not *ex facie* of the deeds above referred to parties to the purchase of said subjects or to the bond and disposition in security granted over the same. The declaration of trust was not recorded in the Register of Sasines, and there was nothing appearing on the public records to shew that the company were connected with or in

* The declaration of trust was, *inter alia*, as follows:—"Considering that said subjects are held by me in trust as after mentioned, and that I have been requested to grant the declaration of trust after written; therefore, I hereby confess and declare that I hold the said subjects in trust only for behoof of the Heritable Reversionary Company, Limited, and I bind and oblige myself and my heirs and successors, whenever required to do so by them, and on being reimbursed of all expenses incurred by me in connection with the said subjects, and being relieved of all obligations which I have undertaken thereanent, to denude myself of the foresaid trust, and for that purpose to grant, subscribe, and deliver a formal and valid disposition or conveyance of the said subjects in favour of any person or persons whom the said the Heritable Reversionary Company, Limited, may name, and that under a penalty of £500 sterling, over and above performance."

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any way interested in the property. The company, however, or their manager for the time, in point of fact, managed the property, and collected the rents thereof, and from the year 1882-83 down to the present date the company was entered in the Valuation-roll of the burgh of Leith, and in the several assessment rolls prepared from the Valuation-roll, as proprietors of the subjects. M'Kay did not interfere in the management or intromit with the rents, except for behoof of the company, and only during the period that he acted as their manager.

It was further stated that the property in question had been sold of consent of parties, and that, after paying off the bond, there remained a surplus of about £365, which was consigned in bank to await the decision of the Court.

Argued for the first parties;—There was no question that if equitable considerations were to prevail, the subjects belonged to them, and they were entitled to the surplus. As regarded moveable property, the trustee in a bankrupt estate took it *tantum et tale* as it stood in the bankrupt. That this was the law in regard to personal estate there could be no doubt. The 102d section of the Bankruptcy Act, 1856, transferred to the bankrupt's trustee "the whole heritable estate belonging to the bankrupt." But the property in question could not be held to be such, because the bankrupt could not have disposed of it without committing a breach of trust. The trust under which he held the property qualified and was inherent in the right which vested in the trustee. He took the estate subject to all latent equities to which the bankrupt was subject, and adjudging creditors "must take the right of their debtor *tantum et tale* as it was in his person."[1] No doubt Professor Bell in his Commentaries[2] had expressed himself to the effect that where land was vested in an individual, with the view that he should hold as trustee for a company, the condition of the right was unavailing, if it did not appear on the record, and this view was borne out by some of the older cases.[3] But in view of the fact that, if Professor Bell was right in his interpretation of these cases, it would lead, as in this case, to the greatest injustice, they were worthy of reconsideration. The law would admittedly be different in the case of *bona fide* purchasers or mortgagees. It was for their protection that the system of public records and the efficacy which attached to them had been introduced. There was justice in according absolute safety to a purchaser or to a mortgagee who bought or lent on the faith of the records. The case of an ordinary creditor was distinct. He only trusted to the personal credit of his debtor, and knew nothing of the state of any title-deeds which he might happen to have. This distinction was taken by Lord Westbury in his Lordship's opinion in the case of *Fleeming* v. *Howden*.[4] Further, the property in question had always been managed by the company, who had themselves drawn the rents, and had thus been in possession both before and after M'Kay had ceased to be manager. The right of property had therefore effectually vested in the company,[5] and

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[1] Thomson v. Douglas, Heron, & Co., 1786, M. 10,229.

[2] Bell's Comms. 5th ed. i. 282, 7th ed. i. 301.

[3] Wylie v. Duncan, 1803, M. 10,269; Russell and Others v. Ross' Creditors, 1792, M. 10,300; Mitchells v. Ferguson, 1781, M. 10,296, and Lord Hailes' Decns. 879; Jeffrey v. Paul, May 15, 1835, 1 S. and M'L. 767; Goudy on Bankruptcy, 251.

[4] Fleeming v. Howden, July 16, 1868, 6 Macph. (H. L.) 113, at p. 121, 40 Scot. Jur. 616; Graeme's Trustee v. Giersberg, June 1, 1888, 15 R. 691; Molleson v. Challis, March 11, 1873, 11 Macph. 510, 45 Scot. Jur. 328.

[5] Watson v. Duncan, July 12, 1879, 6 R. 1247.

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it could not be said, in the words of the 102d section of the Bankruptcy Act, 1856, that this was "property belonging to the bankrupt."

Argued for the second party;—It was a long-established rule in the law of Scotland that a person, whether creditor or purchaser, dealing with a proprietor who had completed his infeftment, was entitled to rely upon the public records. Any condition or limitation of the right which did not appear there could not receive effect.[1] The doctrine of *tantum et tale* had no application to the case of real rights completed by infeftment. No analogy could be drawn from the cases of moveable property such as a ship, the title to which required registration, and such authorities as that of *Watson* v. *Duncan*[2] were entirely inapplicable. The maxim *assignatus utitur jure auctoris* did not apply to the transmission of heritable estate.[3]

At advising,—

LORD ADAM.—The parties to this case are, in the first place, the Heritable Reversionary Company, Limited, and in the second place, the trustee on the sequestrated estate of Daniel Smith M'Kay.

It appears that M'Kay was sequestrated on 2d December 1890, and that he was then infeft in certain houses in Balfour Street, Edinburgh, as absolute proprietor, conform to disposition thereof in his favour, recorded in the Register of Sasines on 14th September 1882. These subjects, however, were in fact held by him in trust for the Reversionary Company, in whose favour he had executed a declaration of trust dated 17th May 1886. It is made matter of statement in the case that this declaration of trust was not recorded in the Register of Sasines, and that there was nothing appearing in the public records to shew that the company were connected with or in any way interested in the property. It is in these circumstances that we are asked whether the trustee on M'Kay's sequestrated estate took the property free from the latent trust in favour of the Reversionary Company, or whether he took it *tantum et tale* as it stood in the person of the bankrupt, and affected by that trust.

The question primarily depends on the vesting clause of the Bankruptcy Act, 1856 (sec. 102), which provides that the Act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him, for behoof of creditors, absolutely and irredeemably, as at the date of the sequestration, the whole heritable estate belonging to the bankrupt in Scotland to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication in payment and in security of debt subject to no legal reversion, had been pronounced in favour of the trustee and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground—and at the end of the section there is the qualification that if any part of the bankrupt's estate

[1] Bell's Comms. 5th ed. i. 282, 7th ed. i. 301; Wylie v. Duncan, 1803, M. 10,300; Russell and Others v. Ross' Creditors, 1792, M. 10,300; Mitchells v. Ferguson, 1781, M. 10,296, and Hailes' Decns. 879; Jeffrey v. Paul, Nov. 29, 1831, 10 S. 75, 4 Scot. Jur. 149, and (H. L.), May 15, 1835, 1 S. and M'L. 767, 7 Scot. Jur. 530; Mansfield v. Walker's Trustees, June 28, 1833, 11 S. 813, 5 Scot. Jur. 569, affd. April 10, 1835, 1 S. and M'L. 203, per Lord Brougham, 333; Laurie v. Laurie, March 10, 1854, 16 D. 860, 26 Scot. Jur. 383.

[2] *Supra*, p. 1168, note 5.

[3] Scottish Widows' Fund v. Buist, July 14, 1876, 3 R. 1078.

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be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach.

It cannot, I think, be maintained that this property was held by the bankrupt on a title limited so as to prevent him from legally conveying it, or, so far as I can see, creditors from attaching it. The bankrupt's title was not *ex facie* limited in any way, and I do not understand it to be disputed that he could have given a perfectly good title to a disponee free from the latent trust. But it was said that a creditor, and therefore the bankrupt's trustee as having the same rights as a creditor, could not attach it except under burden of the trust, but must take it *tantum et tale* as it stood in the person of the bankrupt.

I understand that this is maintained on the ground that the trust was an inherent qualification of the bankrupt's right, and therefore affected the subjects in the hands of anyone deriving right from or through the bankrupt.

If the trust be an inherent qualification of the bankrupt's right, it is difficult to see why it should not affect the subjects in the hands of a disponee as well as of a creditor. But however that may be, in my opinion the doctrine of *tantum et tale* has no application in the case of real rights perfected by sasine.

I have always understood that any person, whether creditor or purchaser, dealing with a proprietor infeft, was entitled to rely on the public records, and was not affected by any qualification, burden, or condition on the real right not there appearing. It appears to me that to give effect to the claim of the Reversionary Company would be to violate this well-settled principle—and I see no reason why an exception should be made in the case of a latent trust any more than in the case of any other latent qualification or obligation of an *ex facie* absolute proprietor.

On this subject Mr Bell in his Commentaries (i. 300), says,—"A right as it stands in the bankrupt's person may be limited or qualified by certain conditions and stipulations, and in general the qualification, if inherent in the constitution of the right and apparent on the face of it, is effectual against third parties." Then, after stating the difficulty of distinguishing between conditions limiting the right of the holder and those which resolve into mere personal obligations, he adds,—"But wherever the right itself is qualified or limited, the condition is effectual," with certain exceptions. He then states the exceptions, and the first which he states is that "of real rights to lands where the limitation does not appear in the infeftment." Then he adds, I think quite accurately,—"The statutes relative to the records have the effect of protecting creditors and purchasers against such burdens and qualifications of the real right of a proprietor infeft as are not of the nature of a radical defect in his title." One of the illustrations which he gives of the application of this doctrine is the case we have here,—"Where lands and houses are vested in one individual intending that he shall hold as trustee for a company." In support of this doctrine Mr Bell refers to the case of *Wylie* v. *Duncan*, M. 10,269.

In this case Wylie disponed to Archibald absolutely certain subjects at a price. At the same date Archibald granted to Wylie a missive obliging himself to redispone the subjects to him on repayment of the price, and upon being allowed the expense of repairs and meliorations. Archibald was infeft on this disposition.

Wylie remained in possession, and there is no doubt that the transaction was one of loan.

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Archibald, the disponee, was sequestrated, and the question arose between Duncan, the trustee on his sequestrated estate, who claimed the subjects, and Wylie, the disponer, who claimed to be entitled to redeem them on repayment of the price, and who pleaded that the trustee could only take them *tantum et tale* as they stood in the person of the bankrupt. The decision was, that the Lords considered the burden as personal, and not good against creditors.

I cannot distinguish that case from the present. In both cases the bankrupt was infeft absolutely in the subjects, and in both cases he was under a personal obligation to convey on certain conditions the subjects to the true owner. That the conditions were different on which the bankrupt was bound to redispone does not appear to me to make any difference in principle.

In the case of *Fleeming* v. *Howden*, 6 Macph. (H. L.) 113, to which we were referred, an heir of entail in possession and infeft in an estate was bound to denude in favour of the next heir of entail on succeeding to a peerage. He succeeded to the peerage, and some months afterwards died without having denuded himself of the estate. The trustees for his creditors claimed the estate, but the House of Lords repelled the claim, holding that he, the heir in possession, held the estate in trust for the next heir from the date of his succession to the peerage.

The present question, however, did not arise for decision in that case, because the trust was patent on the face of the title. Lord Cranworth, who delivered the leading judgment, says,—"This was apparent on the face of the title as recorded in the Register of Sasines, and any person becoming his creditor after that event must have known, if he looked to that register, that he was trusting a person who was no longer tenant in tail, for an event had occurred which made it his duty to denude in favour of another person."

But the case is important in respect of the view expressed in the House of Lords, that an obligation to do an act with respect to property creates a trust in the holder. If that be so, I do not see that any distinction can be maintained between the present case and *Wylie* v. *Duncan*, because in that view the bankrupt in *Wylie's* case was as much a trustee as the bankrupt in this case.

But I think, further, that the question raised in the present case was decided in the House of Lords in the case of *Paul* v. *Jeffrey*, 1 S. and M'L. 767.

That case related to three bonds and dispositions in security for £3000, £400, and £1925 respectively. It appears that a certain William Harley, having become insolvent, granted a conveyance of his whole estates, heritable and moveable, to certain trustees for the purpose of selling them and applying the proceeds in payment of the expenses of the trust, the advances made by them, and of paying the balance to the truster.

The three bonds in question were all granted by purchasers of portions of the trust property in security of payment of part of the purchase price.

The bond for £3000 was taken in the names of two of the trustees, James Cook and Archibald Cuthill, but *privatis nominibus*, and not as trustees. The bond for £400 was also taken in the names of Cook and Cuthill and of another trustee Henry Paul, but also as individuals, and not as trustees. The bond for £1925 was taken in names of the same three trustees, but expressly as trustees. It was not disputed that the bonds were in fact the property of the trust.

Cuthill became bankrupt and was sequestrated, and a Mr Jeffrey was appointed trustee on his sequestrated estates.

The two solvent trustees Cook and Paul raised an action in which, *inter alia*, they claimed right to the three bonds,

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The trustee on Cuthill's sequestrated estate put in defences, in which he maintained that as the bonds for £3000 and £400 were taken in favour of Cuthill as an individual, and appeared so on the Register of Sasines, he, on behalf of the creditors, was entitled to the benefit of them to the extent of Cuthill's share, and that the alleged trust was of no relevancy in a question with him.

This plea was not given effect to in the Court of Session, in which an interlocutor was pronounced finding "that the sums contained in the securities are applicable, in the first place, for payment of the outstanding debts of the trust"; in the second place, in relief of any superadvances made by Cook, &c., thereby affirming, as it appears to me, that the bonds for £3000 and £400, although standing partly in the name of Cuthill as an individual, were yet to be considered as the property of the trust, and liable for the trust debts. The case, however, was appealed by Jeffrey to the House of Lords, with the result that this interlocutor was varied, and it was declared that the "said appellant is entitled and ought to receive one third part or share of the principal sum of £400 contained in the heritable bond by William Ewing in the said proceedings mentioned, with a proportionate part or share of such interest as may have been received or may be due and payable thereupon." No reasons are given for the judgment, but the judgment itself appears to me clearly to import that the right of Cuthill's trustee was held not to be affected by the latent trust in the person of Cuthill. I see no other ground on which the judgment can be rested.

But if this be so, the question occurs, why the same principle was not applied to the bond for £3000 which was also taken to the trustees as individuals. I have read the session papers, and the reason is no doubt that the bond for £3000 was not granted for an independent debt of that amount, but merely in corroboration for a prior debt of £3000, which had been created a real burden in favour of the trustees over the portion of the trust property sold by them to the granters of the bond, and with which it was identified.

It appears to me therefore that the present question was decided in the House of Lords in the case of *Jeffrey* v. *Paul*, and I am of opinion, both on authority and principle, that the trustee on M'Kay's sequestrated estate is entitled to the subjects in question free from the latent trust in the person of the bankrupt.

Lord M'Laren.—Without attempting a full discussion of the question in issue, I should desire to state my reasons for respectfully, but very firmly, dissenting from the judgment proposed.

If it were possible to approach this question uninfluenced by the supposed tendency of previous decisions and professional impressions, I can hardly conceive that a Court of justice would give countenance to the proposal to divide trust property amongst the creditors of a trustee.

It is true that where a trustee is infeft in trust-estate on an *ex facie* absolute title, and afterwards sells or mortgages this property, dealing with it as his own, the title of the purchaser or mortgagee will be sustained against the competing claim of the truster or beneficiary. For this apparently inequitable conclusion two reasons may be given—First, because it is the act of the truster that has enabled the trustee to commit the fraud, and it is therefore considered proper that the loss should fall on him rather than on the innocent purchaser or mortgagee who has advanced his money in reliance on the apparently unqualified title of the granter of the conveyance to him. The second reason, which is sometimes given, is that the security of our system of records requires

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that a purchaser on the faith of the records should be kept safe. But this second reason does not appear to me to add anything to the force of the first reason, and this is evident when we consider that an *ex facie* absolute holder of personal estate, such as shares or moveable bonds, may also give a good title to a purchaser, although in this case the element of registration in a public register is absent.

Passing to the case before us of a bankrupt trustee whose estate is to be divided amongst his creditors, I should imagine that the property available for distribution would be the property which the bankrupt holds in his own right, and that on proof that any estate vested in the bankrupt is trust-estate, it ought to be struck out of the sequestration. It is admitted that this is the law in relation to personal estate, and no reason has been given satisfactory to my mind why it should not be the law in relation to heritable estate which may be vested in the bankrupt in trust. The rule is expressed in our older decisions in the maxim that creditors and adjudgers take the debtor's estate *tantum et tale* as it stands in his person. In other words, they take the estate affected by all latent equities which were binding on the bankrupt himself. This rule is illustrated by the leading case of *Thomson* v. *Douglas, Heron, & Co.*, M. 10,229. Thomson disponed his lands to a trustee in trust that he might sell the same and apply the proceeds "for the disponer's behoof." The disponee omitted the qualifying declaration from his title, and used the estate as a fund of credit for himself, borrowing money on heritable security, and afterwards became insolvent. The heritable creditors were held to have a good title against the truster, but the truster's right was held to be preferable as against adjudging creditors, and it was observed on the bench that "by decisions which for the stability of the law ought not to be departed from, they (the adjudging creditors) must take the right of their debtor *tantum et tale* as it was in his person."

It appears that some doubts have been expressed as to the soundness of this decision by Professor G. J. Bell in his Commentaries, 5th ed. pp. 282-3.

I have the greatest respect for the views of Professor Bell, but I do not hold him to be infallible. I will add that I am not satisfied that in the passage referred to Bell was contemplating the case of proper trust-estate, because the case he puts is that of a disponee who is "under a relative personal obligation," and the case he quotes, *Wylie* v. *Duncan*, is not a case of a trust qualifying the title of the trustee, but is the case of a bankrupt disponee who had purchased an estate out-and-out, at the same time coming under a collateral personal obligation to reconvey on demand. The case is correctly summarised by Professor Bell himself in a footnote, thus,—"*Pactum de retrovendendo* contained in a back-bond was held merely personal, and not effectual against creditors." From my point of view the decision in *Wylie* v. *Duncan* is unimpeachable. The bankrupt's title was essentially an individual title, and did not lose that character by reason of his having come under a separate and independent obligation (which might never be put in force) to reconvey on demand. But the estate of a trustee does not depend on the future action or resolution of the truster. It is essentially qualified, and it is as much the right of the trustee to require the truster to take back the estate and to repay him his advances, as it is the right of the truster to call for a reconveyance on tendering payment of the advances. If the Judges who decided *Wylie* v. *Duncan* meant to disaffirm the principle which was solemnly laid down in the case of *Douglas, Heron, & Co.*, it is extraordinary that the report should contain no trace of such an intention. The two

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cases appear to me quite consistent, and the principle is this, that where the bankrupt's right is qualified, the creditors take subject to the qualification, but that creditors are not affected by separate personal obligations which do not qualify the estate, and are only intended to bind the disponee personally.

Since 1803, when the latter of these cases was decided, I cannot find that this question has been the subject of direct decision. But there are two decisions of the House of Lords in which it has been raised.

In *Jeffrey* v. *Paul*, 1 S. and M'L. 767, as I read it, the right of the truster was not in question at all. There were three trustees, who together had made advances exceeding the value of the estate, and the competition was between the trustees. Now, it is a known principle of trust law that every trustee has a lien over the trust-estate for his advances, and where trustees have advanced money in different proportions, there may be difficulty in explicating their rights over the insolvent estate. A decision on such a question would not, in my judgment, be an authority applicable to the present case. If Lord Brougham had supposed he was dealing with so large a question as the claim of the creditors of a bankrupt trustee to divide the trust-estate amongst them, it is inconceivable that the noble Lord would have decided the case without making a single observation regarding this point. But if the case involved nothing more than the settlement of rights arising out of the trustees' lien (which I take to be its real nature), it did not call for any discussion of matters of principle, and in this view the case has no bearing on the present dispute. I understand that some of your Lordships take the view that the facts in *Jeffrey* v. *Paul* raise this question, and that the judgment of the House of Lords can only be explained or supported by supposing that the House did not recognise the latent trust. If this view does not truly involve an assumption of the question (as I think it does), it is at least open to the observation that the precedent proposed to be established is not founded on any expression of judicial opinion to be found in the case. Now, as I see no reason to believe that Lord Brougham really entertained the opinion that is attributed to him, I cannot regard this case as an authority for the proposition for which it is cited.

The other case in the House of Lords is *Fleeming* v. *Howden*, Law. Rep. 1 Scotch Ap. p. 372. In that case Lord Westbury observed,—"The right of a trustee under a sequestration is very different from the right of a singular successor, for it is a rule common both to English and Scotch bankruptcy law that the trustee or assignee takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy. But the singular successor is not bound by a trust or duty of which he had no notice. The trustee under a sequestration is in the same position as a gratuitous alienee. He takes such estate or interest only as the bankrupt can lawfully convey,"—p. 382. Similar observations, though less pointedly expressed, are to be found in the opinions of Lords Cranworth and Chelmsford. It was argued to the House of Lords that the vesting clauses of the Scottish Bankruptcy Act gave to the creditors of the bankrupt all the estate that was vested in him in title. The House rejected that construction, and held that the statute only gave the creditors what was vested in their debtor as of right; Lord Chelmsford observing on the words "estate capable of being affected by diligence or attached for debt," that these words "are nothing more than a general description of the species of property which the sequestration is to embrace." This leads me to observe that the present question is not, as I think, in any way touched by the

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vesting clause of the Bankruptcy Act. Suppose the trust purposes to be engrossed in the trustee's title, on his bankruptcy the vesting clause takes effect on the property. But then the estate acquired by the creditors in virtue of that clause is of no value to them, because it is a mere legal estate affected by a trust. The question here is, whether the right is not so qualified where the conditions of the trust are contained in a separate writing. Now, the Bankruptcy Act does not profess to solve this question, but leaves it to be determined according to known principles of law and equity. Exception has been taken to the expression used by Lord Westbury that the trustee under a sequestration is in the same position as a "gratuitous alienee." It may be that these words are not the best that could be chosen to express the quality of the right of creditors in the estate of their debtor. But there can be little doubt as to Lord Westbury's meaning. He meant to emphasise the distinction that creditors in a bankruptcy are not in the position of a purchaser who has advanced money on the faith of the seller's or mortgagor's title, but are only in the position of a disponee who takes his debtor's estate for whatever it is worth, in security or satisfaction of a pre-existing claim. Lord Westbury uses the words of the statute when he says that the trustee in a sequestration takes such interest as the bankrupt might "lawfully convey." His Lordship evidently understood these words as meaning that the trustee takes such estate as the bankrupt could honestly convey, not as meaning that the creditors would be in the position of a purchaser to whom the bankrupt had fraudulently conveyed. A fraudulent conveyance is not a "lawful" conveyance, although it may have the effect of vesting the property in a purchaser who has paid a full price and who was not cognisant of the fraud. Why creditors should be put in this position I am unable to understand.

It has been pointed out that in the case of *Fleeming* v. *Howden*, although the entail was not perfected by being recorded in the Register of Entails, yet creditors might have discovered by examining the Register of Sasines, that the entail contained a clause of devolution, and that therefore the heir in possession after succeeding to the peerage held the estate as a *quasi*-trustee for the next heir in succession. It may be that this circumstance renders the case of *Fleeming* v. *Howden* a less direct authority than it would otherwise be for the doctrines which are there laid down. But this specialty was fully in view of the Lords who took part in the decision; and while they certainly refer in their judicial opinions to this specialty they nevertheless profess to lay down a general rule of bankruptcy law in the passages to which I have referred.

I may conclude by observing that I am unable to see how any practical inconvenience or injustice to anyone can result from the recognition in a question with creditors of the inherent qualification of the title of a trustee to trust-estate. Creditors in general do not give credit to a bankrupt in reliance on any supposed presumption that property standing in his name is his private property. Unless they are going to advance money on heritable security they know nothing of his title-deeds, and trust only to his personal credit. The security offered by our system of records is an excellent thing to those who desire to take advantage of it, and I should be the last person to wish to impair its efficiency. But it is not at all involved in the present case. No just expectations can be disappointed by withdrawing from a sequestration an estate to which the bankrupt never had anything more than an administrative title; and I should think less highly than I do of our system of property law if I believed

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that it compelled us to give to creditors a right which the bankrupt himself could not conscientiously give, and which he never professed to be able to convey.

LORD KINNEAR.—If this were an open question, I should have thought that a great deal of weight must be attached to certain considerations which have been stated by Lord M'Laren. But I take it to be settled law that a trustee for creditors under the Bankruptcy Acts takes the heritable estate in which the bankrupt was infeft subject to no limitations or burdens which do not appear on the face of the record, and therefore that his right is in no way affected by a latent trust such as that which is alleged in the present case. I think the question arises in a somewhat simpler form than in the earlier cases to which your Lordships have referred, because although the present Bankruptcy Act is in substance the same as the previous statutes for the same purpose, still the vesting clauses are not expressed in the same way as the corresponding clauses of the previous Acts; and I think that the vesting clauses of the present Act are so expressed as to leave very little room for difficulties that may have been found, in the construction of the previous statutes. The trustee's right appears to me to be measured by the heritable diligences, which are specified in the second subsection of section 104 of the Bankrupt Act of 1856. The heritable estate under that subsection is vested in the trustee to the same effect "as if a decree of adjudication in implement of sale as well as a decree of adjudication for payment and in security of debt subject to no legal reversion had been pronounced in favour of the trustee, and recorded at the date of the sequestration." Now, as I understand the argument, it has not been suggested that any question could be raised as to the effect of a duly recorded decree of adjudication in implement of a contract of sale. It is admitted to be well settled in law that no condition or obligation, not incorporated in the infeftment, can have any effect in a question with a purchaser in good faith from a feudal proprietor. A proprietor infeft as of fee by an absolute title is in a position to make a perfectly effectual contract for the sale of the estate, notwithstanding that his right may in fact be qualified by some latent trust or personal obligation. It is of no consequence whether the purchaser may have completed his title by a voluntary, or by a judicial conveyance, provided that he has taken infeftment before the true owner has taken the necessary steps for vindicating his right. But the statute gives to the trustee for creditors all the right which the common law gives to a *bona fide* purchaser. It appears to me to follow from the enactment which I have quoted that heritable property in which a bankrupt stands infeft by an absolute title, so that it could be made the subject of an effectual contract of sale, and adjudged by the purchaser in implement of such a contract, must necessarily be vested in the trustee by force of the statute to the same effect as it would be vested in the purchaser by force of his decree of adjudication.

But while it is very material to observe that the trustee is in the same position as if he had adjudged the bankrupt's heritable estate in implement of a contract of sale, I am disposed to think that the other heritable diligence which is specified in the second subsection would be equally effectual, because in bankruptcy an adjudger for debt stands in as good a position as an adjudger in implement. Mr Bell states the law thus—"As in bankruptcy there is no true distinction among creditors who hitherto held nothing but a mere personal oblig-

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tion, whether that obligation be to pay money, or to convey land, or to perform any other specific act—a creditor for a money debt being just as well entitled to have direct execution against the debtor's land as one who holds an obligation from the debtor to convey land to him; so a creditor obtaining an adjudication in implement will not have preference over a creditor for debt who, with a decree of adjudication in payment, has previously completed his security by sasine." It is true that there was at one time some doubt whether a distinction, in this respect, ought not to be taken between purchasers and adjudgers for debt; and the case of *Thomson* v. *Douglas, Heron, & Company* has been cited as an authority in support of that distinction. It is said to have been decided, in this case, that an adjudging creditor will be affected by a latent trust which will not be effectual against a purchaser. The decision has been overruled, on the assumption that this is its import. But it does not appear to me that that case could very well be accepted as an authority upon the point, even if it had never been challenged. In the report of the case in the Folio Dictionary, it is stated that the point now in question was very little discussed, as the fund was said to be exhausted by preferable debts, and that the Court did not mean to lay down a general rule. I think the fuller report (M. 10,229) seems very much to bear out that statement in the Folio Dictionary. It appears that there were two specialties upon which it is quite possible that the case might have been decided without trenching in any degree upon the doctrine that neither adjudgers nor purchasers shall be affected by the latent obligations of a proprietor infeft. In the first place, the adjudging creditors had not taken infeftment, and therefore they had no real right in the land. In the second place, the latent trust which was held to be effectual against them, but ineffectual against disponees, had been omitted from the trustee's infeftment by fraud, but it was a trust for sale, so that the trustee's title to dispone could not have been successfully challenged if the trust had been expressed in the sasine. A disposition had been granted by a proprietor infeft to his man of business, "heritably and irredeemably, in order that he might sell the estate and apply the proceeds for behoof of the granter." The disponee executed the procuratory of resignation, and obtained a crown charter, but omitted to insert in the procuratory the above qualification of his right, so that it did not appear in the record. He thereafter disponed the estate in security of a loan, and certain of his creditors, to whom he had given no such security, adjudged the estate as being the property of their debtor. The original owner brought an action for the reduction of his trustee's infeftment, and all the rights derived from him; and his argument was that his trustee's assumption of the character of an unlimited proprietor, by the omission to engross the conditions of his right in the procuratory of resignation, was a fraud which must import *labes realis*, and invalidate the titles derived from him, as well as his own title. Now, that would have been a perfectly sound argument, if the Court had thought the conveyance in trust disabled the trustee from disponing in security of his own debt. It proceeds upon a distinction which is explained in the very learned and valuable dissertation on this subject which Baron Hume has appended to his report of the case of *Calder* v. *Stewart*. Baron Hume expounds very clearly the true ground of distinction between those cases in which purchasers or creditors of a proprietor infeft will be affected by latent defects or limitations of his right, and those cases in which they will not be so affected. He gives, as an illustration, the case of a proprietor

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infeft disponing his lands really in trust, but in terms absolute, and taking at the same time a back-bond from his disponee. In that case, he says a purchaser from the disponee cannot be affected by the personal obligations of his author, because the author is infeft as absolute fiar with the concurrence and by the act of the true owner, and his absolute right is therefore unqualified by any limitation which enters the record or affects the estate. But then, on the other hand, if the author's feudal investiture, although *ex facie* regular, is intrinsically vicious, as involving falsehood in its texture, or forgery, the title so acquired by fraud will be altogether ineffectual against the true owner. Now, in *Thomson* v. *Douglas, Heron, & Company*, the Court gave effect to that distinction, for what the Judges are reported to have said is this,—"If a disponee omit to engross in his infeftment those clauses which were meant by the disponer to limit or qualify his right, the disponer by this fraud can in no shape be hurt. The right will not be unlimited, because what was truly bestowed on the disponee was only a limited right. But in the present case the disposition imported absolute and unlimited property, although as a counterpart of this grant there arose a personal obligation on the disponee to render account, and whether this has been justly fulfilled or fraudulently violated, the right of property remains unaffected." The question therefore was considered on the assumption that the infeftment had been taken, as it ought to have been taken, in the same terms as the conveyance; and what was decided was merely this, that a disponee with a power of sale but under an obligation to account may infeft a lender as well as a purchaser, neither having any concern with the application of the price or of the loan. It was held that adjudging creditors were in a different position, and must take *tantum et tale* as the right stood in their debtor. But I apprehend that if that observation is to be referred to the particular facts of the case in which it is made, it means *tantum et tale* as the right would have stood in the debtor had his title been truly and honestly completed; and in that case, it might very well be held that the diligence of an ordinary creditor for an unsecured debt would not carry land that was held under a title, qualified as in the case supposed, although it might at the same time be held that conveyances to purchasers and lenders upon security of the estate were perfectly effectual. I am quite unable, therefore, if there were nothing else to be said, to accept the decision in the case of *Douglas, Heron, & Company* as a leading authority upon the point for which it has been cited. But it must be admitted that it has been referred to by subsequent writers, and in subsequent decisions, as a case that was intended to settle the general point. But if that be the import of the decision I think it clear that its authority has been very distinctly and decidedly rejected. Mr Bell says in a passage to which Lord Adam referred, that the decision was disapproved and departed from; and that appears to me to be a perfectly accurate statement. It appears to me that the case of *Duncan* v. *Wylie*, and the case of *Douglas, Heron, & Company* cannot stand together if the latter case means that land held by a title *ex facie* absolute, but subject to a latent and personal obligation to account as for a trust, cannot be adjudged by the creditors of the proprietor infeft. In *Douglas, Heron, & Company*, the true owner conveyed his estate to a trustee, to sell it for him and account to him for the proceeds. In *Duncan* v. *Wylie*, the owner remained in possession of the estate and granted a disposition in terms absolute, but really in security to a creditor, who was to pay himself, and was bound by the terms of an extrinsic agreement, to reconvey. Both of these were cases which involved not a direct but a constructive trust in the ostensible

owner of the estate, and therefore I cannot doubt that Mr Bell was right in saying, on the assumption to which I have referred, that they are inconsistent. If I am right in the view I have taken of *Douglas, Heron, & Company*, they are quite reconcilable. But in that view *Douglas, Heron, & Company* has no bearing upon the present question.

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But Mr Bell does not stand alone. The doctrine laid down by him is stated with very great clearness and precision, in the dissertation of Baron Hume, to which I have already referred. He lays down the doctrine in the clearest possible terms and illustrates it, as I have observed, by the case of a conveyance *ex facie* absolute qualified by a back-bond of trust; and then he goes on to say that the position of a trustee for personal creditors infeft under a judicial sequestration of their debtor's estate, had been at one time thought to be different in this respect from that of purchasers obtaining a conveyance, but that it was now settled on the contrary that they stood exactly in the same situation, and as his authority for that statement he quotes *Duncan* v. *Wylie*, as a decision of which he clearly approves.

The whole question was made the subject of elaborate discussion in the very important case of *Mansfield* v. *Inglis* both here and in the House of Lords. There was a point in that case with which at present we have no concern—the question how far the Act of 1696, cap. 6, was applicable to the circumstances. But both here and in the House of Lords it was thought necessary to determine whether the effect of the Bankruptcy Statutes was to convey to a trustee for creditors heritable estate which the bankrupt himself could not convey to a lender or a purchaser without fraud; and in considering that question, the effect which our law allows to an unqualified infeftment was defined after full examination of the previous decisions. The conclusion at which the majority of the Court arrived, as expressed in the opinion of Lord Corehouse, was that a trustee in a sequestration, like a purchaser, takes the heritable estate free from all qualifications and limitations which do not appear on the record. Lord Corehouse observes, "It is said that although a *bona fide* purchaser is exposed to no objections but those which constitute a radical defect in the title of the seller, or in feudal property which appear on the face of the records, a creditor adjudging stands in a different situation and takes the right adjudged subject to the conditions and under the equities though latent, by which it was qualified in the person of the debtor, or in technical phraseology he takes it *tantum et tale* as his debtor had it. That this was at one time the doctrine of the law of Scotland, though not to the extent to which it is now maintained by the defender, may be granted. But the law has been settled otherwise by a numerous and consistent train of decisions, which are not now to be called in question." There can be no doubt that the case of *Douglas, Heron, & Company* was brought under consideration of the Court on this occasion, because it is mentioned in the opinion of the dissentient Judges as an authority against the conclusion at which the majority of the Court arrived. In the House of Lords Lord Brougham states the general rule of law quite as emphatically as Lord Corehouse states it in the Court below. He says (1 S. and M'L.'s Apps. 338), "Much of the argument in this case seems to have been rested on the analogy of our equitable estates in England, but the Scotch law holds no resemblance now with the law of England in this particular." And then his Lordship goes on to say,—"This consideration too is an answer to the argument that the trustee takes the estate of the bankrupt *tantum et tale*. He does so, and the estate was not affected in the bankrupt's hands by the per-

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sonal obligations which were sufficiently valid and binding against the bankrupt. Between the bankrupt and the trustee there can be no privity such as to affect the latter with any personal obligation incurred by the former, and the land not being affected by such obligations the trustee taking it *tantum et tale* takes it discharged of any real burden." I think the case of *Jeffrey* v. *Paul* which was also decided by Lord Brougham within a very few weeks of the decision of *Mansfield* v. *Inglis* is an authority to the same effect; and I think with Lord Adam, for the reasons he has given, that it is a direct authority to the effect that the doctrine in question must apply to the case of a latent trust, just as clearly as to the case of any personal obligation arising from contract. I cannot see that we can draw any useful inference from the brevity of Lord Brougham's opinion as it is reported. It is evident from what is stated by the reporter that Lord Brougham did give his reasons for his judgment, although the reporter does not tell us what they were, because in the few words quoted his Lordship says he is now giving effect to the reasons he has stated previously. But, however that may be, the argument shews that the very point which had been rejected in *Mansfield* v. *Inglis*, that creditors take *tantum et tale* as their debtor held—was again urged upon the House in the case of *Jeffrey* v. *Paul* and again rejected. I think therefore that the latter case is directly in point; and apart from that decision, I must say I should have held the doctrine to be well established by authorities in our own books, which, as Lord Corehouse says, are not now to be called in question.

It has been said—and Lord M'Laren is disposed to give effect to the argument—that there is a material distinction between the case of a personal obligation arising in any other way and a personal obligation arising from a trust reposed by the true owner of land in the ostensible owner. I confess I am unable to see any solid ground of distinction between these two cases. Every obligation which might have entered the record, but which the creditor in the obligation is content to leave standing upon the personal responsibility of the proprietor infeft, necessarily involves a trust in the latter; and accordingly Lord Westbury says, in the passage to which Lord Adam referred, that every obligation made in respect of land creates a trust. The true distinction is between those obligations which by their constitution are merely personal, and those, on the other hand, which have either been expressed in the title to land, or have only been omitted from the title by fraud, and in violation of the contract upon which they rest. It is well stated by Baron Hume. If the ground of challenge affects the honesty and validity of the title, so as to follow the land into whose hands soever it may come, then it may be effectual whether it enters the record or not; but if the ostensible owner is infeft as absolute fiar of the land without fraud or deceit, and under a title which the true owner has voluntarily conferred upon him, neither his disponees nor adjudgers on him will be affected by conditions or limitations which have not been made to affect the land itself. It is said that a trust operates as an inherent qualification of the title of the trustee. But an inherent qualification of the seller's right and title must affect the subject in the hands of a purchaser. An inherent trust which affects the title of a bankrupt, and yet which does not prevent him from making a conveyance contrary to the trust, is a contradiction in terms. Now, it is admitted that a *bona fide* purchaser would take the subjects in question free from all limitations or qualifications not expressed upon record, and it follows that these qualifications do not affect the legal right and title of the

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bankrupt whatever validity they may have as personal obligations upon the bankrupt himself.

The case of *Fleeming* v. *Howden* does not appear to me to present any real difficulty, for the reason stated by Lord Adam. All the learned Judges who took part in the decision based their judgment on the ground which Lord Adam has stated. Lord Westbury, indeed, uses some general expressions which might have a wider scope, but these expressions must be construed with reference to the case in which they were used, and if they should be read as having any wider effect than was necessary for the judgment in that case, then they would be inconsistent with the law previously laid down by the House of Lords in the case to which I have referred. But I think Lord Westbury makes it clear that it was not his intention to decide any other question except that which was before the House, because he refers to the words of the statute, by which it is provided that if any part of the bankruptcy estate be held under an entail or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach. Now, according to that enactment the trustee's right depends upon the bankrupt's title, and his consequent capacity to make a legal and effectual conveyance on a sale; and in *Howden's* case the House of Lords held that the bankrupt could not have sold. But if that criterion be applied to the present case, the trustee must prevail, because nobody disputes that the bankrupt might have given a good legal conveyance to a purchaser. Of course it is not disputed that his doing so would have been a fraud, but I take it to be settled law that notwithstanding that he could not himself have conveyed to a purchaser or to an individual creditor without fraud, the statute will carry his estate to the general body of creditors, to be equally distributed amongst them all. I therefore concur in the conclusion at which Lord Adam has arrived.

LORD PRESIDENT.—I concur in the judgment of Lord Adam and also in the views of Lord Kinnear, and I should hardly have thought it necessary to add anything to what has fallen from my two colleagues but for the importance of the case and the fact that there is a division of opinion on the bench, but in these circumstances I shall beg leave to add a few observations.

It appears to me that there is a principle in the law of Scotland which affirms that where a party has a legal title in writing, whether he be disponee or assignee, and that title has been perfected by sasine in the one case and intimation of the assignation in the other, the title is not defeasible by reference to any latent equities. I say that principle exists in the law of Scotland outside altogether of the statutory rules of bankruptcy, and there is no better illustration of this than in the judgment of the House of Lords in the case of *Somervail* v. *Redfearn*, 1813, 1 Dow's Rep. 50. In that case a share in a joint stock company had formed the subject of an assignation which was duly intimated. The cedent had held the subjects originally as trustee for another party, but that did not appear upon the face of any title, and particularly did not appear on the face of the title which he gave to his assignee. In these circumstances the House of Lords held that the assignee having intimated his assignation could not be affected by any latent trust or latent equity. Lord Eldon, who, along with Lord Redesdale, gave the judgment in that case, puts the case thus (p. 72):—"There were cases of back-bonds upon assignments of back-bonds, but he had looked very

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anxiously and carefully to see whether there were any cases where latent equities had prevailed against intimated assignations, and he had found none. An assignation would even defeat an arrestment, if intimated before the arrestment, as the arrestment was only a prohibitory diligence. If latent equities were suffered to prevail against assignations, the effect would be that nothing could ever be assigned, for so long as their Scottish neighbours retained any part of their characteristic shrewdness, they would never take an assignment if they were aware that by means of latent defects such assignments might give them nothing." Now, it is very true that that question arose out of the bankruptcy of the cedent, but it occurred so far back as the year 1813, before any of the new statutes—if I may so call them—of bankruptcy were passed by the Legislature, and I think it proceeds from beginning to end not upon any reference or allusion to the bankrupt law then in existence, but entirely upon the general principle to which I have referred.

Now, if that be the general principle of the law of Scotland, it seems to me that a reference to the statutory rules of bankruptcy shews that that principle has been enforced and extended by these rules. I am not sure that people always attach an adequate value to the words of the vesting clause in the Bankruptcy Act of 1856, and I rather think they were not mentioned in the course of the argument, but I take leave to call attention to them for the purpose of seeing what is the nature and extent of the title that a trustee in a sequestration obtains by means of that clause. As regards the heritable estate of the bankrupt, he is said to be vested to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration. Now, that seems to me to be as comprehensive a title as any statute could possibly confer upon a trustee. He has an adjudication in implement of sale. That immediately constitutes an absolute title to the property. He has a decree of adjudication for payment and in security of debt, subject to no legal reversion. That is to say, he is in the same position as an adjudger upon an adjudication whose legal has expired. I can hardly conceive any stronger title to heritage than that is. So in like manner as regards the moveable estate of a bankrupt, although that is not in question in the present case, it is transferred, "so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration and are not null or reducible." Now, could anything more forcibly enact that the principle embodied in the case of *Somervail* v. *Redfearn* should have effect as regards the vesting of the moveable estate of the bankrupt in the trustee? It is to be vested in him "so far as attachable for debt," and all moveable estate is attachable for debt unless something in the title—something that is published and made known to the world—appears to prevent that moveable estate from being attached and from being brought within the operation of the sequestration. But with that single exception everything in the nature of moveable estate attaches absolutely to the trustee.

I think the reference to the vesting clause of the statute is very conclusive of the whole of this matter. But a great many cases have been referred to which I am not going to enumerate. They have been referred to by my brother Lord Kinnear so far as of importance in the present case, but I take leave to observe

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at the case of an adjudger is a totally different case from that which we have to deal with here. The cases which refer to adjudications for debt are cases dealing with adjudications in which the legal had not expired, and therefore they give no light at all. But in the present case we have a statute to guide us and to tell us that the adjudication in favour of the trustee in a sequestration is an adjudication which has no legal, or is the same as one in which the legal has expired, and so cases of adjudication where the legal has not expired, and where there is after all nothing but a decree of adjudication, which may form a good security upon the estate, do not help us.

It seems to me that the case of *Fleeming* v. *Howden* has been somewhat misunderstood, not by my brethren who concur with me in this case, but elsewhere. The heir of entail in possession in that case, Mr John Howden, was infeft in the estate, and upon the face of his title it appeared quite clearly that he was not a fee-simple proprietor. No doubt, as the entail had not been recorded, there were certain infirmities in his title as proprietor, but there was nothing in the entail that made his right more extensive than it would otherwise have been, or more extensive than it appeared to be on the face of his recorded infeftment. Therefore that case appears to me to have no application here, unless it be that there is, in the opinion of Lord Westbury, a doctrine, which I must say I find for the first time in that noble and learned Lord's judgment, and which I have always had some difficulty in completely understanding. He says that "the right of a trustee in a sequestration is very different from the right of a singular successor, for it is a rule common to both English and Scotch bankruptcy law that the trustee or assignee takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy." Now, I take upon me to question the soundness of that law so far as it regards the existing Bankruptcy Statute. The right of a trustee in a sequestration is not different from the right of a singular successor, because he is made a singular successor *vi statuti*. He is in the same position as if he had an adjudication in implement of sale, and an adjudication for debt with an expired legal, consequently the rights of property are vested in him just as completely as the right of any singular successor. His Lordship goes on to say that "the trustee in a sequestration is in the same position as a gratuitous alienee. He takes such estate or interest only as the bankrupt can lawfully convey. So in England the assignee takes such interest only as the bankrupt can lawfully depart withal. The force of the two expressions is the same, and the implied conveyance to the trustee or assignee ranks no higher than a gratuitous alienation." Now, what is meant in that passage of Lord Westbury's opinion by gratuitous alienations? If it means that the trustee gave nothing for the property, but has right to it by the operation of the Bankruptcy Act, then I assent to it, but it is irrelevant. But if, on the other hand, it is meant in a more substantial sense to express that there is no onerous consideration for the transference of the right of property from the bankrupt to the trustee, that admits, I think, of a very simple answer. The onerous consideration there is the vesting in the trustee of the estate for the purpose of paying the debts of the bankrupt. That I apprehend to be a most onerous consideration. The estate is given to him in trust no doubt, but it is in trust for a purpose, and for a purpose expressed, and the onerous consideration for a conveyance in trust is generally to be found in the trust purposes. The trust purposes here are that the debts of the creditors shall be paid and the bankrupt ultimately discharged. I cannot see how it is possible in any view

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to reconcile the *dicta* of Lord Westbury with the judgment pronounced by the Lord Chancellor and Lord Chelmsford in the same case, and still less are his *dicta* reconcilable with the precise terms of the Bankruptcy Act of 1856. I have thought it right to add these observations to what your Lordships have said—not that I think the views of your Lordships require any strengthening, but that I might pay due deference to the opinion of my brother on the left and to the importance of the case.

THE COURT found and declared that the second party, as trustee on the sequestrated estate of Daniel Smith M'Kay, took the subjects free of the latent trust in favour of the first parties, and that the first parties were entitled only to rank on the sequestrated estate for the value of said subjects, and were not entitled to recover the same from the second party as their own property: Further, found and declared that the surplus price of said subjects belonged to the second party as trustee foresaid, and decerned.

WATT & ANDERSON, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 219. July 15, 1891. Baird v. Baird.

GEORGE ALEXANDER BAIRD, Petitioner (Respondent).—*D.-F. Balfour—W. L. Mackenzie.*

JOHN GEORGE ALEXANDER BAIRD AND OTHERS, Respondents (Reclaimers).—*Dickson—Ure.*

Entail—Disentail—Entail Act, 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 13.—The Entail Act, 1882, sec. 13, enacts,—"In any application under the Entail Acts to which the consent of the heir-apparent, or other nearest heir, is required, and such heir, or the curator ad litem appointed to him in terms of this Act, shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security shall be given over the estate, and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained." *Held* that the conditions upon which the Court is authorised to dispense with the consent of an heir are imperative, and must be strictly complied with.

In a petition for disentail, which was opposed by the next three heirs, the Lord Ordinary—before the value of the interests of the three next heirs had been ascertained, but after the respondents had stated their claim at £50,000—pronounced an interlocutor, in which he found that the value of the interests of the three next heirs did not exceed the value of £55,000, and, upon the petitioner consigning that sum in the joint names of the agents of the petitioner and the respondents subject to the future orders of the Court, dispensed with the consents of the said heirs, and interponed his authority to the disentail. *Held* that the interlocutor was incompetent.

1ST DIVISION. Lord Low. C.

IN July 1889 George Alexander Baird presented a petition for authority to disentail the lands of Strichen and others, of which he was institute of entail, with the consent of the three next heirs, and as they declined to give their consent the Lord Ordinary made a remit to ascertain the value of their expectancy in terms of the Entail Act, 1882 (45 and 46 Vict. cap. 53), sec. 13.*

It appeared from the report of the actuary to whom the remit was made, and from the objections to that report, that a considerable delay would probably take place before the expectancies were valued, and accordingly the petitioner offered "to consign in bank, subject to the order of the Court,

* Quoted in rubric.

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the largest sum claimed by the respondents, viz., £50,000, or such other sum as may appear to the Court satisfactory to fully secure the value in money of the next heirs' expectancies, and thus to admit of the Court dispensing with the consents of the respondents, and granting the prayer of the petition in so far as to approve of the instrument of disentail (No. 23 of process), and interpone authority thereto; and to grant warrant upon such consignation being made for recording said instrument in the Register of Entails."

On 18th June 1891 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the value in money of the interests or expectancies of the respondents John George Alexander Baird, James Douglas Baird, and Henry Robert Baird, the three next heirs of entail in the entailed estates mentioned in the petition, do not exceed the sum of £55,000 sterling in all; and, in respect of the offer made by the petitioner in the said minute, No. 36 of process, and upon the petitioner consigning in bank, in the joint names of the agents of the petitioner and the respondents, the three next heirs of entail, and subject to the future orders of the Court, the sum of £55,000 sterling, to meet the value of the said interests or expectancies of the said respondents in the said entailed estates, dispenses with the consents of the said respondents as next heirs of entail foresaid to the disentail of the said estates: Finds that the procedure has been regular and proper, and in conformity with the provisions of the Acts of Parliament and relative Acts of Sederunt: Interpones authority to and approves of the instrument of disentail, No. 23 of process: Grants warrant to, and authorises and ordains the Keeper of the Register of Tailzies to record the same in said register, in terms of the statute, and decerns *ad interim:* But supersedes extract and execution hereof until the said consignation has been made, and the receipt therefor lodged in process and transmitted to the Accountant of Court."

The respondents (the three next heirs) reclaimed.[1]

LORD PRESIDENT.—I am sorry to say that I cannot agree with the Lord Ordinary in the course he has adopted in this case. I think that he has failed to give sufficient weight to the very precise provisions of the 13th section of the Act of 1882. When a power of disentail is given by statute, which is coupled with attendant conditions, it is an imperative rule that these conditions must be simply and literally complied with by anyone who seeks to take advantage of the power. Now, nothing can be clearer than the conditions of this section. It is in these terms:—"In any application under the Entail Acts to which the consent of the heir-apparent, or other nearest heir, is required, and such heir, or the curator ad litem appointed to him in terms of this Act, shall refuse or fail to give his consent, the Court shall ascertain"—these words are perfectly clear and imperative—"the value in money of the expectancy or interest in the entailed estate of such heir with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security shall be given over the estate, and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained." It follows as a matter of course that until the value in money of the expectancy of the next heir has been ascertained and paid into bank or secured there can be no authority to disentail. On that simple ground—I do not think I can elaborate it,—I am for recalling the Lord Ordinary's interlocutor, and remitting to his Lordship to proceed.

[1] Shand v. Home, March 4, 1876, 3 R. 544; M'Donalds v. M'Donald, March 12, 1880, 7 R. (H. L.) 41.

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that it compelled us to give to creditors a right which the bankrupt himself could not conscientiously give, and which he never professed to be able to convey.

LORD KINNEAR.—If this were an open question, I should have thought that a great deal of weight must be attached to certain considerations which have been stated by Lord M'Laren. But I take it to be settled law that a trustee for creditors under the Bankruptcy Acts takes the heritable estate in which the bankrupt was infeft subject to no limitations or burdens which do not appear on the face of the record, and therefore that his right is in no way affected by a latent trust such as that which is alleged in the present case. I think the question arises in a somewhat simpler form than in the earlier cases to which your Lordships have referred, because although the present Bankruptcy Act is in substance the same as the previous statutes for the same purpose, still the vesting clauses are not expressed in the same way as the corresponding clauses of the previous Acts; and I think that the vesting clauses of the present Act are so expressed as to leave very little room for difficulties that may have been found, in the construction of the previous statutes. The trustee's right appears to me to be measured by the heritable diligences, which are specified in the second subsection of section 104 of the Bankrupt Act of 1856. The heritable estate under that subsection is vested in the trustee to the same effect "as if a decree of adjudication in implement of sale as well as a decree of adjudication for payment and in security of debt subject to no legal reversion had been pronounced in favour of the trustee, and recorded at the date of the sequestration." Now, as I understand the argument, it has not been suggested that any question could be raised as to the effect of a duly recorded decree of adjudication in implement of a contract of sale. It is admitted to be well settled in law that no condition or obligation, not incorporated in the infeftment, can have any effect in a question with a purchaser in good faith from a feudal proprietor. A proprietor infeft as of fee by an absolute title is in a position to make a perfectly effectual contract for the sale of the estate, notwithstanding that his right may in fact be qualified by some latent trust or personal obligation. It is of no consequence whether the purchaser may have completed his title by a voluntary, or by a judicial conveyance, provided that he has taken infeftment before the true owner has taken the necessary steps for vindicating his right. But the statute gives to the trustee for creditors all the right which the common law gives to a *bona fide* purchaser. It appears to me to follow from the enactment which I have quoted that heritable property in which a bankrupt stands infeft by an absolute title, so that it could be made the subject of an effectual contract of sale, and adjudged by the purchaser in implement of such a contract, must necessarily be vested in the trustee by force of the statute to the same effect as it would be vested in the purchaser by force of his decree of adjudication.

But while it is very material to observe that the trustee is in the same position as if he had adjudged the bankrupt's heritable estate in implement of a contract of sale, I am disposed to think that the other heritable diligence which is specified in the second subsection would be equally effectual, because in bankruptcy an adjudger for debt stands in as good a position as an adjudger in implement. Mr Bell states the law thus—"As in bankruptcy there is no true distinction among creditors who hitherto held nothing but a mere personal oblig-

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tion, whether that obligation be to pay money, or to convey land, or to perform any other specific act—a creditor for a money debt being just as well entitled to have direct execution against the debtor's land as one who holds an obligation from the debtor to convey land to him; so a creditor obtaining an adjudication in implement will not have preference over a creditor for debt who, with a decree of adjudication in payment, has previously completed his security by sasine." It is true that there was at one time some doubt whether a distinction, in this respect, ought not to be taken between purchasers and adjudgers for debt; and the case of *Thomson* v. *Douglas, Heron, & Company* has been cited as an authority in support of that distinction. It is said to have been decided, in this case, that an adjudging creditor will be affected by a latent trust which will not be effectual against a purchaser. The decision has been overruled, on the assumption that this is its import. But it does not appear to me that that case could very well be accepted as an authority upon the point, even if it had never been challenged. In the report of the case in the Folio Dictionary, it is stated that the point now in question was very little discussed, as the fund was said to be exhausted by preferable debts, and that the Court did not mean to lay down a general rule. I think the fuller report (M. 10,229) seems very much to bear out that statement in the Folio Dictionary. It appears that there were two specialties upon which it is quite possible that the case might have been decided without trenching in any degree upon the doctrine that neither adjudgers nor purchasers shall be affected by the latent obligations of a proprietor infeft. In the first place, the adjudging creditors had not taken infeftment, and therefore they had no real right in the land. In the second place, the latent trust which was held to be effectual against them, but ineffectual against disponees, had been omitted from the trustee's infeftment by fraud, but it was a trust for sale, so that the trustee's title to dispone could not have been successfully challenged if the trust had been expressed in the sasine. A disposition had been granted by a proprietor infeft to his man of business, "heritably and irredeemably, in order that he might sell the estate and apply the proceeds for behoof of the granter." The disponee executed the procuratory of resignation, and obtained a crown charter, but omitted to insert in the procuratory the above qualification of his right, so that it did not appear in the record. He thereafter disponed the estate in security of a loan, and certain of his creditors, to whom he had given no such security, adjudged the estate as being the property of their debtor. The original owner brought an action for the reduction of his trustee's infeftment, and all the rights derived from him; and his argument was that his trustee's assumption of the character of an unlimited proprietor, by the omission to engross the conditions of his right in the procuratory of resignation, was a fraud which must import *labes realis*, and invalidate the titles derived from him, as well as his own title. Now, that would have been a perfectly sound argument, if the Court had thought the conveyance in trust disabled the trustee from disponing in security of his own debt. It proceeds upon a distinction which is explained in the very learned and valuable dissertation on this subject which Baron Hume has appended to his report of the case of *Calder* v. *Stewart*. Baron Hume expounds very clearly the true ground of distinction between those cases in which purchasers or creditors of a proprietor infeft will be affected by latent defects or limitations of his right, and those cases in which they will not be so affected. He gives, as an illustration, the case of a proprietor

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infeft disponing his lands really in trust, but in terms absolute, and taking at the same time a back-bond from his disponee. In that case, he says a purchaser from the disponee cannot be affected by the personal obligations of his author, because the author is infeft as absolute fiar with the concurrence and by the act of the true owner, and his absolute right is therefore unqualified by any limitation which enters the record or affects the estate. But then, on the other hand, if the author's feudal investiture, although *ex facie* regular, is intrinsically vicious, as involving falsehood in its texture, or forgery, the title so acquired by fraud will be altogether ineffectual against the true owner. Now, in *Thomson* v. *Douglas, Heron, & Company*, the Court gave effect to that distinction, for what the Judges are reported to have said is this,—"If a disponee omit to engross in his infeftment those clauses which were meant by the disponer to limit or qualify his right, the disponer by this fraud can in no shape be hurt. The right will not be unlimited, because what was truly bestowed on the disponee was only a limited right. But in the present case the disposition imported absolute and unlimited property, although as a counterpart of this grant there arose a personal obligation on the disponee to render account, and whether this has been justly fulfilled or fraudulently violated, the right of property remains unaffected." The question therefore was considered on the assumption that the infeftment had been taken, as it ought to have been taken, in the same terms as the conveyance; and what was decided was merely this, that a disponee with a power of sale but under an obligation to account may infeft a lender as well as a purchaser, neither having any concern with the application of the price or of the loan. It was held that adjudging creditors were in a different position, and must take *tantum et tale* as the right stood in their debtor. But I apprehend that if that observation is to be referred to the particular facts of the case in which it is made, it means *tantum et tale* as the right would have stood in the debtor had his title been truly and honestly completed; and in that case, it might very well be held that the diligence of an ordinary creditor for an unsecured debt would not carry land that was held under a title, qualified as in the case supposed, although it might at the same time be held that conveyances to purchasers and lenders upon security of the estate were perfectly effectual. I am quite unable, therefore, if there were nothing else to be said, to accept the decision in the case of *Douglas, Heron, & Company* as a leading authority upon the point for which it has been cited. But it must be admitted that it has been referred to by subsequent writers, and in subsequent decisions, as a case that was intended to settle the general point. But if that be the import of the decision I think it clear that its authority has been very distinctly and decidedly rejected. Mr Bell says in a passage to which Lord Adam referred, that the decision was disapproved and departed from; and that appears to me to be a perfectly accurate statement. It appears to me that the case of *Duncan* v. *Wylie*, and the case of *Douglas, Heron, & Company* cannot stand together if the latter case means that land held by a title *ex facie* absolute, but subject to a latent and personal obligation to account as for a trust, cannot be adjudged by the creditors of the proprietor infeft. In *Douglas, Heron, & Company*, the true owner conveyed his estate to a trustee, to sell it for him and account to him for the proceeds. In *Duncan* v. *Wylie*, the owner remained in possession of the estate and granted a disposition in terms absolute, but really in security to a creditor, who was to pay himself, and was bound by the terms of an extrinsic agreement, to reconvey. Both of these were cases which involved not a direct but a constructive trust in the ostensible

owner of the estate, and therefore I cannot doubt that Mr Bell was right in saying, on the assumption to which I have referred, that they are inconsistent. If I am right in the view I have taken of *Douglas, Heron, & Company*, they are quite reconcilable. But in that view *Douglas, Heron, & Company* has no bearing upon the present question.

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But Mr Bell does not stand alone. The doctrine laid down by him is stated with very great clearness and precision, in the dissertation of Baron Hume, to which I have already referred. He lays down the doctrine in the clearest possible terms and illustrates it, as I have observed, by the case of a conveyance *ex facie* absolute qualified by a back-bond of trust; and then he goes on to say that the position of a trustee for personal creditors infeft under a judicial sequestration of their debtor's estate, had been at one time thought to be different in this respect from that of purchasers obtaining a conveyance, but that it was now settled on the contrary that they stood exactly in the same situation, and as his authority for that statement he quotes *Duncan* v. *Wylie*, as a decision of which he clearly approves.

The whole question was made the subject of elaborate discussion in the very important case of *Mansfield* v. *Inglis* both here and in the House of Lords. There was a point in that case with which at present we have no concern—the question how far the Act of 1696, cap. 6, was applicable to the circumstances. But both here and in the House of Lords it was thought necessary to determine whether the effect of the Bankruptcy Statutes was to convey to a trustee for creditors heritable estate which the bankrupt himself could not convey to a lender or a purchaser without fraud; and in considering that question, the effect which our law allows to an unqualified infeftment was defined after full examination of the previous decisions. The conclusion at which the majority of the Court arrived, as expressed in the opinion of Lord Corehouse, was that a trustee in a sequestration, like a purchaser, takes the heritable estate free from all qualifications and limitations which do not appear on the record. Lord Corehouse observes, "It is said that although a *bona fide* purchaser is exposed to no objections but those which constitute a radical defect in the title of the seller, or in feudal property which appear on the face of the records, a creditor adjudging stands in a different situation and takes the right adjudged subject to the conditions and under the equities though latent, by which it was qualified in the person of the debtor, or in technical phraseology he takes it *tantum et tale* as his debtor had it. That this was at one time the doctrine of the law of Scotland, though not to the extent to which it is now maintained by the defender, may be granted. But the law has been settled otherwise by a numerous and consistent train of decisions, which are not now to be called in question." There can be no doubt that the case of *Douglas, Heron, & Company* was brought under consideration of the Court on this occasion, because it is mentioned in the opinion of the dissentient Judges as an authority against the conclusion at which the majority of the Court arrived. In the House of Lords Lord Brougham states the general rule of law quite as emphatically as Lord Corehouse states it in the Court below. He says (1 S. and M'L.'s Apps. 338), "Much of the argument in this case seems to have been rested on the analogy of our equitable estates in England, but the Scotch law holds no resemblance now with the law of England in this particular." And then his Lordship goes on to say,—"This consideration too is an answer to the argument that the trustee takes the estate of the bankrupt *tantum et tale*. He does so, and the estate was not affected in the bankrupt's hands by the per-

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sonal obligations which were sufficiently valid and binding against the bankrupt. Between the bankrupt and the trustee there can be no privity such as to affect the latter with any personal obligation incurred by the former, and the land not being affected by such obligations the trustee taking it *tantum et tale* takes it discharged of any real burden." I think the case of *Jeffrey* v. *Paul* which was also decided by Lord Brougham within a very few weeks of the decision of *Mansfield* v. *Inglis* is an authority to the same effect; and I think with Lord Adam, for the reasons he has given, that it is a direct authority to the effect that the doctrine in question must apply to the case of a latent trust, just as clearly as to the case of any personal obligation arising from contract. I cannot see that we can draw any useful inference from the brevity of Lord Brougham's opinion as it is reported. It is evident from what is stated by the reporter that Lord Brougham did give his reasons for his judgment, although the reporter does not tell us what they were, because in the few words quoted his Lordship says he is now giving effect to the reasons he has stated previously. But, however that may be, the argument shews that the very point which had been rejected in *Mansfield* v. *Inglis*, that creditors take *tantum et tale* as their debtor held—was again urged upon the House in the case of *Jeffrey* v. *Paul* and again rejected. I think therefore that the latter case is directly in point; and apart from that decision, I must say I should have held the doctrine to be well established by authorities in our own books, which, as Lord Corehouse says, are not now to be called in question.

It has been said—and Lord M'Laren is disposed to give effect to the argument—that there is a material distinction between the case of a personal obligation arising in any other way and a personal obligation arising from a trust reposed by the true owner of land in the ostensible owner. I confess I am unable to see any solid ground of distinction between these two cases. Every obligation which might have entered the record, but which the creditor in the obligation is content to leave standing upon the personal responsibility of the proprietor infeft, necessarily involves a trust in the latter; and accordingly Lord Westbury says, in the passage to which Lord Adam referred, that every obligation made in respect of land creates a trust. The true distinction is between those obligations which by their constitution are merely personal, and those, on the other hand, which have either been expressed in the title to land, or have only been omitted from the title by fraud, and in violation of the contract upon which they rest. It is well stated by Baron Hume. If the ground of challenge affects the honesty and validity of the title, so as to follow the land into whose hands soever it may come, then it may be effectual whether it enters the record or not; but if the ostensible owner is infeft as absolute fiar of the land without fraud or deceit, and under a title which the true owner has voluntarily conferred upon him, neither his disponees nor adjudgers on him will be affected by conditions or limitations which have not been made to affect the land itself. It is said that a trust operates as an inherent qualification of the title of the trustee. But an inherent qualification of the seller's right and title must affect the subject in the hands of a purchaser. An inherent trust which affects the title of a bankrupt, and yet which does not prevent him from making a conveyance contrary to the trust, is a contradiction in terms. Now, it is admitted that a *bona fide* purchaser would take the subjects in question free from all limitations or qualifications not expressed upon record, and it follows that these qualifications do not affect the legal right and title of the

bankrupt whatever validity they may have as personal obligations upon the bankrupt himself.

The case of *Fleeming* v. *Howden* does not appear to me to present any real difficulty, for the reason stated by Lord Adam. All the learned Judges who took part in the decision based their judgment on the ground which Lord Adam has stated. Lord Westbury, indeed, uses some general expressions which might have a wider scope, but these expressions must be construed with reference to the case in which they were used, and if they should be read as having any wider effect than was necessary for the judgment in that case, then they would be inconsistent with the law previously laid down by the House of Lords in the case to which I have referred. But I think Lord Westbury makes it clear that it was not his intention to decide any other question except that which was before the House, because he refers to the words of the statute, by which it is provided that if any part of the bankruptcy estate be held under an entail or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach. Now, according to that enactment the trustee's right depends upon the bankrupt's title, and his consequent capacity to make a legal and effectual conveyance on a sale; and in *Howden's* case the House of Lords held that the bankrupt could not have sold. But if that criterion be applied to the present case, the trustee must prevail, because nobody disputes that the bankrupt might have given a good legal conveyance to a purchaser. Of course it is not disputed that his doing so would have been a fraud, but I take it to be settled law that notwithstanding that he could not himself have conveyed to a purchaser or to an individual creditor without fraud, the statute will carry his estate to the general body of creditors, to be equally distributed amongst them all. I therefore concur in the conclusion at which Lord Adam has arrived.

LORD PRESIDENT.—I concur in the judgment of Lord Adam and also in the views of Lord Kinnear, and I should hardly have thought it necessary to add anything to what has fallen from my two colleagues but for the importance of the case and the fact that there is a division of opinion on the bench, but in these circumstances I shall beg leave to add a few observations.

It appears to me that there is a principle in the law of Scotland which affirms that where a party has a legal title in writing, whether he be disponee or assignee, and that title has been perfected by sasine in the one case and intimation of the assignation in the other, the title is not defeasible by reference to any latent equities. I say that principle exists in the law of Scotland outside altogether of the statutory rules of bankruptcy, and there is no better illustration of this than in the judgment of the House of Lords in the case of *Somervail* v. *Redfearn*, 1813, 1 Dow's Rep. 50. In that case a share in a joint stock company had formed the subject of an assignation which was duly intimated. The cedent had held the subjects originally as trustee for another party, but that did not appear upon the face of any title, and particularly did not appear on the face of the title which he gave to his assignee. In these circumstances the House of Lords held that the assignee having intimated his assignation could not be affected by any latent trust or latent equity. Lord Eldon, who, along with Lord Redesdale, gave the judgment in that case, puts the case thus (p. 72):—"There were cases of back-bonds upon assignments of back-bonds, but he had looked very

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anxiously and carefully to see whether there were any cases where latent equities had prevailed against intimated assignations, and he had found none. An assignation would even defeat an arrestment, if intimated before the arrestment, as the arrestment was only a prohibitory diligence. If latent equities were suffered to prevail against assignations, the effect would be that nothing could ever be assigned, for so long as their Scottish neighbours retained any part of their characteristic shrewdness, they would never take an assignment if they were aware that by means of latent defects such assignments might give them nothing." Now, it is very true that that question arose out of the bankruptcy of the cedent, but it occurred so far back as the year 1813, before any of the new statutes—if I may so call them—of bankruptcy were passed by the Legislature, and I think it proceeds from beginning to end not upon any reference or allusion to the bankrupt law then in existence, but entirely upon the general principle to which I have referred.

Now, if that be the general principle of the law of Scotland, it seems to me that a reference to the statutory rules of bankruptcy shews that that principle has been enforced and extended by these rules. I am not sure that people always attach an adequate value to the words of the vesting clause in the Bankruptcy Act of 1856, and I rather think they were not mentioned in the course of the argument, but I take leave to call attention to them for the purpose of seeing what is the nature and extent of the title that a trustee in a sequestration obtains by means of that clause. As regards the heritable estate of the bankrupt, he is said to be vested to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration. Now, that seems to me to be as comprehensive a title as any statute could possibly confer upon a trustee. He has an adjudication in implement of sale. That immediately constitutes an absolute title to the property. He has a decree of adjudication for payment and in security of debt, subject to no legal reversion. That is to say, he is in the same position as an adjudger upon an adjudication whose legal has expired. I can hardly conceive any stronger title to heritage than that is. So in like manner as regards the moveable estate of a bankrupt, although that is not in question in the present case, it is transferred, "so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration and are not null or reducible." Now, could anything more forcibly enact that the principle embodied in the case of *Somervail* v. *Redfearn* should have effect as regards the vesting of the moveable estate of the bankrupt in the trustee? It is to be vested in him "so far as attachable for debt," and all moveable estate is attachable for debt unless something in the title—something that is published and made known to the world—appears to prevent that moveable estate from being attached and from being brought within the operation of the sequestration. But with that single exception everything in the nature of moveable estate attaches absolutely to the trustee.

I think the reference to the vesting clause of the statute is very conclusive of the whole of this matter. But a great many cases have been referred to which I am not going to enumerate. They have been referred to by my brother Lord Kinnear so far as of importance in the present case, but I take leave to observe

that the case of an adjudger is a totally different case from that which we have to deal with here. The cases which refer to adjudications for debt are cases dealing with adjudications in which the legal had not expired, and therefore they give no light at all. But in the present case we have a statute to guide us and to tell us that the adjudication in favour of the trustee in a sequestration is an adjudication which has no legal, or is the same as one in which the legal has expired, and so cases of adjudication where the legal has not expired, and where there is after all nothing but a decree of adjudication, which may form a good security upon the estate, do not help us.

It seems to me that the case of *Fleeming* v. *Howden* has been somewhat misunderstood, not by my brethren who concur with me in this case, but elsewhere. The heir of entail in possession in that case, Mr John Howden, was infeft in the estate, and upon the face of his title it appeared quite clearly that he was not a fee-simple proprietor. No doubt, as the entail had not been recorded, there were certain infirmities in his title as proprietor, but there was nothing in the entail that made his right more extensive than it would otherwise have been, or more extensive than it appeared to be on the face of his recorded infeftment. Therefore that case appears to me to have no application here, unless it be that there is, in the opinion of Lord Westbury, a doctrine, which I must say I find for the first time in that noble and learned Lord's judgment, and which I have always had some difficulty in completely understanding. He says that "the right of a trustee in a sequestration is very different from the right of a singular successor, for it is a rule common to both English and Scotch bankruptcy law that the trustee or assignee takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy." Now, I take upon me to question the soundness of that law so far as it regards the existing Bankruptcy Statute. The right of a trustee in a sequestration is not different from the right of a singular successor, because he is made a singular successor *vi statuti*. He is in the same position as if he had an adjudication in implement of sale, and an adjudication for debt with an expired legal, consequently the rights of property are vested in him just as completely as the right of any singular successor. His Lordship goes on to say that "the trustee in a sequestration is in the same position as a gratuitous alienee. He takes such estate or interest only as the bankrupt can lawfully convey. So in England the assignee takes such interest only as the bankrupt can lawfully depart withal. The force of the two expressions is the same, and the implied conveyance to the trustee or assignee ranks no higher than a gratuitous alienation." Now, what is meant in that passage of Lord Westbury's opinion by gratuitous alienations? If it means that the trustee gave nothing for the property, but has right to it by the operation of the Bankruptcy Act, then I assent to it, but it is irrelevant. But if, on the other hand, it is meant in a more substantial sense to express that there is no onerous consideration for the transference of the right of property from the bankrupt to the trustee, that admits, I think, of a very simple answer. The onerous consideration there is the vesting in the trustee of the estate for the purpose of paying the debts of the bankrupt. That I apprehend to be a most onerous consideration. The estate is given to him in trust no doubt, but it is a trust for a purpose, and for a purpose expressed, and the onerous consideration of a conveyance in trust is generally to be found in the trust purposes. The trust purposes here are that the debts of the creditors shall be paid and the bankrupt ultimately discharged. I cannot see how it is possible in any view

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to reconcile the *dicta* of Lord Westbury with the judgment pronounced by the Lord Chancellor and Lord Chelmsford in the same case, and still less are his *dicta* reconcilable with the precise terms of the Bankruptcy Act of 1856. I have thought it right to add these observations to what your Lordships have said—not that I think the views of your Lordships require any strengthening, but that I might pay due deference to the opinion of my brother on the left and to the importance of the case.

THE COURT found and declared that the second party, as trustee on the sequestrated estate of Daniel Smith M'Kay, took the subjects free of the latent trust in favour of the first parties, and that the first parties were entitled only to rank on the sequestrated estate for the value of said subjects, and were not entitled to recover the same from the second party as their own property: Further, found and declared that the surplus price of said subjects belonged to the second party as trustee foresaid, and decerned.

WATT & ANDERSON, S.S.C.—MORTON, SMART, & MACDONALD, W.S.—Agents.

No. 219. July 15, 1891. Baird v. Baird.

GEORGE ALEXANDER BAIRD, Petitioner (Respondent).—*D.-F. Balfour—W. L. Mackenzie.*

JOHN GEORGE ALEXANDER BAIRD AND OTHERS, Respondents (Reclaimers).—*Dickson—Ure.*

Entail—Disentail—Entail Act, 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 13.—The Entail Act, 1882, sec. 13, enacts,—"In any application under the Entail Acts to which the consent of the heir-apparent, or other nearest heir, is required, and such heir, or the curator ad litem appointed to him in terms of this Act, shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security shall be given over the estate, and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained." *Held* that the conditions upon which the Court is authorised to dispense with the consent of an heir are imperative, and must be strictly complied with.

In a petition for disentail, which was opposed by the next three heirs, the Lord Ordinary—before the value of the interests of the three next heirs had been ascertained, but after the respondents had stated their claim at £50,000—pronounced an interlocutor, in which he found that the value of the interests of the three next heirs did not exceed the value of £55,000, and, upon the petitioner consigning that sum in the joint names of the agents of the petitioner and the respondents subject to the future orders of the Court, dispensed with the consents of the said heirs, and interponed his authority to the disentail. *Held* that the interlocutor was incompetent.

1ST DIVISION. Lord Low. C.

IN July 1889 George Alexander Baird presented a petition for authority to disentail the lands of Strichen and others, of which he was institute of entail, with the consent of the three next heirs, and as they declined to give their consent the Lord Ordinary made a remit to ascertain the value of their expectancy in terms of the Entail Act, 1882 (45 and 46 Vict. cap. 53), sec. 13.*

It appeared from the report of the actuary to whom the remit was made, and from the objections to that report, that a considerable delay would probably take place before the expectancies were valued, and accordingly the petitioner offered "to consign in bank, subject to the order of the Court,

* Quoted in rubric.

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the largest sum claimed by the respondents, viz., £50,000, or such other sum as may appear to the Court satisfactory to fully secure the value in money of the next heirs' expectancies, and thus to admit of the Court dispensing with the consents of the respondents, and granting the prayer of the petition in so far as to approve of the instrument of disentail (No. 23 of process), and interpone authority thereto; and to grant warrant upon such consignation being made for recording said instrument in the Register of Entails."

On 18th June 1891 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the value in money of the interests or expectancies of the respondents John George Alexander Baird, James Douglas Baird, and Henry Robert Baird, the three next heirs of entail in the entailed estates mentioned in the petition, do not exceed the sum of £55,000 sterling in all; and, in respect of the offer made by the petitioner in the said minute, No. 36 of process, and upon the petitioner consigning in bank, in the joint names of the agents of the petitioner and the respondents, the three next heirs of entail, and subject to the future orders of the Court, the sum of £55,000 sterling, to meet the value of the said interests or expectancies of the said respondents in the said entailed estates, dispenses with the consents of the said respondents as next heirs of entail foresaid to the disentail of the said estates: Finds that the procedure has been regular and proper, and in conformity with the provisions of the Acts of Parliament and relative Acts of Sederunt: Interpones authority to and approves of the instrument of disentail, No. 23 of process: Grants warrant to, and authorises and ordains the Keeper of the Register of Tailzies to record the same in said register, in terms of the statute, and decerns *ad interim:* But supersedes extract and execution hereof until the said consignation has been made, and the receipt therefor lodged in process and transmitted to the Accountant of Court."

The respondents (the three next heirs) reclaimed.[1]

LORD PRESIDENT.—I am sorry to say that I cannot agree with the Lord Ordinary in the course he has adopted in this case. I think that he has failed to give sufficient weight to the very precise provisions of the 13th section of the Act of 1882. When a power of disentail is given by statute, which is coupled with attendant conditions, it is an imperative rule that these conditions must be simply and literally complied with by anyone who seeks to take advantage of the power. Now, nothing can be clearer than the conditions of this section. It is in these terms:—"In any application under the Entail Acts to which the consent of the heir-apparent, or other nearest heir, is required, and such heir, or the curator ad litem appointed to him in terms of this Act, shall refuse or fail to give his consent, the Court shall ascertain"—these words are perfectly clear and imperative—"the value in money of the expectancy or interest in the entailed estate of such heir with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security shall be given over the estate, and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained." It follows as a matter of course that until the value in money of the expectancy of the next heir has been ascertained and paid into bank or secured there can be no authority to disentail. On that simple ground—I do not think I can elaborate it,—I am for recalling the Lord Ordinary's interlocutor, and remitting to his Lordship to proceed.

[1] Shand v. Home, March 4, 1876, 3 R. 544; M'Donalds v. M'Donald, March 12, 1880, 7 R. (H. L.) 41.

No. 219. LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

July 15, 1891. Baird v. Baird. THE COURT recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed.

W. & F. HALDANE, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 220. JAMES GEDDES, Pursuer (Appellant).—*James Reid.*
DAVID REID, Defender (Respondent).—*Shaw—Salvesen.*

July 16, 1891. Geddes v. Reid. *Writ—Informality of execution—Proof—Onus—Conveyancing (Scotland) Act*, 1874 (37 *and* 38 *Vict. c.* 94), *secs.* 38 *and* 39.—Where a person alleged that a deed, without a testing-clause, bearing to be signed by him and by attesting witnesses had not been signed by him, and it was proved that the witnesses had signed but had not seen the alleged granter sign or heard him acknowledge the subscription, and where the person founding on the deed did not prove that the granter had signed it, *held* that the deed could not receive effect.

Opinion (*per* Lord Young) that when a deed is irregularly executed by reason of the persons signing as witnesses not having seen the granter subscribe or heard him acknowledge the subscription, the deed will be effectual if it is proved that the granter signed it.

2D DIVISION. Sheriff of Banffshire. I. IN 1886 James Geddes, fisherman, Portgordon, his son, George Geddes, and David Reid, an accountant in Portgordon, and formerly agent for the North of Scotland Bank, embarked in a fishing adventure, the accounts being kept by the latter. In order to provide his share of the funds, James Geddes found it necessary to borrow £65 on the security of certain house property in Portgordon of which he had a building lease. The loan was arranged by Reid on Geddes' behalf, and the latter granted a bond and assignation in security to the lender. In 1888 the house property was destroyed by fire. It had been insured through Reid's agency, and an insurance company paid Geddes for the loss a sum of £280. That sum was handed by Geddes to Reid in September 1888, with instructions that he was to pay off the bond for £65 out of the money, and Reid granted a receipt, dated 8th September 1888, bearing that the money was received "as a loan until arranged for." Reid paid off the bond for £65 in November 1889, and received the titles of the property from the lenders' agents, along with the bond and assignation and the discharge thereof.

In June 1890 James Geddes presented a petition in the Sheriff Court at Banff, *inter alia*, for delivery to him by Reid of these title-deeds and writs.

The defender in answer founded upon and produced a letter of authority or mandate which he averred that he had received from the pursuer, and which was in these terms:—"North of Scotland Bank, Limited, incorporated under Act of Parliament, Portgordon, 28th February 1889.—This to certify that I authorise Mr David Reid, bank-agent, Portgordon, to lift the titles of my house, No. 13 Gordon Street, Portgordon, and pay the bond of £65 sterling thereon, from Messrs Mair & Macvean, solicitors, Buckie, and to retain them in security for advances made to me and my sons, and to be made by him, for the rebuilding of said house. Also authorise him to get a loan on the property, and I bind myself to sign the assignation so soon as it is ready for signature. Said loan to meet said advances. JAMES GEDDES. John Reid, witness, clerk, Portgordon; Lizzie Taylor, witness, domestic servant, 7 Gordon Square, Portgordon."

The pursuer averred, in regard to the letter of authority;—It is not signed by pursuer, is not holograph, nor tested, or stamped, is written by defender, and the designations of the witnesses were added by defender's agent when this action was raised, or immediately prior thereto, or at least sometime after the signatures were adhibited."

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The pursuer pleaded, *inter alia*;—(1) The pursuer having placed the said title-deeds and writs in the hands of the defender in the manner stated, and the defender having no right or title to retain the said documents, he is bound to deliver the same to the pursuer, and decree should be granted accordingly. (3) The letter of authority founded on being neither signed by nor holograph of the pursuer, nor tested or stamped, cannot be received in evidence, and can bear no faith in judgment.

The defender pleaded;—(1) The defender is not bound to deliver up the said titles to pursuer until the pursuer pays off the defender's advance made for him, or, at all events, until pursuer makes reasonable provision for that purpose.

At the proof the defender deponed;—Upon 12th February 1889 he had received from the agents of the lender of the £65 a letter calling up the bond. On 28th February he shewed this notice to the pursuer, and obtained from the latter the letter of authority founded upon, which the defender deponed was signed in his office on the date it bore, and in presence of the witnesses, who saw the pursuer sign. The defender further explained that he had taken the letter in order to secure himself for advances made to the pursuer for the rebuilding of his house, and in place of taking an assignation of the property in his own favour.

The pursuer denied that he had ever signed the letter of authority or any document in the presence of the attesting witnesses or either of them.

John Reid, the first of the attesting witnesses, deponed that he "attended the pony, and did any office work," and was in the habit of witnessing deeds at the defender's request. He could not say that he saw the pursuer sign the document, or that he had heard the pursuer acknowledge his subscription.

Lizzie Taylor, the other attesting witness, deponed that the pursuer was not in the room when she signed the document as witness at the defender's request, that he did not sign in her presence, and that she did not remember what signature was there when she signed.

James Geddes junior, the pursuer's son, deponed that the signature of the document was not his father's.

On 10th April 1891 the Sheriff-substitute (Grant) found in fact that the document, No. 5 of process, was the writ of the pursuer, and in law that the writ warranted the defender in retaining the titles of which delivery was craved; therefore sustained the first plea in law for the defender, and dismissed the action.

The pursuer appealed, and argued;—The pursuer had at least proved that at anyrate one, if not both, of the witnesses were not present when he was alleged to have signed, and that his signature was not acknowledged to them. That being so, while the omission of this formality was no longer fatal to the deed as formerly, the *onus* was laid upon the defender of proving that it was the genuine writ of the pursuer.* The defender

* The Conveyancing and Land Transfer Act, 1874 (37 and 38 Vict. c. 94), section 39, provides,—"No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared

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had failed to discharge the *onus*, the proof going to shew that the pursuer had never signed the writ in question. The pursuer was therefore entitled to delivery of the title-deeds.

Argued for the defender;—The writ was *ex facie* probative, and must receive effect as such.* The *onus* lay upon the pursuer to shew that the writ was forged.[1] He had failed to discharge it, and the judgment of the Sheriff-substitute must therefore stand.

LORD YOUNG.—The facts of this case are to a large extent admitted, though the record brings out some points of difference distinctly. It seems that the pursuer, his son, and the defender entered into a fishing adventure in 1886. The defender kept the accounts, and had charge of the incomings and outgoings, and that account is not settled yet, though five years have elapsed since the adventure was started. It appears that the pursuer in 1886, in order to raise money for his share of the initial expenses of the adventure, borrowed a sum of £65 on the security of some house property which he possessed in Portgordon. This property he had insured through the agency of the defender. It was burnt down in 1888, and he received the sum of £280 from the insurance office. On 8th September of that year he handed that sum to the defender on the receipt No. 8 of process. It is according to the evidence that the pursuer told the defender, when he handed him the money, that he must pay off the debt of £65 secured on the property I have mentioned. Curiously enough that was not done till Martinmas 1889, but it was done then, more than a year after the money was received, and on making application the defender got the titles of the property from the lender's agents. These are the documents which the pursuer asks now to be delivered to him.

The defender objects to restore the titles, on the ground that he holds them under a letter of authority or mandate from the pursuer dated 28th February 1889. That letter bears to be a certificate on the part of the pursuer, authorising Mr David Reid "to lift the titles of my house, No. 13 Gordon Street, Portgordon, and pay the bond of £65 sterling thereon, from Messrs Mair & Macvean, solicitors, Buckie, and to retain them in security for advances made to me and my sons, and to be made by him, for the rebuilding of said house. Also authorise him to get a loan on the property, and I bind myself to sign the assignation so soon as it is ready for signature, said loan to meet said advances."

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that such deed, instrument, or writing was subscribed by such grantor or maker and witnesses."

* The Conveyancing and Land Transfer Act, 1874, section 38, provides,—"It shall be no objection to the probative character of a deed, instrument, or writing whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument, or writing or in the testing-clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any Court, and need not be written by the witnesses themselves." M'Laren, &c. v. Menzies, July 20, 1876, 3 R. 1151; Thomson's Trustees v. Easson, &c., Nov. 2, 1878, 6 R. 141; Brown, Dec. 22, 1883, 11 R. 400; Addison, &c., Feb. 23, 1875, 2 R. 457.

[1] Baird's Trustee v. Murray, Nov. 21, 1883, 11 R. 153; Cleland v. Cleland, July 6, 1837, 15 S. 1246, 9 Scot. Jur. 594; Arnott, &c. v. Burt, Nov. 14, 1872, 11 Macph. 62, 45 Scot. Jur. 46.

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When this letter of authority is produced in answer to the pursuer's claim to have his own titles delivered to him, he says that it was not signed by him. It bears his name, and the names of two attesting witnesses, John Reid and Lizzie Taylor. John Reid is designed as "clerk, Portgordon." His evidence, however, shews that he is quite an uneducated lad, and the account he himself gives is that he took charge of the defender's pony and did "any office work." In short, he was just the stable-boy. The other witness, Lizzie Taylor, was a domestic servant. Now, the pursuer swears that the signature to this document was not his, and his son says that it is not his signature. The defender, on the other hand, swears that the pursuer did sign the document. With regard to the instrumentary witnesses, the boy says that he cannot say that he saw the pursuer sign the document, and cannot say that he heard him acknowledge his subscription. He was asked if the pursuer was in the room, and he says, "I cannot recollect if Mr Geddes was present. I some think he was." The servant girl Lizzie Taylor says explicitly and distinctly that the pursuer was not in the room when she signed as witness at defender's request, that he did not sign in her presence, and never acknowledged his signature to her.

Now, what is the law on this matter? We were referred to sections 38 and 39 of the Conveyancing Act of 1874, and it was contended for the defender on the former clause that there being here the names of two subscribing witnesses, with designations appended to their signatures, this was a probative deed, and must receive effect, unless it was proved to be forged on such evidence as would convict a man of forgery in a criminal Court. I am going to assume, though I abstain from expressing an opinion on the point, that this is a probative instrument, and must have faith if nothing is proved to the contrary. But we have here to consider the matter on the evidence, and it is proved to my satisfaction that this document was not subscribed by the pursuer in the presence of witnesses, and that he did not acknowledge his signature to one or other of the persons subscribing as witnesses. Therefore, if the deed was executed at all by the pursuer, it was quite irregularly executed, for the law still remains that in order to the regular execution of a deed, the granter's subscription must be adhibited or acknowledged in the presence of the attesting witnesses. If there is an omission of this formality it is not now fatal to the deed as formerly, but it puts upon the party using the deed, and founding upon it, the burden of proving the deed to be genuine. My opinion in this case is founded on the proposition in fact that it may be doubtful, more or less, on the evidence whether the pursuer subscribed the deed at all, but it is quite certain that he did not do so in the presence of the witnesses, or acknowledge his signature to them. Perhaps it is proper that I should guard against any application of the rule which I hold applicable to this case being made to cases to which it is not applicable. We have no concern here to consider the case of an old deed, or the case where the attesting witnesses are dead or not to be found. Nor is there occasion to consider the case of a *non memini* on the part of the attesting witnesses. Cases of the denial of the authenticity of deeds are fortunately very rare, but it might frequently occur in such cases—indeed nothing could be more natural—that the attesting witnesses should have no recollection of the circumstances, and it would be quite enough for such a witness to say,—"That is my signature, and I would not have adhibited it unless the granter of the deed had signed in my presence, or acknowledged his signature to me."

I think, in considering a question of this kind, the character of the deed, the

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relation of the parties thereto, the circumstances of execution, and the position of the witnesses called in, must all be taken into account. Here the character of the deed was, that it was taken by an agent from his client of a sudden, and for the agent's advantage, the client having no advice or assistance but his own. The witnesses were a stable-boy and a servant girl, and the servant girl is certain that the alleged granter of the deed did not sign in her presence or acknowledge his signature to her. I therefore hold that the deed, if executed, was irregularly executed, though the consequences of the irregularity might be removed by evidence that it was really executed by the pursuer, by whom it bears to be executed.

On that last question I am of opinion that it is not proved that the pursuer ever subscribed this deed at all. I do not go the length of saying that he did not subscribe it, but I have no difficulty in saying that it is not proved that he did. That is sufficient for this part of the case, for the letter of authority or mandate, on which the defender relies as the ground for withholding the title-deeds of the pursuer, thus fails, and therefore I am of opinion that we must pronounce the order craved in the first part of the prayer.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred in the judgment proposed.

LORD TRAYNER was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutor appealed against with respect to the letter of authority or mandate dated 28th February 1889 (No. 5 of process): Find in fact, first, that it was not executed or subscribed by the pursuer in presence of the subscribing witnesses, John Reid and Lizzie Taylor, or either of them, and that neither of them saw the pursuer subscribe the same or heard him acknowledge his subscription; second, that it is not proved that the pursuer did subscribe the said letter or mandate: With respect to the title-deeds and documents specified in the prayer of the petition, find in fact, first, that they were the property of the pursuer, and that they were delivered to the defender on account of and as acting for the pursuer on the occasion of his paying at the pursuer's request, and with the pursuer's money, a debt of £65 which was incurred over the property of the pursuer to which they refer; second, that the defender has no authority or mandate by the pursuer to retain the possession or custody of the said titles and documents or to withhold them from the pursuer: Find in law that the pursuer is entitled to the order which he prays for ordaining the defender to deliver to him the said titles and documents: Therefore decern and ordain the defender to deliver to the pursuer the said titles and documents in terms of the prayer of the petition," &c.

MACPHERSON & MACKAY, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

No. 221. July 17, 1891. Parochial Board of Borthwick v. Parochial Board of Temple.

THE BOUNDARY COMMISSIONERS FOR SCOTLAND.

PAROCHIAL BOARD OF THE PARISH OF BORTHWICK.—*Wallace—C. K. Mackenzie.*

PAROCHIAL BOARD OF THE PARISH OF TEMPLE.—*J. A. Reid.*

Statute—Casus improvisus—Special case—Competency—Poor—Local Government (Scotland) Act, 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 49 *and* 50.—By the Local Government (Scotland) Act, 1889, sec. 49, the Boundary Commissioners acting under the Act are empowered to provide for the adjustment and disposal

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of the property, debts, and liabilities of the various authorities affected by the orders pronounced by the Commissioners, and they are further (sec. 50) empowered to state a special case for the opinion of the Court of Session on any question of law.

The Commissioners having, in pursuance of the Act, pronounced an order detaching a portion of one parish and annexing it to another parish, and the parochial boards of the parishes having applied to the Commissioners to adjust their respective liabilities consequent on this change, the Commissioners presented a special case for the opinion of the Court regarding the liabilities of the two parishes for the parochial relief of persons who were resident on the transferred portion at the date of the transference.

The Court *dismissed* the case, holding that it presented no question of law.

Opinions that the question was one for the determination of the Commissioners.

THIS was a special case presented by the Boundary Commissioners for Scotland acting under the Local Government Act, 1889.*

1ST DIVISION. C.

The case stated,—"By order, dated 24th November 1890, the Boundary Commissioners for Scotland declared that a detached portion of the parish of Temple, containing 228 acres or thereby, situated at or near Gorebridge, should cease to be part of the parish of Temple, and should form part of the parish of Borthwick. . . . The parochial boards of the two parishes have failed to agree as to an adjustment of liabilities consequent upon the transfer of the said detached portion, and have applied to the Boundary Commissioners to make such adjustment. Before they can do so, however, it is necessary to settle the questions of law as to the settlement of those persons who, residing in the said detached portion, possessed at the date of the transfer on 15th May 1891 a settlement by birth or residence in the parish of Temple, and who may thereafter become chargeable. The Parochial Board of Borthwick maintain that the settlement of such persons continues to be in Temple, while the Parochial Board of Temple contend that it is transferred to Borthwick. Since the date of the transfer on 15th May 1891, Alexander Wyllie, who immediately preceding that date possessed a settlement in the parish of Temple by residence in the said detached portion, has made application to the parish of Borthwick for relief, and has been temporarily relieved, pending the settlement of the questions between the two parishes."

The questions of law were—"1. Whether the settlement of the said Alexander Wyllie is still in Temple, or has been transferred to Borthwick? 2. If it be held that his settlement is in Temple, will residence

* The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 49, provides, *inter alia*,—"When an order under this Act has taken effect, the Boundary Commissioners may provide for the adjustment and disposal of the property, debts, and liabilities of the various authorities affected by the order, and for the settlement of differences arising out of the order."

Section 50, subsection (2), provides—"In default of an agreement as to any matter requiring adjustment for the purposes of this Act, then, if no other mode of making such adjustment is provided by this Act, such adjustment may be made or determined by the Commissioners"; and subsection (3) provides,—"The Commissioners, when making an adjustment under this Act, shall be deemed to be a single arbiter within the meaning of the Lands Clauses Consolidation (Scotland) Act, 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly; and further, the Commissioners may state a special case on any question of law for the opinion of either Division of the Inner-House of the Court of Session, who are hereby authorised finally to determine the same, along with any question of expenses."

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by him for four years and a day in the said detached portion after the date of the transfer destroy his residential settlement in Temple? (3) Will a person born in the said detached portion prior to 15th May 1891, and becoming chargeable to the parish of his birth subsequent to that date, fall to be supported by the parish of Temple or by the parish of Borthwick?"

Counsel were heard for the two parishes.

Mr Sheriff Cheyne, one of the Commissioners, was also heard.

At advising,—

LORD PRESIDENT.—This is an application to the Court in the form of a special case in which the Boundary Commissioners for Scotland desire to have the opinion of the Court upon a question of law, for the purpose of enabling them to adjust the respective liabilities of the parishes of Borthwick and Temple, and I fully recognise the duty of the Court to give an opinion for the guidance of the Boundary Commissioners on any question of law, and to determine any question of law so as to be binding on all parties; but the first inquiry is whether any question of law has been stated to us, and upon that I entertain a pretty strong opinion that there is no such question.

The effect of the proceedings of the Boundary Commissioners in reference to these parishes is simply this, to cut off a considerable portion of the parish of Temple from that parish, and to annex that portion to the adjoining parish of Borthwick. Now, so long as the boundaries of these parishes remain unchanged, any question of parochial liability between the two parishes, or in which their interests were involved, would of course have been a question of law upon which the parties would have been entitled to come to the Court. But here the Legislature, by passing this Act, and by the proceedings of the Commissioners in carrying out the Act, has placed these two parishes in an anomalous and not very intelligible position. The law of settlement is entirely statutory, and I do not know anything which the Court have to guide them in determining any question relating to the law of settlement except the statutes. Now, the question which we are here asked to determine is this, whether residence by the pauper for four years and a day in the detached portion of the parish after the date of the transfer will destroy his residential settlement in Temple. That must be a statutory question or not a question of law at all, and for my own part, in the long series of statutes, beginning in 1519 and culminating in the Poor-Law Act of 1845, I have been unable to find a single syllable to guide us in the determination of this question. I am therefore unable to answer the question, which I think is not a question of law, but is a question which has arisen by accident—an accident which is due, I think, to an oversight on the part of the Legislature, in altering the law in so far as the division of the parishes is concerned without making any provision as to the effect of that alteration on the law of residential settlement. The Commissioners, authorised by the Legislature, have cut off part of one parish and joined it on to another parish, and they now ask us what is to be the effect of that. But that is exactly what the Legislature ought themselves to have settled, and what, in my opinion, nobody but the Legislature can settle. It cannot be a question of common law, for common law on the subject there is none. It is not a question of statute law, for the statutes on the subject are silent. The difficulty is a difficulty created by the Legislature, and the Legislature alone can remove it. I am therefore for dismissing the case.

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LORD ADAM.—I am of the same opinion, and I only wish to add this—that if there is a remedy—and it rather appears to me that there is a remedy provided by legislative authority—that remedy is left to the Commissioners. They are the only persons to whom, as far as I can see, the Legislature has entrusted these matters, and they must just do their best.

LORD M'LAREN.—I think that under this statute the Commissioners are to adjust all questions under delegated legislative authority, and in doing so are to take a certain course in questions of law. It is plain enough that a question of settlement is a question that would be better solved by a legal authority than by one which is composed of persons who may not have had a legal training. But it does not follow that it is a question of law. It is rather a question of legislation to be settled in harmony with recognised legal principles, but at the same time one involving an act more or less arbitrary, which can be performed in a perfectly satisfactory way, I have no doubt, by the Commissioners. I am quite sure that if there had been a question of law your Lordship would have discovered it, and we should have been invited to consider it; and as there is none I concur in thinking that the only thing we can do is to dismiss the case.

LORD KINNEAR.—I am of the same opinion. The effect of the statute, as your Lordship has pointed out, is certainly to place these two parishes in a very anomalous position with reference to one another. The Legislature might have laid down some rigid rule for the purpose of regulating all the rights and liabilities of the parishes, consequent on this change, which might have been enforced by Courts of law acting according to the ordinary principles of law. But certainly we cannot find any such rule in the statute. It was not suggested that the statute contains any such rule. The whole argument was directed to the consideration of the convenience or inconvenience which might result from the solution of the present question in one way or another; none of the argument affected any question of law, or presented any question of law for our consideration. But the Legislature might have taken the course—and it rather appears to me that it is the course which the Legislature did take—of leaving these questions to be settled and adjusted on principles of convenience and common sense, as cases might arise, by the Commissioners to whom has been committed the practical resolution of the scheme of the Act. If there are any questions of convenience or of liability between these two parishes arising in consequence of the detachment of a portion of the one parish and its junction to the other, that looks like a question which the Commissioners may determine. At all events, I am quite clear, with your Lordship, that there is here presented to the Court no question of law which the Court can be asked to decide, or is capable of deciding.

THE COURT dismissed the case.

A. J. NAPIER, W.S.—J. & F. ANDERSON, W.S.—Agents.

No. 222.

July 17, 1891. Scott's Trustees v. Scott.

MRS FANNY SCOTT AND OTHERS (Scott's Trustees), First Parties.—*R. V. Campbell—C. K. Mackenzie.*
MRS FANNY SCOTT, Second Party.—*R. V. Campbell—C. K. Mackenzie.*
MRS ELIZABETH THORBURN AND ANOTHER, Third Parties.—*Jameson—Cullen.*

Succession—Vesting—Succession "after these payments are made."—A testator after making certain provisions for his wife and leaving legacies to each of his daughters, payable after their mother's death, declared that his son was "to succeed to whatever may remain of my estate after these payments are made, whom failing to" his daughters. The wife, the son, and the daughters all survived the testator. The son predeceased his mother and sisters. In a question between the widow as one of the heirs *in mobilibus* of her son, and the daughters, who claimed the whole residue as conditional institutes, *held* that the words "after these payments are made," did not refer to a point of time, but meant "subject to these payments," and that the residue vested in the son *a morte testatoris.*

1ST DIVISION. C.

DAVID SCOTT, tenant of the farm of Meadowfield, Duddingston, and of the other farms mentioned in his trust-disposition, died on 26th August 1882, leaving a holograph settlement dated in 1870, whereby he conveyed to trustees "All the heritable and moveable property which may belong to me at my death, as well as the new lease of Lochend and the leases of the other farms, also, so far as not impossible, in trust for the following purposes:—After my death the farms to be carried on for the benefit of the family, till the Martinmas and separation of the crop of the year that my son David is twenty-three. He is then to get Northfield, Meadowfield, and Heriot, and the use of all the stock and stocking on these farms till his mother's death, upon payment of £300 a-year as interest upon the stock and stocking. He will then (at his mother's death) get Lochend also, upon payment of £50 a-year to each of his sisters, so long as they remain unmarried, during the currency of the lease. I leave to my two daughters and their heirs £3000 each, payable six months after the death of their mother. And in consideration of the foregoing arrangements, my son David is to succeed to whatever may remain of my estate and effects after these payments are made; whom failing, to his wife in liferent, and her children in fee; whom failing, to my two daughters in equal value between them, as to my trustees may appear the best division. I appoint and nominate my son David Francis Scott, as above, to be my executor. My wife to live either at Meadowfield or at Lochend, as she may wish, and she is to have the liferent use of whatever furniture she may require; and if the profits of the farms and the interest on my other means will afford it, I desire that she may be allowed £500 a-year, if not, as near that sum as my trustees may think prudent."

The testator was survived by his wife, by his son David, and by two daughters.

The son died on 6th August 1888 unmarried and intestate, aged about thirty-six.

On the death of the son the testator's widow, as one of the heirs *in mobilibus* of her son, claimed one-third of the residue of the trust-estate on the ground that it had vested in him *a morte testatoris.*

The daughters maintained that the vesting of residue was postponed in respect of the direction that the son was "to succeed to whatever may remain after these payments are made" and of the destination over; and they accordingly claimed the whole residue as conditional institutes.

A special case was accordingly presented, to which the trustees were

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the first parties, the widow was the second party, and the daughters were the third parties.

The question of law was,—"Did the residue of the trust-estate vest in the testator's son, and did the second party become entitled to one-third thereof in respect of his death without issue and intestate?"

LORD PRESIDENT.—We have clear evidence on the face of this will that the testator, though not a lawyer, was an intelligent man of business, and he has expressed himself with considerable felicity in regard to the way in which he desired his estate to be disposed of. He was engaged in farming to a large extent, having four farms.

Now, his will was made in 1870, and at that time it would appear that his only son, David, had not then attained the age of twenty-three, which he did not do until 1875. The testator died in 1882, and so he had realised before his death the fact that the condition which he had thought fit to introduce regarding his son attaining the age of twenty-three no longer operated. He had to consider how his four farms were to be carried on, and how his widow and children were to be provided for.

Now, I think he has expressed himself clearly in reference to these matters. He says,—"After my death the farms to be carried on for the benefit of the family, till the Martinmas and separation of the crop of the year that my son David is twenty-three. He is then to get Northfield, Meadowfield, and Heriot, and the use of all the stock and stocking on these farms till his mother's death, upon payment of £300 a-year as interest upon the stock and stocking." So far there is no difficulty in understanding the intention of the testator. Till he attained the age of twenty-three his son was to have nothing to do with the farms, but when he reached that age he was to have the use of the stock on the three farms mentioned till his mother's death, upon payment of £300 a-year as interest, and he was also, at his mother's death, to get Lochend, upon payment of £50 a-year to each of his sisters. Then he leaves to his two daughters and their heirs £3000 each. He then proceeds as follows,—"And in consideration of the foregoing arrangements, my son David is to succeed to whatever may remain of my estate and effects after these payments are made." Now, it is said that these words necessarily imply that until after the payments were made there was no succession in the son. Mr Jameson said there was no gift, and therefore no right to the residue accrued until after the payments were made. He read the word "after" as referable to a point of time, but I do not think that is the correct interpretation. I think that the testator meant in this clause to give his son an immediate gift, subject to the payments provided for in the preceding clause. That is the more natural meaning to give to the words used, and is also more in accordance with the general rule of law as to vesting *a morte testatoris*. There is nothing to militate against it. Therefore, giving due effect to the presumption of law as to vesting *a morte*, there is no difficulty in giving effect to the plain meaning of the testator. I am therefore of opinion that we should answer the question in the affirmative.

LORD ADAM concurred.

LORD M'LAREN.—I concur, and would only add one observation. It is no doubt laid down in the leading cases that words of conditional institution or limitation, as they are called in the House of Lords, *prima facie* are to be taken as referring to the distribution of the estate. But while that is so, it is also to

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be observed that, in determining the period of distribution, there is an important distinction where a general liferent of the estate is given with a destination of the capital at the term of distribution, and the case (which we have here) of an unlimited fee burdened with an annuity. The rule of vesting is perfectly satisfied in the latter case, and I therefore concur with your Lordships in the proposed judgment.

LORD KINNEAR concurred.

THE COURT answered the question in the affirmative.

RONALD & RITCHIE, S.S.C.—J. & J. MILLIGAN, W.S.—Agents.

No. 223. July 18, 1891. Thain v. Thain.

DAVID THAIN, Pursuer (Reclaimer).—*Dickson—Law.*
ALEXANDER THAIN, Defender (Respondent).—*Ure—Craigie.*

Trust—Adverse title made up by accepting trustee—Deathbed—Heritable and moveable—Spes successionis.—Held that a trustee under a settlement executed on deathbed did not commit a breach of trust in completing his own title as heir-at-law to the heritage conveyed, and in disregarding the deathbed conveyance in favour of a stranger.

An assignee's right to a *spes successionis* to heritable property, though merely a *jus crediti*, is a heritable right, and was subject to the law of deathbed prior to its abolition.

In 1850 A B disponed on deathbed heritable subjects to which he had merely a personal right, to C D and others, as trustees for behoof of C D in liferent, and E F in fee.

C D, who was the truster's heir-at-law, being advised that the conveyance was invalid on the ground of deathbed, and that it was unnecessary for him to reduce it, made up a title in his own person as heir-at-law, and thereafter possessed the subjects for the prescriptive period. At his death he disponed the subjects gratuitously to G H, a singular successor.

In an action of declarator and adjudication brought by E F, who claimed to have right to the subjects under the deathbed deed, against G H, the defender pleaded deathbed.

The Court *assoilzied* the defender, the Lord President, Lord Adam and Lord Kinnear holding that C D was entitled to complete his title as heir-at-law without regard to the invalid deathbed deed, and that as C D would have been entitled to plead deathbed when it was proponed against him, his disponee, standing on his title, was entitled to do so, Lord M'Laren holding that the defender had a prescriptive title to the lands which was not open to challenge unless his author's title was tainted by breach of trust, and that as his author was entitled to reduce the deathbed conveyance, there was no breach of trust in disregarding it.

Opinion (*per* Lord M'Laren) that the defender not being an heir-at-law of the truster was not entitled to plead deathbed.

1ST DIVISION. Ld. Kyllachy. C.

IN 1841 James Matthew Thain, proprietor of Arthurbank, a small estate in Perthshire, became insane, and his only brother and presumptive heir-at-law, Thomas Thain, was appointed his curator bonis, their cousin, David Thain *primus*, being cautioner.

By deed of disposition and assignation, dated 28th January 1846, in consideration of certain advances made by David Thain *primus* to and for behoof of James Matthew and Thomas Thain, and of an annuity of £20 which David had agreed should be paid to Thomas as a charge upon Arthurbank, Thomas sold and disponed from him, his heirs and successors, to and in favour of David, his heirs and assignees whomsoever, heritably and irredeemably, the estate of Arthurbank, and all right, title, and interest which he, Thomas, then had or at any time thereafter might acquire in and to the same or any part thereof under the real burden of the said annuity; and further, bound himself, upon the death of James

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Matthew, to procure himself duly and lawfully served and retoured heir to him, and infeft and seised in due and competent form in the said estate, and being thus invested, he obliged himself to infeft and seise David and his foresaids in the same, under burden of the said annuity.

David Thain *primus* died on 9th November 1850, leaving a trust-disposition and settlement, dated the day before his death, by which he conveyed his whole estates, heritable and moveable, to his brother Alexander Thain *primus* and others as trustees, directing them, *inter alia*, "to convey and dispone my property of Arthurbank, all as acquired by me from Thomas Thain formerly residing there, to and in favour of my brother the said Alexander Thain, in liferent for his liferent use allenarly, and to and in favour of David Thain, my natural son, and the lawful heirs of his body in fee."

At the date of the death of David Thain *primus* James Matthew Thain was still alive, and consequently all that was carried by the above conveyance was the assignation to the *spes successionis* acquired by David under the disposition of 1846.

Alexander Thain *primus* accepted office as one of his brother David's trustees, but having been advised that his brother's disposition was ineffectual as regarded Arthurbank as having been granted on deathbed, he on 28th June 1852, without bringing any reduction of the trust-disposition, obtained from Thomas Thain (James Matthew Thain being by this time dead) a disposition of Arthurbank. This disposition, after narrating the previous disposition of 1846, proceeded as follows:—"And further, considering that the said David Thain died on or about the 9th day of November 1850 without lawful issue, and without having executed any legal disposition or conveyance of his right to the said lands and others disponed by me as aforesaid, and that the right to the same contained in the said disposition and assignation by me devolved in consequence upon and now belongs to Alexander Thain, residing at Arthurbank, as his only surviving brother-german, and nearest and lawful heir both of line and conquest to him; and further, considering that the said James Matthew Thain, my brother, died on the 18th day of February last, in the present year, unmarried and intestate, and that I am now his nearest and lawful apparent heir in the said lands and others; and now seeing that the said Alexander Thain, as heir foresaid of the said David Thain, has required me, in implement of the obligations undertaken by me in the said disposition and assignation before narrated, to grant the disposition underwritten, and that he has also agreed of his own proper motive that the same shall be made under burden of an annuity to me of £40 sterling per annum, payable as after mentioned, and under the further burdens hereinafter specified, which annuity and other burdens hereon are to include and be in lieu of the said annuity of £20 sterling per annum contained in the said disposition and assignation before narrated: Therefore I, the said Thomas Thain, as nearest and lawful apparent heir foresaid of the said deceased James Matthew Thain, my brother-german, have sold and disponed, as I do hereby sell, alienate, and dispone to the said Alexander Thain and his heirs and assignees whomsoever, but subject to the real burden of the annuity and other provisions in my favour hereinafter inserted, heritably and irredeemably, All and Whole," &c.

Thereafter Alexander Thain *primus* duly completed a title to Arthurbank, and continued to possess it as proprietor in his own right till his death on 7th July 1890. During his life he granted leases and expended large sums in buildings and improvements. He left a disposition conveying it to his natural son, Alexander Thain *secundus*.

In October 1890 David Thain *secundus*, a natural son of David *primus*,

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and the fiar of Arthurbank under the trust-disposition of David *primus*, brought an action against Alexander Thain *secundus* for declarator that Alexander Thain *primus* and the other trustees of David Thain *primus* were upon the death of David Thain *primus*, and Alexander Thain *primus* after the death of the other trustees, lawfully vest, possessed, and seised of and in the lands and estate of Arthurbank, or of and in the *spes successionis* thereto acquired by David Thain *primus* from Thomas Thain upon trust to dispone and convey the same in the manner intended in the trust-disposition and settlement; that at the time of his death Alexander Thain *primus* having acquired a feudal title to the estate of Arthurbank, was so vest and seised upon trust, and was bound and obliged to dispone and convey the said lands and estate, subject to his own liferent, to and in favour of the pursuer in terms of the trust-disposition and settlement; that as he had failed to do so, and his son refused to implement his obligation, Arthurbank should be adjudged to belong to the pursuer, and that the defender should be ordained to remove therefrom.

The pursuer averred that Alexander Thain *primus* had acted in pursuance of a fraudulent scheme and in breach of his duty as a trustee, in obtaining the disposition in 1852 from Thomas Thain, which he had got by increasing the amount of annuity payable to the said Thomas Thain, in making up his title as fee-simple proprietor, and in keeping the pursuer in ignorance of his rights as beneficiary under the trust-deed.

The pursuer pleaded;—(1) The defender's predecessor having, from the date of his acceptance of the office of trustee under the trust-disposition and settlement condescended on, been under an obligation to convey the said lands and estate to the pursuer, and having, through the execution of the fraudulent scheme condescended on, acquired a title to the fee-simple of the said lands and estate, decree of declarator and adjudication should be pronounced as concluded for, with expenses. (2) The defender's predecessor having, from the date of his acceptance of the office of trustee aforesaid, been under an obligation to convey the said lands and estate to the pursuer, and having, contrary to his trust duty, acquired a title to the fee-simple of the said lands and estate, decree of declarator and adjudication should be pronounced as concluded for.

The defender pleaded;—(4) The present action is excluded by the said warrants and infeftments in favour of the said Thomas Thain and the said Alexander Thain *primus*, and the disposition and deed of settlement of the said Alexander Thain *primus*. (5) The said trust-disposition and settlement of David Thain *primus* having been executed on deathbed is not a habile title to heritage, and the pursuer cannot found thereon. (6) In any event, the defender and his authors having possessed said estate of Arthurbank on an *ex facie* valid irredeemable title recorded in the appropriate Register of Sasines for more than the space of twenty years continually and together, peaceably and without any lawful interruption, the defender is entitled to decree of absolvitor, with expenses.

A proof before answer was allowed. The import of the evidence sufficiently appears from the foregoing narrative (in so far as the facts therein stated were in dispute), and from the Lord Ordinary's opinion.

On 22d May 1891 the Lord Ordinary (Kyllachy) assoilzied the defender.*

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* "OPINION.—The defender here has *prima facie* a good prescriptive title to the small estate in Perthshire which is the subject of the action. That is to say, his father, who died last year, and whose general disponee he is, made up a title to, and was infeft in the estate so far back as the year 1852, and on this infeftment, which was an infeftment in fee and in all respects regular, he pos-

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The pursuer reclaimed. The argument sufficiently appears from the opinions of the Lord Ordinary and the Court.[1]

sessed until his death last year, when the defender succeeded and continued his possession. The question at issue is whether the pursuer is entitled to get behind this prescriptive title, and to claim the estate in virtue of a certain trust-disposition left by David Thain, to whom the property belonged at the time of his death in 1850, and who by the trust-disposition in question left it, or attempted to leave it, to the defender's father in liferent, and to the present pursuer (his own natural son) in fee.

"The first ground on which the pursuer relies is that the possession of the defender's father up to his death in 1890 falls to be ascribed not to his infeftment in fee, but to the personal title which he held to the liferent of the estate under the trust-disposition and settlement of David Thain. I am unable to sustain this contention. The pursuer's possession must, I think, be ascribed to the title which he made up and published,—which was a title inconsistent with the trust-disposition and settlement,—and which was made up on the footing that the trust-disposition and settlement was reducible *ex capite lecti*. Moreover, the proof appears to me to establish that the possession had by the defender's father exhibited all the marks and qualities of possession by a fiar. I refer particularly to the leases which he granted and to the large sums spent by him on the improvement of the property and the erection of buildings upon it. The pursuer might, it will be observed, have raised the present question at any time during the period of prescription. He had always a sufficient title and interest to reduce the infeftment as an infeftment in fee, if he saw his way to do so.

"The other ground on which the pursuer relies is at first sight more formidable. It appears that the defender's father was himself a trustee under the trust-disposition and settlement of his brother, David Thain, and there is no doubt that he acted in the trust as regards the administration of the moveable estate, and also in carrying on for the benefit of the legatees a certain farm of which the truster had a lease current at the time of his death. It is said that in these circumstances the title which he made up to the lands now in dispute constituted a breach of trust, that it was his duty to possess under the trust, and that, consequently, he cannot prescribe against the trust.

"I allowed before answer a proof of the facts bearing on this question, and I am now satisfied of the relevancy and also of the conclusiveness of the facts which that proof establishes. It is clearly proved that the trust-settlement in question was executed by David Thain on the day before he died, and while he was labouring under the disease of which he died. In short, it is quite clear that it was open to the defender's father, as David's brother and heir-at-law, to reduce the deed *ex capite lecti*. It is also clear that the only reason why this was not done was that the heir was advised that it was not necessary, and that there being no question as to his right to succeed, he might make up his title in the most convenient form without reference to the abortive conveyance in the trust-disposition and settlement. In these circumstances I cannot hold that the heir, although a trustee, violated any duty to the trust in taking the course he did. The substance of the matter must, I think, here be looked to; and it being clear that the lands in question formed truly no part of the trust-estate, I see no interest which was prejudiced by the course which the heir took, and which, it will be observed, he took openly and under competent legal advice.

"It is true that the present defender (being, as it appears, illegitimate) can-

[1] *Pursuer's Authorities.*—Anderson, July 15, 1760, M. 5701; Erskine, Jan. 1682, M. 5703; Beaton v. M'Donald, June 7, 1821, 1 S. 53; Trappes v. Meredith, Nov. 3, 1871, 10 Macph. 38, 44 Scot. Jur. 25; University of Aberdeen v. Magistrates of Aberdeen, 4 R. (H. L.) 48; Aberdeen Railway Co. v. Blaikie, July 20, 1854, 17 D. (H. L.) 20, 1 Macq. 461, 26 Scot. Jur. 622; Wyse v. Abbott, July 19, 1881, 8 R. 983.

Defender's Authorities.—Crichton v. Crichton's Trustees, May 12, 1826, 4 S. 561; Hewitt's Trustees v. Lawson, March 20, 1891, *ante*, p. 793; Ersk. Prin. iii. 8, 49; Bell's Comm. i. 141.

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LORD KINNEAR.—The pursuer in this action claims right to certain lands called Arthurbank in Perthshire, in which the defender now stands infeft under a disposition in his favour granted by the late Alexander Thain, the late proprietor, who died in 1890, and had been infeft in the lands in dispute since 1852. There is no question that Alexander Thain's title is *ex facie* perfectly valid and regular, being a conveyance by Thomas Thain to him as nearest and lawful heir both of line and conquest to the deceased David Thain, who died on 9th November 1850. The lands in question had belonged to James Matthew Thain, who was under curatory as being incapable of managing his own affairs. Thomas Thain was brother and heir-at-law of James Matthew Thain, and in 1846, while James Thain was still alive, had conveyed his right of succession and all right, title, and interest which he had in the estate, for onerous causes, to David Thain. David Thain died before James, and therefore he never acquired any real right in the lands, but it is not disputed that by virtue of Thomas' conveyance he had a perfectly good personal right, contingent only on the succession opening to Thomas, and it is clear in law that this was a right which he might validly assign to others, and which, if not so assigned, might be transmissible to his heir. David Thain, who died, as I have said, on 9th November 1850, left a trust-disposition dated 8th November, the day before his death, and by this deed he directed his trustees, of whom Alexander Thain was one, to convey his estate of Arthurbank to Alexander in liferent, for his liferent use allenarly, and to the pursuer in fee.

The pursuer maintains that Alexander Thain, who accepted the trust and acted as a trustee, committed a breach of trust in making up the title in his own person as fiar instead of to himself in liferent only and to the pursuer in fee, and afterwards, in conveying the fee to the defender; that it was his duty as trustee to denude the fee in favour of the pursuer, and that as the defender is a gratuitous disponee he can take no benefit from his author's breach of trust, and

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not now bring a reduction *ex capite lecti;* but that does not, in my opinion, prevent his proving as part of the history of the trust, and as an answer to the suggestion of breach of trust, that the trust-settlement was ineffectual to convey the lands, and was recognised and dealt with as being so.

"It might have been a different matter if the defender's father could be shewn to have homologated the trust-deed prior to his taking the step of making up his adverse title. But I find no evidence, and, indeed, no averment of anything from which such homologation could be inferred. With respect to acts subsequent to the assertion of his adverse title, I do not think that they can count. But they only at best come to this—that the heir-at-law, while repudiating the trust-deed as a conveyance of the lands, yet acted in the management of the trust as a trust embracing the moveable estate. It is quite certain that he never intended to ratify the trust-deed as containing a conveyance of the lands in question.

"Some doubt was suggested as to whether the law of deathbed applied, looking to the peculiarity of David Thain's title. It appears that although in possession, he, at the time of his death, had no feudal title to the property, but only a *jus crediti* under a contract with a person who had a conveyance to what was then only a *spes successionis*. The right, however, such as it was, was a heritable right, and one which ultimately became available to David Thain's heir. And no authority was quoted to me for the proposition that the law of deathbed was confined to feudal or proper personal rights to land, and did not include rights of the nature of *jura crediti*."

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must now denude, as the latter would have been compelled to do had the defender not been kept in ignorance of the way in which he had made up his title. The answer is that there was no breach of trust, because the conveyance to Alexander Thain by David Thain was executed upon deathbed, and therefore was ineffectual to prejudice the right of Alexander his heir-at-law. I do not think it doubtful that that is a perfectly good answer if the facts on which it rests can be established. Alexander Thain could acquire no right in any part of the trust-estate contrary to the terms of the trust, but he was not bound by acceptance of the trust to abandon an estate which belonged to himself, and which the truster had no power to convey. The question between the parties appears to me to be a question of fact. If Alexander Thain made up his title in breach of the trust, the pursuer, whose interest he was bound to protect, will be entitled to vindicate his right to the estate notwithstanding the gratuitous conveyance to the defender. If there was no breach of trust, the pursuer has no right, and the defender must be allowed to retain his own estate.

A good deal of confusion and apparent difficulty was introduced into the argument by the defender's contention that he had acquired a prescriptive right. If there was no breach of trust, defender had no need to plead prescription, and if there was breach of trust, prescription will be of no avail to him. It is settled law, to state the doctrine in the language which was used by your Lordship in the chair in one of the cases cited to us, that no trustee can acquire by prescription a right to perpetuate a breach of trust, and since the defender is a gratuitous disponee in possession of the trustee from whom he derives his title, he can be in no more favourable position than the defaulting trustee himself. It is perfectly true that Alexander Thain, who is said to have committed this breach of trust, made up the title in his own person *ex facie* absolute to the fee of the estate, and possessed, after once making up that title, for his own behoof. But though that was a perfectly good absolute right as against all the world, still if it were the case that he had made up his title as heir to David Thain alone, and if David Thain had effectively conveyed the estate to Alexander in trust for the pursuer, then, as between Alexander Thain and the beneficiary under the trust, the absolute title would have been qualified by the trust obligation, and no prescriptive possession would have enabled the trustee to have got rid of this trust obligation so long as he continued to hold the property, for it is quite obvious that the positive prescription would have no effect on the personal claims affecting the trust, and it is well-settled law that the negative prescription would not extinguish this claim by long possession alone unaided by anything like repudiation or discharge. Therefore I must say for myself that during the argument I was a good deal impressed by the difficulty which the defender seemed to create for himself by this contention that he had made up a prescriptive right.

But then I think it is only necessary to state the facts of the case in order to shew what the real question between the parties is; and when it is rightly understood it seems to me to be very obvious that we have no concern in this case with any plea of prescription at all. If the defence is well founded that David Thain's deed was invalid and ineffectual to convey his right to Alexander, and thus that Alexander Thain had a perfect right to complete his title as he did at the time, it is obvious that that would have been just as good a defence for Alexander Thain if the action had been brought against him in the year he made up his title as it is to the defender now; and if it would not have been a

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good defence to Alexander Thain I think it can be no better for the defender as his gratuitous disponee. It appears to me therefore that the question is really one of fact.

It is said that the defence is bad in law, because the law of deathbed while it subsisted had no application to the kind of right which was vested in David Thain. I agree with the Lord Ordinary that this argument is not well founded, and for the reason which his Lordship gives, that the right even as it was was an heritable right, and one which ultimately became available to David Thain's heirs. The law as it stood at the time of David Thain's death was this—that all gratuitous deeds making over or burdening subjects which the heir would have succeeded to had they not been so conveyed, or from which he would have derived any benefit, or which tended in any degree to prejudice the heir, might be reduced on the head of deathbed. The law is so stated by Erskine, and as thus stated it appears to me to apply directly to the case in hand. The question therefore appears to me to be merely whether there was or was not any breach of trust in fact on the part of Alexander Thain; and I agree so entirely with the Lord Ordinary as to the result of the proof that I think it unnecessary to do more than repeat what his Lordship says as to the effect of the evidence. The Lord Ordinary says,—"It is clearly proved that the trust-settlement in question was executed by David Thain on the day before he died, and while he was labouring under the disease of which he died. In short, it is quite clear that it was open to the defender's father, as David's brother and heir-at-law, to reduce the deed *ex capite lecti*. It is also clear that the only reason why this was not done was that the heir was advised that it was not necessary, and that there being no question as to his right to succeed, he might make up his title in the most convenient form without reference to the abortive conveyance in the trust-disposition and settlement. In these circumstances I cannot hold that the heir, although a trustee, violated any duty to the trust in taking the course he did. The substance of the matter must, I think, here be looked to; and it being clear that the lands in question formed truly no part of the trust-estate, I see no interest which was prejudiced by the course which the heir took, and which, it will be observed, he took openly and under competent legal advice."

The only observation that occurs to me to add to what the Lord Ordinary has here said is with reference to his statement that this course was taken openly. I think it very clearly proved that it was known to everybody concerned. The pursuer, however, alleges on record that he was kept in ignorance of the facts of the case, and of the method in which Alexander Thain made up his title. But then he has not gone into the box to prove that he was ignorant of these facts, and therefore I think it cannot be assumed that the pursuer was really kept in ignorance of what it was important for him to know any more than any of the other persons interested in the estate of David Thain.

Now, if the facts are as the Lord Ordinary has stated them, and I think accurately, there remains only one point to be considered. It is said the defender has no right to reduce the deed *ex capite lecti*, because he is not the heir-at-law either of David Thain or of Alexander Thain, and if it were necessary for him to reduce David's trust-conveyance, that would, I think, be a very formidable plea. But then he is under no necessity to reduce the deed. He has no title to set aside any conveyance by David Thain in respect of a right of succession to him, but he has an undeniable right to maintain the right which has been

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granted him by Alexander Thain, and for that purpose to prove that his author's title was not founded on breach of trust. The material consideration is that there is no competing title which requires to be set aside, because the defender has the only title to the lands. If David Thain had been infeft in the lands, and had conveyed them *mortis causa*, then it would have been absolutely necessary that his conveyance should have been set aside *ex capite lecti*, and there can be no doubt at all that Alexander Thain would have been so advised. It is quite clear on the correspondence that the reason why he took the course he did take was, that as David Thain's deed was quite invalid and ineffectual to convey the lands, and valid only to create an obligation on him as heir, which might have been made good against him if the deed had not been executed on deathbed, he was advised that it was unnecessary for him to set aside the deed at all, as it created no effectual obstacle to completing a title in his own person, and accordingly he made up a title which is perfectly good. The only risk to which he was exposed in following this advice was that he might by death and lapse of time lose the benefit of evidence which was necessary in order to prove the fact which lies at the base of his right, that the deed in question was executed on deathbed, but fortunately for the defender, though a good many persons who were likely to be called to speak to these transactions are dead, there still remains evidence enough to establish the case. Now, that being so, I think the defender has a perfectly good answer to the action brought against him, and is not required to resort to any process of reduction whatever. The pursuer has nothing but a personal claim to compel the defender to denude of the estate in his favour, and all the defender requires to do is to shew that that would not have been a good personal claim against his author Alexander Thain, and therefore that it is not a good claim against himself. I therefore agree with the decision at which the Lord Ordinary has arrived.

LORD ADAM.—I concur with Lord Kinnear, and on the same grounds.

The facts of this case are a little complicated, but they appear to be as follows,—There was a certain James Matthew Thain infeft in the lands of Arthurbank. This James Matthew Thain was a lunatic confined in an asylum. His curator was his brother Thomas, and Thomas's cautioner was David Thain. Now, it appears that this David Thain, who was a cousin of Thomas and James, had made large advances to Thomas in respect of some transaction arising out of the caution, and in respect of these advances, Thomas, who, besides being curator bonis, was at the time heir-presumptive to James, while still presumptive heir, granted to David a disposition of the lands of Arthurbank, and he also at the same time granted an obligation that he, Thomas, on the death of James, would make up a title and convey these lands to David and his heirs and successors. That was in 1846. James Matthew Thain died in 1852, predeceased by David, who died in 1850. Alexander, the defender's father, was David's heir, and he (Alexander) called upon Thomas to implement his obligation of 1846, which Thomas did, by disponing the lands of Arthurbank on 9th March 1852 to Alexander absolutely. Alexander made up his title and possessed on that disposition until 7th July 1890, when he died. By disposition dated 21st November 1872, Alexander conveyed to his son, the present defender, these lands of Arthurbank. Accordingly the father and son had possessed ever since 1852 these lands on an *ex facie* absolute title in their own person.

Now, I agree with Lord Kinnear that if a person is in possession on such a

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title he requires no assistance from prescription to support his title. That is the position of the defender here. He holds these lands on an absolute disposition derived from his father. Nobody seeks to reduce that title, and there is no competing title. The only case made on record is this—that the defender's father, Alexander, during all that time from 1852 till his death was under an obligation to convey these lands to his brother David's trustees, and accordingly this action is brought to have it found and declared that Alexander, the defender, was under this obligation, and on his failing to implement that obligation, to have the lands adjudged. Accordingly, it appears to me that the only question we have to decide is whether or not Alexander Thain, in the year 1852 and downwards, was under an obligation to convey these lands, to which he had made up a fee-simple title, to the trustees under David's trust-deed.

That question depends upon the disposition granted by David Thain. David died in 1850, predeceasing, as I have said, Thomas Thain, but he left a trust-disposition and settlement, dated 8th November 1850, in favour of the elder Alexander and three other trustees, by which he conveyed to them his whole estates, and directed them to dispone Arthurbank to Alexander Thain in liferent, and to the pursuer David, the truster's natural son, in fee. It is said that that was a binding obligation upon Alexander, and that is the obligation which Alexander's son, the defender, is now called upon to fulfil.

It appears to me that if David's trust conveyance was then, and is now, to be treated as a valid and unreducible conveyance, the pursuer possibly might be entitled to prevail. But I agree with Lord Kinnear and the Lord Ordinary that the circumstances in which this trust-disposition was executed were these—it was executed on 8th November 1850; the granter of it, David, died the next day, 9th November 1850, and when he executed it he was ill of the disease of which he died. I think that on the evidence these facts are clear beyond any doubt, and therefore this was a disposition which was reducible at any moment by Alexander Thain. The result of that is that these lands of Arthurbank were *de facto* the property of Alexander Thain. The question then comes to be—if these lands were *de facto* the property of Alexander, whether or not he was under any obligation to convey them to the trustees. I think that he was under no obligation to convey them, and that he committed no breach of trust in not conveying them. They were his own property, and I cannot see how there should be obligation on Alexander, simply because he happened to be a trustee under David's trust, to convey his own property to the trustees.

I agree with Lord Kinnear that in certain circumstances it might have been necessary to reduce this deed. If for example, David had been in point of fact infeft in these lands and had conveyed them under a disposition under which the trustees might have completed a title to them and possessed them, in that case it would have been necessary for Alexander to come forward and reduce that disposition if he desired the property. But that was not the position of matters here. It is obvious that the trustees could make up no title to these lands without the assistance of Alexander, who was the heir, or by bringing an action of adjudication against him. If Alexander chose to make up a title, the only other course was just what has been taken here—the raising of an action of implement and adjudication. It is obvious that if such an action had been raised during Alexander's life he would have had a complete answer. He would have said, as the defender says now,—"This is a deed reducible *ex capite lecti*." He consulted his advisers, and they took that view. His agent told him that he need

not reduce this deed unless a challenge was brought. No such challenge was brought during all his life. That perhaps was not very prudent advice, for he exposed himself to the risk of losing evidence. It is fortunate for the defender that there is preserved evidence, to my mind conclusive, that this deed was reducible *ex capite lecti*, but if the facts had been otherwise, and the defender had been unable to prove that the deed was reducible *ex capite lecti*, I do not see very well what answer he would have had. But that is not the state of facts, and I agree that the defender is entitled to shew the true state of matters, and to prove that in point of fact this deed was a deed reducible *ex capite lecti*. The deed conferred on the pursuer a personal claim only on Alexander to convey; and I think, with Lord Kinnear, that that being the nature of the case, it is an answer to this personal claim that Alexander could and would have shewn at any time during his life that no such personal claim existed against him. I think that no such claim existed against the defender's author, and therefore I think no such claim exists against the present defender.

I only wish to add that, as it is averred on record, and is a ground of this action, that this was a case of fraud, and that all this title was made up in pursuance of a fraudulent scheme to defeat the pursuer's right under the trust-disposition, I see no trace whatever of fraud on the face of these proceedings. I think that everything was done by Alexander Thain in the most open way possible. There was no concealment. I think that the other trustees and everybody else concerned knew perfectly well the state of the title and the facts; and I agree with Lord Kinnear that we are entitled to conclude from the non-appearance of the pursuer in the witness-box that he knew as well as other people the true state of the facts in this matter. On the whole matter I concur with Lord Kinnear in thinking that the defender should be assoilzied.

LORD M'LAREN.—I had not intended to express any separate opinion in this case, because I concur in great part with the complete and lucid exposition of this case which has been given by Lord Kinnear; but after hearing his Lordship's opinion there is one point not affecting the result of the case, but one on which I think there is a slight divergence of view, and perhaps it is right I should state what that is.

In my view, I am not able altogether to disregard the element of prescription or assertion of prescriptive right on the part of the defender. The case arises in this way, if I may summarise so much of the facts as is necessary to bring out my view:—The defender, or rather the immediate author of the defender, was in a position to make up a title to this little property as heir-at-law, and he was also one of three trust disponees under a conveyance of the same property. He made up his title as heir-at-law, and in so doing he acted quite legally, but having made up that title he was, but for a plea of deathbed, under an obligation to give the benefit of this title to the trust—to grant a deed in implement of the trust which he had accepted. Now, he did not do that, for reasons which are probably quite satisfactory; but supposing that prescription had not run upon the title of heir-at-law which was made up by the defender here, then it appears to me the defender would have had no answer to the present action, because he would have been in the position of a person sued on the obligation which lies upon every heir to implement his ancestor's trust-deed, and, on the other hand, he would not have been in a position to reduce that deed *ex capite lecti* founding on his individual right, because it was quite settled in the law of Scotland

that no one but the heir can bring an action of reduction *ex capite lecti*. It appears to me that the defender takes benefit by prescription in this way—that he has a good title by prescription against any adverse claim excepting one founded on breach of trust, and if it can be shewn that he has committed a breach of trust his prescriptive title would be of no avail. But, then, on the question of breach of trust, it appears to me, in accordance with a rule of wide application, that the strict rules of evidence and rules of law are to a certain extent broken down, so that anyone who is charged with breach of trust may shew by all competent evidence that he has acted honestly. And therefore though the defender is not in the position of bringing a reduction *ex capite lecti*, yet he is obliged to defend his author against a charge of breach of trust, and so shew in point of fact that the deed was executed on deathbed, and that therefore his author committed no fraud in making up his title and neglecting to convey to the trust. Having established that point, he then falls back on his prescriptive title, which is a perfectly good title against any other competing right except one founded on the trust-deed. The view I take has only a theoretical difference from that suggested by Lord Kinnear and, as I understand, concurred in by Lord Adam, but they both lead to the same result—that both in law and substantial justice the claim of the defender is well founded.

LORD PRESIDENT.—I concur in the opinion of Lord Kinnear.

THE COURT adhered.

REID & GUILD, W.S.—GORDON-PETRIE & SHAND, S.S.C.—Agents.

JOHN YATES, Petitioner.—*Lorimer.*
WILLIAM ROBERTSON, Respondent.—*Crabb Watt.*

Sheriff—Proof—Loss of shorthand writer's notes—Nobile officium.—When the shorthand writer's notes of the testimony of certain witnesses in a proof taken in a Sheriff Court action had been accidentally destroyed, the Court, on the petition of the pursuer, which was opposed by the defender, *remitted* to the Sheriff to take the evidence of these witnesses of new, but expressed the opinion that the Sheriff might have allowed the evidence to be taken of new without such authority.

JOHN YATES, labourer in Aberdeen, presented this petition, in which he stated that he was pursuer of a petitory action in the Sheriff Court at Aberdeen against William Robertson, farmer, Old Machar; that the proof in the action was taken on 17th February 1891; that part of the shorthand writer's notes of the evidence of his witnesses had been accidentally destroyed, and that the Sheriff-substitute (Hamilton Grierson) had refused to allow the witnesses whose evidence had thus been lost to be re-examined, on the ground that he had no power to do so. He therefore prayed the Court, in the exercise of its *nobile officium*, to remit to the Sheriff-substitute to take the evidence of these witnesses of new, and to deal with the evidence so taken as part of the proof in the cause.

Robertson lodged answers, admitting the facts stated, but objecting to the petition being granted. He stated,—"The only evidence adduced for the pursuer was that of his wife and children. The proof shewed that the children had been tutored to corroborate the pursuer and his wife. They broke down in almost all essential particulars, and their evidence was shewn to be unreliable. The respondent therefore did not think it necessary to call any witnesses. Although the official shorthand writer's notes have been lost, the evidence was taken down verbatim by

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another newspaper reporter, who was present at the trial. Subject to revisal by the Sheriff-substitute, these notes would form a sufficient record of the proof. The defender's agent offered to adjust the said notes of evidence with the pursuer's agent, and to submit them for revisal to the Sheriff-substitute, but the pursuer, because of their damaging effect upon his case, refused to accept them as the record. Six months have elapsed since the date of the proof, and the loss of the official notes. In the interval the pursuer has had ample opportunity to improve his case. The defender believes and avers, that it is solely with the object and hope of extracting more reliable testimony from his wife and children that the pursuer now seeks to have the evidence led over again. The defender will be greatly prejudiced if the petition is granted, and he submits that, consistently with fairness to the defender, the pursuer ought to adopt the only competent remedy provided by the law in such circumstances."

LORD PRESIDENT.—I am rather inclined to think that this matter might have been set right in the Sheriff Court; but the Sheriff-substitute had a scruple as to his power to allow the evidence to be taken over again. Whether he consulted the Sheriff we are not informed, but I am not surprised at his scruple, for this certainly is rather an unusual occurrence. I do not, however, see any reason for not granting the prayer of the petition, and so removing the difficulty that has occurred in the Sheriff Court.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT granted the prayer of the petition.

AULD & MACDONALD, W.S.—WISHART & MACNAUGHTON, W.S.—Agents.

No. 225.
July 18, 1891.
Simpson v. Simpson.

MRS BARBARA MACDOUGALL OR SIMPSON, Petitioner.—*P. J. Blair.*
THOMAS SIMPSON AND ANOTHER, Respondents.—*Strachan.*

Judicial factor—Curator bonis—Appointment pending brieve of cognition.—Circumstances in which the Court *appointed* the nearest male agnate, of full age, who was suing a brieve of cognition, to be curator bonis to an insane person.

1ST DIVISION. C.

ON 15th June 1891 Mrs Barbara Macdougall or Simpson, wife of Donald Simpson, wine and spirit merchant, Lochalsh Road, Inverness, presented a petition for the appointment of a curator bonis to her husband, who was then an inmate of the Saughtonhall Asylum, Edinburgh. The petitioner suggested a chartered accountant in Inverness for the office.

Answers were lodged by Thomas Simpson and J. A. Simpson, brothers of Donald Simpson, and his nearest male agnates other than an infant son of him and the petitioner. The respondents admitted the insanity of their brother, but averred that his business was a "counter" business, which could not successfully be carried on by a chartered accountant, or by anyone not practically acquainted with the trade. They then stated that they had come to the conclusion that Thomas Simpson, the nearest agnate of full age, should, in the interest of his brother and his family, exercise his right as legal guardian of the ward and assume the management of the estate; and that Thomas Simpson accordingly had obtained a brieve from Chancery under the Court of Session Act, 1868, and was in process of carrying out the other proceedings necessary for his appointment as tutor-at-law to his brother.

The Lord Ordinary (Low) reported the petition.*

* "NOTE.— . . . It therefore appears that there is no dispute as to the insanity of Donald Simpson, but that the only question is, who is to have the

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The petitioner lodged a note, in which she stated that there were questions in dispute between the parties which made it desirable that the business should be managed by a neutral person.

The respondents argued that the petition for the appointment of a curator bonis ought to be superseded till the result of the depending brieve of cognition had been ascertained.[1]

LORD PRESIDENT.—I should suggest that the nearest agnate, who is at present prosecuting a brieve of cognition, should be appointed curator bonis in the meantime. He will be required to find caution, so that I do not see that anyone has any interest to object.

Neither party stating any objection to the course proposed by his Lordship, the Court accordingly made the appointment.

FORRESTER & DAVIDSON, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

No. 226.
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Cochrane v. Stevenson.

THE LADY GERTRUDE COCHRANE AND SPOUSE, Pursuers (Respondents). —*Ure—Pitman.*

WILLIAM STEVENSON, Defender (Reclaimer).—*C. J. Guthrie—Burnet.*

Heritable and Moveable—Fixtures—Pictures.—In a question between the purchaser and seller of a mansion-house, *held* that a picture, valued at £100, painted on canvas, and inserted as a panel above the fire-place in the dining-room, was moveable, although its removal left exposed a stone and lime wall.

1ST DIVISION. Ld. Kyllachy. C.

BY minute of sale, dated 31st December 1886, the trustees of the Earl of Glasgow sold the mansion-house of Hawkhead to William Stevenson, and a formal disposition was subsequently granted in June 1887.

On 29th October 1890 Lady Gertrude Cochrane and her husband, Mr Thomas Cochrane, as purchasers from Lord Glasgow and his trustees of the furniture and other moveable subjects in the mansion-house of Hawkhead, brought an action against Stevenson, the purchaser of the lands and house, for declarator that three pictures in the dining-room of the house belonged to them as being moveable property.

The defender pleaded that the pictures in question were heritable, and formed part of the house.

A proof was allowed. The following was the import of the evidence. The pictures in question were full-length portraits of Lord and Lady Wharton, by an unknown artist, supposed to be a pupil of Lely, and a full-length portrait of King Charles II., supposed to be by Lely himself. Mr Dowell, auctioneer and valuer, Edinburgh, valued the Wharton

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management of his estate. It was stated by the counsel for the petitioner that there are serious objections to the management being entrusted to the respondent Thomas Simpson.

"I am informed that a precept has been issued under the brieve in terms of section 1 of the Act of Sederunt of 3d December 1868, fixing the 18th inst. as the first diet of compearance. At that diet the claim of Thomas Simpson to the office of curator will, I apprehend, be brought up under section 2 of this Act of Sederunt.

"In these circumstances, I doubt if it would be proper for me to appoint a curator; but as there is no question that Donald Simpson is insane, and as the cognition is only brought for the purpose of enabling Thomas Simpson to obtain the management of the estate, it appears to me that the best course is to report the case."

[1] Irving v. Swan, Nov. 7, 1868, 7 Macph. 86, 41 Scot. Jur. 50.

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pictures at 50 guineas a-piece, and the Charles II. at 250 guineas. Mr W. C. Angus, art-dealer, Glasgow, valued the Whartons at £10 each, and the Charles II. at £100. The Charles II. was said to be a replica of a picture the original of which is in Windsor Castle. All the pictures were painted on canvas stretched on wooden stretching frames in the usual way. The frames of the Wharton pictures were ordinary gilt picture frames attached to the wall; the frame of the Charles II., which was above the fire-place, was a mirror frame, with pilasters on either side, constituting part of the plaster ornamentation of the room. The space behind that picture was a bare stone and lime wall, that behind the Wharton pictures was wood, although the parties were in dispute as to whether it was finished panelling like the rest of the room, or merely unplaned wood. The pictures had not been taken down for the purposes of the proof, but the Charles had been taken out to be cleaned in 1874.

The Lord Ordinary (Kyllachy) found and declared in terms of the declaratory conclusions of the summons, and ordained the defender to deliver to the pursuers the three pictures therein mentioned.*

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* "OPINION.—The question in this case arises between the seller and purchaser of the estate of Hawkhead, and relates to three pictures in the dining-room of the mansion-house, which are claimed by the purchaser as forming part of the house, and as therefore conveyed to him under the general terms of his disposition. These terms, I may say, are in no way exceptional, the conveyance being of the lands as described by boundaries, and all houses and buildings thereon.

"The pictures in question are full-length portraits—two of them of Lord and Lady Wharton, and the third of King Charles II. The two first are by an unknown artist, supposed, however, to be one Raleigh, a pupil of Sir Peter Lely. The other—that of the King—is said to be by Sir Peter Lely himself, and to be a replica of a picture the original of which is in Windsor Castle. Mr Dowell values it at 250 guineas, and is satisfied of its authenticity. Mr W. C. Angus on the other side considers it only a copy, and values it at 100 guineas. The other two pictures are valued by Mr Dowell at 50 guineas each, and by Mr W. C. Angus at about 10 guineas each.

"All three pictures are painted on canvas stretched on wooden stretching frames in the usual way; and each picture is enclosed in a frame in which it could be moved about and hung upon or attached to any suitable wall. The frames of the Wharton portraits are ordinary gilt frames prepared by a gilder. The frame of the King's picture again is a mirror frame, the glass of the mirror having apparently at some time been removed, and the picture—stretched on its stretching-frame—inserted in its place. The three pictures as thus framed are attached to the walls by plates at the top and along the sides, similar to the plate shewn on the model, No. 25 of process; and there is in each case round the outside of the frame a moulding known as a dust moulding, which is fastened to the frame and wall by sprigs, and which serves to conceal the plates, and also to prevent dust from getting into the space behind the picture. The moveable piece in No. 25 represents this dust moulding. The walls of the rooms are panelled in painted wood as shewn in the photographs, and the frames of the pictures are in each case fastened to the panelling as above described. But there is some uncertainty (which I think might have been avoided, and for which the defender seems responsible) as to what lies behind the Wharton pictures. The pursuers' witnesses say that behind those pictures the panelling of the wall is continued, the pictures being simply placed on the finished though perhaps unpainted panel. The defender's witnesses—while not disputing that behind the pictures there is woodwork flush with the rest of the panelling—say that the woodwork is rough and unfinished, and that they can find no trace of mouldings such as they would expect if the panelling was continuous. With respect to the King's picture, both parties are agreed that at that place the panelling has been either cut out or left unfinished—the space

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The defender reclaimed.[1]
At advising,—

LORD PRESIDENT.—The defender, Mr Stevenson, in December 1886 purchased

behind the picture (which is over the fire-place) being apparently a stone and lime wall.

"I am disposed on the question as to what is behind the Wharton pictures to prefer the evidence of the pursuers. The probability I think is that the panelling extends under the pictures, but at the same time, that in view of pictures being placed over it, the panelling there has not been painted, and perhaps not fully dressed. So far as continuance of the moulding is of importance, I do not see that the examination made by either party was fitted to ascertain the state of the fact. As regards all the pictures, my impression of the history of the matter is that when the room was being decorated there were certain places where it was contemplated to place mirrors or pictures—that where mirrors were to be placed the panelling was either omitted or cut away to prevent the mirrors projecting too much—and that where pictures were to be placed, the panelling was not finished so highly as over the rest of the room. I think further it may be taken as more than probable that when the room was converted (as it was) from a drawing-room into a dining-room, the mirror above the fire-place was taken out from its frame, and the picture of the King substituted as more suitable for a dining-room.

"I should add that on the same wall as the Wharton pictures there was a mirror—as shewn in the photograph—having an ordinary mirror frame, and fastened to the wall in the same way as the pictures, but having behind it no panelling, but only lath and plaster; and perhaps it is not without importance that this mirror was treated by both parties as moveable, and removed by the pursuers after the sale without objection.

"I think these are all the important facts, except perhaps this that the frame of the King's picture—originally, as I have said, a mirror frame—while not bearing any relation to the cornice or panelling of the room, does appear to bear a relation to the pilasters and other decorations around the mantelpiece. That is to say, it (the frame) and the pilasters appear to have been introduced at the same time, and, in style, to harmonise with one another. There is no such relation between the frames of the Wharton pictures and the other mouldings on the wall.

"Upon these facts it seems clear enough that all three pictures would be moveable as between landlord and tenant; that is to say, they could all be easily removed without injury to themselves or to the walls of the house. But the defender says that they would be heritable as between heir and executor, and that the law as between seller and purchaser is the same as between heir and executor.

"I am not at all satisfied that the law on this subject as between heir and executor necessarily rules as between seller and purchaser. As between the latter the question must always be, What is the meaning of the contract? and in such cases there may be elements of construction available which may altogether supersede the legal presumptions. I shall consider presently whether there are not some such elements here; but in the meantime this seems at least certain, that the inferences and presumptions deducible from the nature of the article may be much more important and to the point as between buyer and seller than as between heir and executor. For example, supposing the question had here been as to family portraits—say of near relations of the seller; or

[1] *Defender's Authorities.*—Cave v. Cave, 1705, 2 Vern. 508; Fisher v. Dixon, June 26, 1845, 4 Bell's App. 382; D'Eyncourt v. Gregory, 1866, L. R., 3 Eq. 382.

Pursuer's Authorities.—Beck v. Rebow, 1706, 1 Peere Williams, 92; Birch v. Dawson, 1834, 2 Ad. and Ellis, 37; Dowall v. Miln, July 11, 1874, 1 R. 1180; Nisbet v. Mitchell Innes, Feb. 20, 1880, 7 R. 575.

the mansion-house of Hawkhead and certain lands along with it from the trustees of the late Earl of Glasgow. There was an arrangement about the then sub-

supposing the pictures had been say Raphaels or Murillos, worth as much perhaps as the fee-simple of the estate, that circumstance might, as between heir and executor, have been of little moment; but, as between purchaser and seller, it must have been almost conclusive. And although it is true that the pictures in question are not (as it now appears) family portraits, or, at least, portraits of near relatives, and only one of them is of special value, yet they are all works of art, having a value otherwise than as mere decorations, and certainly not a kind of article which generally goes with a house when a house is sold.

"Accordingly I do not think that it is a satisfactory way of viewing the question to take it simply as if it had arisen between Lord Glasgow's heirs and Lord Glasgow's executors. At all events, in considering the authorities, I confess I prefer, at least in the first instance, to consider those cases which have occurred like the present, between buyer and seller. And here—as it happens—the authorities appear to be uniform.

"The leading case in England on the subject, and the only case in which—so far as I can discover—a question as to pictures, mirrors, and such like articles of ornament has been decided as between buyer and seller, is the case of *Beck* v. *Rebow*, 1 P. W. 94. In that case the Lord Keeper of the day held that hangings and looking-glasses fixed to the walls of a house by nails and screws, although put up in lieu of wainscot and having no wainscot underneath, were only matters of ornament and furniture, and did not pass to a purchaser as part of the house or freehold. And according to Amos & Ferrard on Fixtures this decision has been frequently cited and approved by the English Courts. It appears also that the case of *Harvey* v. *Harvey* which followed upon it (although itself a case between heir and executor) is expressly recognised as law by Mr Justice Buller in his treatise on the law of *nisi prius*. (Buller's N. P., p. 34, 7th ed.)

"The only Scotch case of the kind as between buyer and seller is that of *Nisbet* v. *Mitchell Innes*, 7 R. 575, where it was held by the Lord Ordinary and the Court that while tile hearths passed with a house sold in general terms, the purchaser was not entitled to built-in grates, lustres, gas-brackets, picture-rods, or a mirror used as a sliding shutter.

"I am not aware of any decision relating to ornamental articles, and arising between buyer and seller other than those two. It may be noticed, however, that Lord Hardwick in *Ex parte Quincy*, 1 Atk. 477, appears to have held that the fixed utensils of a brewhouse would not pass with a conveyance of the brewhouse with its accompaniments; although, on the other hand, in *Colgrave* v. *Dias Santos*, 2 Barnwell and Cresswell, 76, the Court of Queen's Bench appears to have held that upon a contract for the sale of a house, wash-tubs, grates, closets, shelves, &c., passed with the house to the purchaser.

"Following, therefore, the only cases which appear strictly in point, I am prepared in this case to find for the pursuers; and I am the more willing to do so because I consider upon the correspondence and proof, that the claim to these pictures on the part of the defender was somewhat of an afterthought—the actings of parties subsequent to the sale making it, in my opinion, sufficiently clear that neither of them intended these pictures to pass as part of the house. I refer particularly to the fact that in the reference between the parties as to the apportionment of the rent paid by Mr Lye, the tenant of the house and furniture, the pictures in question were treated by both parties as part of the furniture; and were included in valuations of the furniture laid by both parties before the arbiters. I might also perhaps refer to what I have already mentioned, viz., the removal by the pursuers, without objection, of the mirror at the side of the room, which was certainly as much a fixture as any of the pictures in dispute.

"As, however, the case may go further, and the question may be elsewhere

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good defence to Alexander Thain I think it can be no better for the defender as his gratuitous disponee. It appears to me therefore that the question is really one of fact.

It is said that the defence is bad in law, because the law of deathbed while it subsisted had no application to the kind of right which was vested in David Thain. I agree with the Lord Ordinary that this argument is not well founded, and for the reason which his Lordship gives, that the right even as it was was an heritable right, and one which ultimately became available to David Thain's heirs. The law as it stood at the time of David Thain's death was this—that all gratuitous deeds making over or burdening subjects which the heir would have succeeded to had they not been so conveyed, or from which he would have derived any benefit, or which tended in any degree to prejudice the heir, might be reduced on the head of deathbed. The law is so stated by Erskine, and as thus stated it appears to me to apply directly to the case in hand. The question therefore appears to me to be merely whether there was or was not any breach of trust in fact on the part of Alexander Thain; and I agree so entirely with the Lord Ordinary as to the result of the proof that I think it unnecessary to do more than repeat what his Lordship says as to the effect of the evidence. The Lord Ordinary says,—"It is clearly proved that the trust-settlement in question was executed by David Thain on the day before he died, and while he was labouring under the disease of which he died. In short, it is quite clear that it was open to the defender's father, as David's brother and heir-at-law, to reduce the deed *ex capite lecti*. It is also clear that the only reason why this was not done was that the heir was advised that it was not necessary, and that there being no question as to his right to succeed, he might make up his title in the most convenient form without reference to the abortive conveyance in the trust-disposition and settlement. In these circumstances I cannot hold that the heir, although a trustee, violated any duty to the trust in taking the course he did. The substance of the matter must, I think, here be looked to; and it being clear that the lands in question formed truly no part of the trust-estate, I see no interest which was prejudiced by the course which the heir took, and which, it will be observed, he took openly and under competent legal advice."

The only observation that occurs to me to add to what the Lord Ordinary has here said is with reference to his statement that this course was taken openly. I think it very clearly proved that it was known to everybody concerned. The pursuer, however, alleges on record that he was kept in ignorance of the facts of the case, and of the method in which Alexander Thain made up his title. But then he has not gone into the box to prove that he was ignorant of these facts, and therefore I think it cannot be assumed that the pursuer was really kept in ignorance of what it was important for him to know any more than any of the other persons interested in the estate of David Thain.

Now, if the facts are as the Lord Ordinary has stated them, and I think accurately, there remains only one point to be considered. It is said the defender has no right to reduce the deed *ex capite lecti*, because he is not the heir-at-law either of David Thain or of Alexander Thain, and if it were necessary for him to reduce David's trust-conveyance, that would, I think, be a very formidable plea. But then he is under no necessity to reduce the deed. He has no title to set aside any conveyance by David Thain in respect of a right of succession to him, but he has an undeniable right to maintain the right which has been

granted him by Alexander Thain, and for that purpose to prove that his author's title was not founded on breach of trust. The material consideration is that there is no competing title which requires to be set aside, because the defender has the only title to the lands. If David Thain had been infeft in the lands, and had conveyed them *mortis causa*, then it would have been absolutely necessary that his conveyance should have been set aside *ex capite lecti*, and there can be no doubt at all that Alexander Thain would have been so advised. It is quite clear on the correspondence that the reason why he took the course he did take was, that as David Thain's deed was quite invalid and ineffectual to convey the lands, and valid only to create an obligation on him as heir, which might have been made good against him if the deed had not been executed on deathbed, he was advised that it was unnecessary for him to set aside the deed at all, as it created no effectual obstacle to completing a title in his own person, and accordingly he made up a title which is perfectly good. The only risk to which he was exposed in following this advice was that he might by death and lapse of time lose the benefit of evidence which was necessary in order to prove the fact which lies at the base of his right, that the deed in question was executed on deathbed, but fortunately for the defender, though a good many persons who were likely to be called to speak to these transactions are dead, there still remains evidence enough to establish the case. Now, that being so, I think the defender has a perfectly good answer to the action brought against him, and is not required to resort to any process of reduction whatever. The pursuer has nothing but a personal claim to compel the defender to denude of the estate in his favour, and all the defender requires to do is to shew that that would not have been a good personal claim against his author Alexander Thain, and therefore that it is not a good claim against himself. I therefore agree with the decision at which the Lord Ordinary has arrived.

LORD ADAM.—I concur with Lord Kinnear, and on the same grounds.

The facts of this case are a little complicated, but they appear to be as follows,—There was a certain James Matthew Thain infeft in the lands of Arthurbank. This James Matthew Thain was a lunatic confined in an asylum. His curator was his brother Thomas, and Thomas's cautioner was David Thain. Now, it appears that this David Thain, who was a cousin of Thomas and James, had made large advances to Thomas in respect of some transaction arising out of the caution, and in respect of these advances, Thomas, who, besides being curator bonis, was at the time heir-presumptive to James, while still presumptive heir, granted to David a disposition of the lands of Arthurbank, and he also at the same time granted an obligation that he, Thomas, on the death of James, would make up a title and convey these lands to David and his heirs and successors. That was in 1846. James Matthew Thain died in 1852, predeceased by David, who died in 1850. Alexander, the defender's father, was David's heir, and he (Alexander) called upon Thomas to implement his obligation of 1846, which Thomas did, by disponing the lands of Arthurbank on 9th March 1852 to Alexander absolutely. Alexander made up his title and possessed on that disposition until 7th July 1890, when he died. By disposition dated 21st November 1872, Alexander conveyed to his son, the present defender, these lands of Arthurbank. Accordingly the father and son had possessed ever since 1852 these lands on an *ex facie* absolute title in their own person.

Now, I agree with Lord Kinnear that if a person is in possession on such a

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title he requires no assistance from prescription to support his title. That is the position of the defender here. He holds these lands on an absolute disposition derived from his father. Nobody seeks to reduce that title, and there is no competing title. The only case made on record is this—that the defender's father, Alexander, during all that time from 1852 till his death was under an obligation to convey these lands to his brother David's trustees, and accordingly this action is brought to have it found and declared that Alexander, the defender, was under this obligation, and on his failing to implement that obligation, to have the lands adjudged. Accordingly, it appears to me that the only question we have to decide is whether or not Alexander Thain, in the year 1852 and downwards, was under an obligation to convey these lands, to which he had made up a fee-simple title, to the trustees under David's trust-deed.

That question depends upon the disposition granted by David Thain. David died in 1850, predeceasing, as I have said, Thomas Thain, but he left a trust-disposition and settlement, dated 8th November 1850, in favour of the elder Alexander and three other trustees, by which he conveyed to them his whole estates, and directed them to dispone Arthurbank to Alexander Thain in liferent, and to the pursuer David, the truster's natural son, in fee. It is said that that was a binding obligation upon Alexander, and that is the obligation which Alexander's son, the defender, is now called upon to fulfil.

It appears to me that if David's trust conveyance was then, and is now, to be treated as a valid and unreducible conveyance, the pursuer possibly might be entitled to prevail. But I agree with Lord Kinnear and the Lord Ordinary that the circumstances in which this trust-disposition was executed were these—it was executed on 8th November 1850; the granter of it, David, died the next day, 9th November 1850, and when he executed it he was ill of the disease of which he died. I think that on the evidence these facts are clear beyond any doubt, and therefore this was a disposition which was reducible at any moment by Alexander Thain. The result of that is that these lands of Arthurbank were *de facto* the property of Alexander Thain. The question then comes to be—if these lands were *de facto* the property of Alexander, whether or not he was under any obligation to convey them to the trustees. I think that he was under no obligation to convey them, and that he committed no breach of trust in not conveying them. They were his own property, and I cannot see how there should be obligation on Alexander, simply because he happened to be a trustee under David's trust, to convey his own property to the trustees.

I agree with Lord Kinnear that in certain circumstances it might have been necessary to reduce this deed. If for example, David had been in point of fact infeft in these lands and had conveyed them under a disposition under which the trustees might have completed a title to them and possessed them, in that case it would have been necessary for Alexander to come forward and reduce that disposition if he desired the property. But that was not the position of matters here. It is obvious that the trustees could make up no title to these lands without the assistance of Alexander, who was the heir, or by bringing an action of adjudication against him. If Alexander chose to make up a title, the only other course was just what has been taken here—the raising of an action of implement and adjudication. It is obvious that if such an action had been raised during Alexander's life he would have had a complete answer. He would have said, as the defender says now,—"This is a deed reducible *ex capite lecti*." He consulted his advisers, and they took that view. His agent told him that he need

not reduce this deed unless a challenge was brought. No such challenge was brought during all his life. That perhaps was not very prudent advice, for he exposed himself to the risk of losing evidence. It is fortunate for the defender that there is preserved evidence, to my mind conclusive, that this deed was reducible *ex capite lecti*, but if the facts had been otherwise, and the defender had been unable to prove that the deed was reducible *ex capite lecti*, I do not see very well what answer he would have had. But that is not the state of facts, and I agree that the defender is entitled to shew the true state of matters, and to prove that in point of fact this deed was a deed reducible *ex capite lecti*. The deed conferred on the pursuer a personal claim only on Alexander to convey; and I think, with Lord Kinnear, that that being the nature of the case, it is an answer to this personal claim that Alexander could and would have shewn at any time during his life that no such personal claim existed against him. I think that no such claim existed against the defender's author, and therefore I think no such claim exists against the present defender.

I only wish to add that, as it is averred on record, and is a ground of this action, that this was a case of fraud, and that all this title was made up in pursuance of a fraudulent scheme to defeat the pursuer's right under the trust-disposition, I see no trace whatever of fraud on the face of these proceedings. I think that everything was done by Alexander Thain in the most open way possible. There was no concealment. I think that the other trustees and everybody else concerned knew perfectly well the state of the title and the facts; and I agree with Lord Kinnear that we are entitled to conclude from the non-appearance of the pursuer in the witness-box that he knew as well as other people the true state of the facts in this matter. On the whole matter I concur with Lord Kinnear in thinking that the defender should be assoilzied.

LORD M'LAREN.—I had not intended to express any separate opinion in this case, because I concur in great part with the complete and lucid exposition of this case which has been given by Lord Kinnear; but after hearing his Lordship's opinion there is one point not affecting the result of the case, but one on which I think there is a slight divergence of view, and perhaps it is right I should state what that is.

In my view, I am not able altogether to disregard the element of prescription or assertion of prescriptive right on the part of the defender. The case arises in this way, if I may summarise so much of the facts as is necessary to bring out my view:—The defender, or rather the immediate author of the defender, was in a position to make up a title to this little property as heir-at-law, and he was also one of three trust disponees under a conveyance of the same property. He made up his title as heir-at-law, and in so doing he acted quite legally, but having made up that title he was, but for a plea of deathbed, under an obligation to give the benefit of this title to the trust—to grant a deed in implement of the trust which he had accepted. Now, he did not do that, for reasons which are probably quite satisfactory; but supposing that prescription had not run upon the title of heir-at-law which was made up by the defender here, then it appears to me the defender would have had no answer to the present action, because he would have been in the position of a person sued on the obligation which lies upon every heir to implement his ancestor's trust-deed, and, on the other hand, he would not have been in a position to reduce that deed *ex capite lecti* founding on his individual right, because it was quite settled in the law of Scotland

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completion of the bargain ought not to have any influence on the decision of the case.

In all such cases the form of the question is of course whether the subject in dispute is or is not incorporated with the tenement; but it must be admitted that the law recognises certain qualifications of the rule that what is physically attached to a building becomes part of the heritable subject. By the custom of the country certain fittings are removable by an executor in a question with the heir, or by a vendor in a question with the purchaser of the buildings. I am not sure that where the right of removal depends on custom we can assume that the customary rights are the same in Scotland as in England. In Scotland we know that certain house-furnishings, such as window-blinds and cornices, gasfittings, chandeliers, mirrors, and grates (even when these are built into the fire-place) are removable. I rather think that in England grates are not considered to be removable fixtures; but this is a mere difference of detail. It seems to me that all such things as I have mentioned (and no doubt there are others *ejusdem generis*) are things which may be described as part of the furnishing of a house, which are not included in the notion of an unfurnished house as that is commonly understood. They are therefore considered to be attached to the walls temporarily for purposes of convenience or security, and not with the view of annexing them to the tenements. From the nature of the case the attachment of such things is generally slight, so that they can be removed with little damage to the heritable subject. But I do not think that the kind of attachment is material to the question of removability. A mirror or a picture, for example, is screwed to the wall, and is most easily removed; a carpet is secured by studs, which have to be displaced by the use of a hammer or chisel.

A gas-bracket has its pipe soldered to the supply-pipe, and has to be cut; if the thing be removable, the attachment, whatever that may be, has to be severed, leaving in most cases some trace of injury. Such slight injury is an inconvenience to which the heir or purchaser must submit as an unavoidable incident of the separation of what does not belong to him from the property which he has acquired by inheritance or purchase. If the article cannot be removed without doing appreciable damage to the structure, I should say that it is then in fact annexed to the tenement, because I think that the question in such cases is really one of fact, whether the attachment is such as amounts to an incorporation of the moveable subject with the tenement.

In the present case I should hesitate to say that the pictures are removable by custom, because the case is probably not of such frequent occurrence as to have fallen directly under the influence of a customary rule. But the customary rule whereby mirrors and ornamental furnishings are removable has, as I think, a very material bearing on this case, because, as your Lordship has pointed out, pictures painted on canvas are not in any true sense part of the structure of the house, and because the principle underlying the custom of removing domestic fixtures is, that things which are not part of the structure are removable notwithstanding their temporary attachment to the walls or floors provided they can be removed without material injury to the apartment. If they cannot be removed without causing structural damage they must be taken to be incorporated. Keeping this distinction in view I have formed a clear opinion that the portraits of Lord and Lady Wharton retain their moveable character.

It seems to me that questions of this kind are always and necessarily circum-

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stantial questions, and that no definite rule can be laid down as to what will amount in fact to an incorporation with or building into the heritable subject. Unless we are prepared to upset all the recognised social conventions on this subject, and to hold that nothing through which a nail has been driven can be claimed as a moveable, each case must be considered with reference to its special circumstances, regard being had to the nature of the thing attached, to the nature of the attachment, to the purposes of the attachment, and (in questions between seller and purchaser) the intention of the contracting parties. With respect to the picture of King Charles II., if it had been the only picture in question I should probably have held that it was incorporated with the tenement, because according to the evidence this picture is not fixed over the panelling of the room, but in a manner takes the place of a panel, there being nothing between it and the stone wall. But when it is considered that the three pictures, together with a mirror (which is admitted to be removable), are all fitted to panels in the same apartment, and that three of the four articles are in our judgment clearly the pursuer's property, I think that the distinction which I have mentioned in the case of the King's portrait is insufficient to place it in a class by itself. I think that the three pictures ought to be considered as a set or assemblage of things which are either inseparably united to the heritable subject or are merely attached to it temporarily for purposes of convenience; and looking at them collectively I agree with the Lord Ordinary and with your Lordships that these pictures retain their moveable character notwithstanding their attachment to the walls of the apartment, and that the conclusions of the action are well founded.

LORD KINNEAR.—I have come to the same conclusion. The only question which we have to consider appears to me to be whether the pictures in dispute are in fact a part of the lands of Hawkhead or not. There are no stipulations in the contract between the parties which would enable the seller upon the one hand to withhold any part of the lands from the purchaser, or the purchaser on the other hand to claim delivery of corporeal moveables which are separate from the land, or to claim a right to retain any such moveables which he may have found upon the land. The contract accordingly has been carried into effect by the execution and delivery of a conveyance in ordinary terms, and I do not understand that the defender has any fault to find with the terms of his conveyance. Therefore if the pictures form part of the subjects conveyed, they belong to the defender, and if they do not form part of these subjects, they remain the property of Lord Glasgow's representatives, to whom they belonged before the sale. The question, therefore, would appear to be a question of fact, whether the pictures form part of the lands of Hawkhead and of the houses and buildings thereon, because that is the subject which has been conveyed to the defender, and that depends entirely upon whether they have been so fastened to the houses of Hawkhead as to become an integral part of the houses.

Now, it appears to me that in considering that question we have not to take into account distinctions which may sometimes be of importance in regulating the conflicting interests of landlord and tenant or possibly of successive heirs of entail, because I think we must take the law as it has been laid down in the House of Lords in the case of *Brand's Trustees*, 3 R. (H. L.) 16, where the Lord Chancellor lays down the doctrine of law in this way. His Lordship says there are two

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general rules. One of them is the well-known rule that whatever is fixed to the freehold of the land becomes part of the freehold. The other is quite a different and separate one, that whatever has once become part of the freehold cannot be severed by a limited owner whether he be owner for life or owner for years. Then his Lordship goes on to say that to the first of these rules there is no exception whatever—whatever is fixed to the land is part of the land. Then he says that to the second there are various important exceptions, and all the questions as to the difference and distinctions between the rights of landlord and tenant and of successive owners which have been raised in this case appear to me, according to his Lordship's exposition of the law, to depend upon this second rule to which there is that exception—that under certain circumstances things that have been fixed may be removed. But it is very clear that these are considerations with which we have nothing to do, because they do not apply, and cannot apply, to a case between disponer and disponee. Lord Glasgow might of course have detached the pictures from the walls of the house before he effected the sale, but after the conclusion of the sale it is quite clear that he could do nothing; and therefore the question appears to me to be, as your Lordships have considered it to be, a mere question of fact—whether the pictures in dispute are so permanently fixed to the buildings and houses of Hawkhead as to make them an integral part of those houses. It is in accordance with all our authorities to say that in considering that question the method of attachment is not the only point to which attention should be directed, because it is common for articles in themselves removable to be temporarily attached to the walls of a house for use or ornament, or to the floors of a house, as in the case of things which might be nailed to the floor without being so permanently fixed as to become in consequence of their attachment integral parts of the house itself. But still the real question, as it seems to me, must always be, whether in fact the subject which is said to be moveable has been so permanently fixed as to become a part of the house, or whether the attachment is of such a kind as to make the subject, which in itself was moveable, easily removable or removable without injury to the subject itself or to the building. Now, upon that question of fact I entirely agree with what has been said by your Lordships, and therefore I think it quite unnecessary to dwell upon the grounds upon which it seems to me that these three pictures have not been made permanent parts of the building but are removable and are not carried by the conveyance.

In common with your Lordship it has seemed to me that the question with regard to the picture of King Charles II. is somewhat different from the question with regard to the portraits of Lord and Lady Wharton. I agree with what was said by Lord Adam, that if it had been proved that in order to remove that picture it was necessary to remove also the entire structure of the frame in which it is fixed, the question would have been one of much greater difficulty than it actually is; but I also agree with what his Lordship said, that the evidence shews that that is not necessary, but that the picture may be removed like the others for any purpose for which it is desirable to get it down either temporarily or permanently.

I therefore agree with your Lordships in the result at which you have arrived.

THE COURT adhered.

J. & F. ANDERSON, W.S.—F. J. MARTIN, W.S.—Agents.

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Gilmour v. Caledonian Insurance Co.

ANDREW GILMOUR, Pursuer (Respondent).—*Salvesen.*
THE CALEDONIAN INSURANCE COMPANY, Defenders (Reclaimers).—*M'Clure.*

Arbitration—Arbiters not named—Insurance.—A policy of fire insurance provided, *inter alia*:—"Where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment of any of the conditions herein set forth, but a difference at any time arises between the company and the insured as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when and as the same arises, shall be referred to the arbitration of" persons to be chosen by the parties. *Held* that this clause imported more than a reference for valuation merely, and therefore, being a reference to arbiters unnamed, did not exclude action on the policy.

1ST DIVISION.
Ld. Stormonth Darling.

ON 21st April 1891 Andrew Gilmour, merchant, Blantyre, brought an action against the Caledonian Insurance Company, Edinburgh, on a policy of fire insurance taken by him with the company over certain buildings in Blantyre, which had been destroyed by fire in February 1891.

The company in defence pleaded;—(1) The present action is excluded by the clause of reference in the policy. (2) In any view, the action ought to be sisted, pending the decision of the pursuer's claim by arbitration in terms of the policy.

The clause founded on by the defenders was in these terms:—"Where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment of any of the conditions hereinbefore set forth, but a difference at any time arises between the company and the insured, or any claimant under this policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when and as the same arises, shall be referred to the arbitration of one person to be chosen by both parties, or of two independent persons," who should choose an umpire. "And it is hereby expressly declared to be a condition of the making of this policy, and part of the contract between the company and the insured, that where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment as aforesaid, the party insured or claimant shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy."

On 23d June 1891 the Lord Ordinary (Stormonth Darling) repelled the first and second pleas in law for the defenders.*

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* "OPINION.—This is an action on a fire insurance policy to recover the loss occasioned by a fire which took place last February. The parties are at issue as to the amount of the loss, the pursuer claiming £1700, which is the full sum in the policy, and the defenders refusing to pay more than £1350.

"What I have to dispose of now is the defence that the action is excluded by the clause of reference in the policy, or, if not excluded, that it ought to be sisted pending the decision of the pursuer's claim by arbitration. To this the pursuer replies that the clause is ineffectual because no arbiters are named.

"The clause is set out in answer 5. The substance of it is, that when a difference at any time arises between the company and the insured as to the amount payable in respect of any loss or damage by fire, there being no question of fraud or non-fulfilment of the conditions of the policy, such difference is to be referred to the arbitration of a person or persons to be chosen by the parties. Then there are provisions for working out the reference, and a declaration that the insured is not to be entitled to commence or maintain any action on the policy

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The defenders reclaimed.[1]

LORD PRESIDENT.—In this case the holder of a fire policy has raised the present action against the insurance company to recover the amount of the loss occasioned by a fire which occurred in his premises in February 1891. The defence to the claim is that it is excluded by the terms of the clause of reference in the policy. The Lord Ordinary has repelled that plea. In so doing his Lordship has proceeded upon the well-known rule of the law of Scotland that an agreement to refer future disputes to unnamed arbiters is ineffectual, and has in consequence held that it does not fall within the equally well-known exception which his Lordship refers to in that part of his note in which, quoting from Bell on Arbitration, he observes that "there is an exception to the rule when the agreement to refer 'does not contemplate the decision of proper disputes between the parties, but the adjustment of some condition, or the liquidation of some obligation, contained in the contract of which the agreement to submit forms a part.'" Now, this rule and the exception to it are fixed by a series of decisions, and they are exemplified in the recent case of *Tancred, Arrol, & Company* in the House of Lords (17 R. (H. L.) 31).

The only question, therefore, which we have to determine is, whether the present case falls within the rule or within the exception, and that of course

till the amount shall have been fixed by arbitration. Of course the efficacy of this last declaration must depend on whether there is an effectual agreement to refer.

"The general rule of the law of Scotland that an agreement to refer future disputes or differences to unnamed arbiters is ineffectual cannot at this time of day be called in question, and it received very recent recognition by the House of Lords in the case of *Tancred, Arrol, & Company* v. *Steel Company of Scotland*, 17 R. (H. L.) 31. There is an exception to the rule where the agreement to refer, to quote the words of Bell on Arbitration, p. 87, 'does not contemplate the decision of proper disputes between the parties, but the adjustment of some condition, or the liquidation of some obligation, contained in the contract of which the agreement to submit forms a part.' Examples of this exception are to be found in the common case of a landlord being bound in a lease to take the tenant's stock off his hands at valuation, or to pay a certain proportion of the value of buildings on the ground (as in the recent case of *Lord Advocate* v. *Earl of Home*, 18 R. 397), or of a mineral tenant being entitled to relinquish the lease when, in the opinion of skilled men mutually chosen, the minerals have become incapable of being worked to profit (as in *Merry & Cuninghame* v. *Brown*, 21 D. 1337). But these are all cases where the right, whether it be a right to receive money or to be rid of an obligation, is conferred by and made dependent on the very clause which binds the parties to nominate arbiters. There are also cases in which the fact to be ascertained, or the sum to be assessed by the arbiter is something quite subsidiary to the main purposes of the contract. In the present case the position is altogether different. The right to recover for damage by fire is the cardinal right conferred on the insured by the policy. It in no way depends on the agreement to refer; and the arbitration clause is simply an attempt to oust the jurisdiction of the Courts of law from every action which the insured could have any possible interest to raise, except in the single case where the insurance company has intimated a defence of fraud or non-fulfilment of the conditions of the policy.

"It seems to me, therefore, that this clause falls under the rule and not under the exception, and that it offers no obstacle to the action going on in the ordinary way."

[1] Merry & Cuninghame v. Brown, July 15, 1859, 21 D. 1337, 31 Scot. Jur. 733, affd. March 21, 1863, 1 Macph. (H. L.) 14, 35 Scot. Jur. 417; Ramsay v. Strain, Feb. 6, 1884, 11 R. 527; Tancred, Arrol, & Co. v. Steel Company of Scotland, March 7, 1890, 17 R. (H. L.) 31.

depends upon the terms of the clause of arbitration. The clause is in these terms:—"Where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment of any of the conditions herein-before set forth, but a difference at any time arises between the company and the insured, or any claimant under this policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when and as the same arises, shall be referred to the arbitration" of persons to be chosen by the parties. Now, what does a claim of this kind comprehend? Is it a mere assessment of damages,—that is to say, a mere valuation of the loss sustained,—or is it an assessment in a wider sense? Now, questions of fact may arise as to whether articles alleged to be destroyed fall within the scope of the policy; or as to whether articles alleged to be destroyed were actually in the premises at the time; or as to the value of articles burnt, which could only be got at by an expert, or by someone who knew their intrinsic value. It appears to me, therefore, that this clause of reference is of the wider kind. If the value of the articles lost was disputed, I think that the language of this clause would admit inquiry, not merely as to the value of articles admittedly on the premises and within the policy, but also as to whether the articles in dispute were or were not in the building at the time of the fire, for there is no admission on that point and also as to whether they belong to the class of articles insured by the policy.

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I therefore agree with the Lord Ordinary in holding that this clause of reference falls under the general rule which I have stated, and not under the exception.

LORD ADAM concurred.

LORD M'LAREN.—I have already expressed my opinion on clauses of this kind in the joint opinion of Lord Rutherfurd Clark and myself in the Second Division case of *Ramsay* v. *Strain*, 11 R. 527, and I have nothing further to add.

LORD KINNEAR concurred.

THE COURT adhered.

THOMAS M'NAUGHT, S.S.C.—T. & R. B. RANKEN, W.S.—Agents.

JOHN ROBERTSON, Pursuer (Appellant).—*Shaw*—*Gunn*.
THE LINLITHGOW OIL COMPANY, LIMITED, Defenders (Respondents).—*Comrie Thomson*—*Dickson*.

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Robertson v. Linlithgow Oil Co., Limited.

Reparation—Master and Servant—Relevancy at common law and under Employers Liability Act, 1880 (42 *and* 43 *Vict. c.* 42).—In an action of damages raised by a labourer against his employer at common law, and alternatively under the Employers Liability Act, 1880, the pursuer alleged that he was in the course of his duty, at two o'clock on the morning of 27th March, uncoupling waggons filled with shale, which had been propelled by an engine along a line of railway belonging to the defenders, and that while he was between two of the waggons the engine-driver returned with the engine, and drove it suddenly, without warning, culpably and carelessly, against these waggons, by reason of which a waggon went over the pursuer's leg; that at the place where the accident happened there was a hole several feet deep and two feet wide under the railway lines, which ought to have been covered with planks, at least during the night, and that the pursuer, notwithstanding the want of warning, would probably have escaped but for said hole; that one of his feet slipped into it, and that he was thereby unable to get his other foot clear in time. *Held* that, as according to the pursuer's statement, it was the engine-driver's breach of duty that caused the

* Decided July 11, 1891.

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2D DIVISION. Sheriff of Lanarkshire. l.

accident at the particular place, there was no relevant case at common law against the defenders.

JOHN ROBERTSON, labourer, raised an action in the Sheriff Court of Lanarkshire, at Glasgow, against the Linlithgow Oil Company, Limited, for damages for injuries received on 27th March 1891 by him, while in the defenders' employment, through their alleged fault. The action concluded for £1000 as damages at common law, and alternatively for £182 as damages under the Employers Liability Act, 1880.

The pursuer averred;—(Cond. 4) "The work to which defenders put pursuer when he entered their employment as a labourer was work in connection with the trigging or stopping and uncoupling of waggons, and the breaking or crushing of shale, and the emptying of waggons which brought shale from the mines to be broken or crushed, preparatory to the oil being extracted therefrom." (Cond. 5) "The defenders had railway lines laid down all through their said works, and they had railway lines laid down close beside the shale-breaking machinery, at or near which pursuer was instructed to work. On these railway lines trains of waggons were run, driven, or propelled by locomotive engines." (Cond. 6) "The shale-breaking or crushing machinery was constructed or situated below the level of the ground and between the rails of one of said railway lines. There were three such shale-breaking machines close beside each other, situated between said rails, which made the place specially dangerous for persons doing work near said rails. Anyone falling into said machines would be seriously injured. The object of said machines being placed between said rails was that waggons containing shale might be run on said railway lines to the breaking machinery, and the shale emptied therein from the waggons while they were standing on the railway lines." (Cond. 7) "The railway lines near said shale-breaking machinery were on an incline of about one in forty. According to the system in vogue in defenders' works, trains of waggons containing shale were propelled along said railway lines towards and over said shale-breaking machines, the engines being behind the train. Said trains of waggons were forced up said incline until they were beyond the shale-breaking machines. The waggons were then spragged, or blocks of wood or bricks placed before the wheels, so as to keep the waggons standing on said incline. This was done owing to some of the waggons not being furnished with brakes, and the brakes on others being broken, or twisted, or otherwise unfit for use. It was then the duty of men in the defenders' employment to go between each pair of waggons and to uncouple each waggon from the other, and to unloose the fastenings at one side of the ends of the waggons, so that the shale might be emptied therefrom into said breaking machines. It was necessary to unloose the fastenings at one side of the ends of the waggons, as the breaking machines were so situated that when the waggons were brought over the same for emptying only one side of the waggon could be reached. It was pursuer's duty to assist in the foregoing operations, as part of the work which the defenders instructed him to perform." (Cond. 8) "A short way up said incline, and a little beyond said shale-breaking machines, the defenders had made a trench or hole some feet deep, and about two feet broad across, and under said railway lines, for the purpose of laying some pipe, or for some other purpose to the pursuer unknown. Defenders culpably and carelessly allowed said trench or hole to remain there longer than was necessary, and it was there on said 27th March 1891, and its presence rendered said railway lines and the ways and works near the same defective and dangerous, which contributed materially to the occurrence of the

accident, and the injuries to pursuer after mentioned. Said trench or hole ought to have been covered by planks, and other means taken to cover the same, at least during the night time. The defective condition of said ways and works arose from the negligence of the defenders or of their manager or foreman in their service entrusted with the duty of seeing that said ways and works were in proper condition." (Cond. 9) "On said 27th March 1891, and at or near said shale-breaking machines, there was no, or at least insufficient, light. Defenders had . . . culpably and carelessly failed to provide any, or at least sufficient light for the proper and safe discharge by pursuer and defenders' other workmen of the duties devolving upon them. This fault on defenders' part materially contributed to the accident after mentioned, and to the injuries sustained by pursuer."

(Cond. 10) "On 27th March 1891 pursuer was at his said work in defenders' employment. Pursuer was on the night-shift. Between two and three o'clock on the morning of said date a train of waggons containing shale was brought along said railway lines towards said breaking machines. An engine belonging to the defenders, called the 'Stag,' was behind said train propelling the same. The engine-driver was named William Martin, and the guard in charge of said train was named Thomas M'Parland. A number of waggons were forced over and beyond said breaking machine, and, according to custom, were then spragged or otherwise made stationary on said incline. The engine then left the spot, and pursuer, according to defenders' instructions, and his duty as shewn him by defenders, or those for whom they are responsible, proceeded to go between said waggons and to uncouple them from each other, and to unloose the fastenings at one side of the door at the ends of the waggons." (Cond. 11) "While pursuer was between two of said waggons, busily engaged at his said work, said engine-driver returned with said engine, having, it is believed, one or two waggons in front of it, which had no lamp or any light affixed to them, and drove suddenly, and without warning, culpably and carelessly, against the waggons, between two of which pursuer was engaged working. The said engine-driver culpably and carelessly failed to sound or blow the engine whistle or horn, as he ought to have done, when approaching said waggons and said shale-breaking machines, or to give any warning or intimation whatever. The said guard in charge of said waggons and trains also culpably and carelessly failed to warn the pursuer of the approach of said engine and waggons, and to take due precautions for his safety, while engaged in his duties foresaid, by preventing said engine and waggons from returning to the spot till pursuer was safe from danger." (Cond. 12) "Pursuer was in the act of coming out from between two of said waggons when said collision occurred, and he would, notwithstanding the want of warning and the danger he was placed in, have probably escaped any injuries but for said hole or trench. One of his feet slipped into it, and he was thereby unable to get the other clear in time, and a waggon went over one of his legs, close below the knee, and severed it from his body."

(Cond. 14) "The system adopted by defenders in bringing the shale to the breaking machines was dangerous and defective, and the position of the breaking machines, which were placed so as to suit said system, was unusual and dangerous. In particular, the habitual propelling of waggons with the engine in rear, in place of being in front drawing the waggons, is contrary to usage and the best practice. The forcing of waggons up an incline, and then spragging or wedging them by pieces of wood or brick, ought only to have been a temporary expedient, instead of being, as it was, the permanent and only method adopted. The railway ought

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to have been level at the spot selected for the storing of said waggons, and the waggons fitted with proper brakes. There ought to have been a lye, into which these waggons should have been shunted, and a gate placed at the entrance thereto, or a man appointed as guard thereof, so that no other waggons or engines could enter the same while men were working about the waggons in the lye. There were too few men habitually employed by defenders in connection with such operations, and there were too few men employed at the time of said accident, and the pursuer was too inexperienced to be employed by defenders in such dangerous work without special precautions being taken for his safety, which they failed to take." (Cond. 15) "The pursuer's said injuries were caused by the fault of the defenders, or those for whom they are responsible. The defenders are liable for said injuries at common law owing to their fault (1) in adopting the dangerous and defective system of working before condescended on; (2) in not providing sufficient light for the carrying on safely of said operations during the night-shifts; (3) in causing such work to be done during night-shifts in place of confining it to the daytime; (4) in habitually employing too few men to do such work safely; and (5) from the defective condition of their said ways and works. The defenders are also liable for said injuries under the Employers Liability Act, owing (1) to the defective condition of their said ways and works; (2) by reason of the negligence of the said engine-driver who had charge or control of said locomotive-engine; (3) by reason of the negligence of the said guard who had charge or control of said trains or waggons upon said railway; and (4) by reason of the negligence of defenders' foreman or other person in defenders' service, to whose said orders or directions the pursuer at the time of said injury was bound to conform, and did conform, said injury resulting from his having so conformed."

The pursuer pleaded, *inter alia*;—(1) The pursuer having been injured as condescended on, by and through the fault of the defenders, or those for whom they are responsible, the defenders are liable to the pursuer in the loss, injury, and damage he has thereby sustained. (3) Alternatively, the pursuer having been injured while in the employment of the defenders as a workman, through the fault of the defenders, or of those for whom they are responsible, under the Employers Liability Act, 1880, the pursuer is entitled to decree in terms of the alternative conclusion of the petition, with expenses.

The defenders pleaded;—(1) The pursuer's statements are irrelevant in so far as the action is based on common law.

On 17th July 1891 the Sheriff-substitute (Spens) allowed a proof before answer. The pursuer appealed for jury trial to the Court of Session.

The defenders, while admitting that the action was relevant under the Employers Liability Act, argued that it was irrelevant as far as laid at common law.

Argued for the pursuer;—The action was relevant at common law. That followed from the case of *Murdoch* v. *MacKinnon*,[1] which shewed that employers were responsible for accidents caused to their workmen through a defective system of working.

At advising,—

Lord Justice-Clerk.—Upon this case I have come to be of opinion that no relevant facts are averred by the pursuer entitling him to an issue at common law, and that the action, if it had been raised prior to the Employers Liability Act of 1880, would have been dismissed as irrelevant. In the record there are

[1] Murdoch v. MacKinnon, March 7, 1885, 12 R. 810.

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a large number of averments, which are brought to a head in condescendence 15, but no case at common law is made out at all. Two statements might have been amplified upon which a case at common law might have been founded. Thus there is a statement about the light which is said to have been defective, but there is no averment as to how the absence of light contributed to the accident. Again, it is alleged that there was an uncovered hole at the place where the accident happened, and it is said that the pursuer's foot slipped into this hole when the engine struck the waggons, and that if there had been no hole there the pursuer might have escaped.

But the case of the pursuer is that the engine should never have been brought into contact with the waggons at all. If so, it is not easy to see how there being defective light or an uncovered hole has anything to do with the accident, which is alleged to have been caused by the engine-driver acting in breach of his duty. The defenders cannot be held in fault for the want of light or the presence of a hole, if neither of these could have caused the accident unless some breach of duty were committed by one of their servants. They were not called upon to provide against such breach of duty. I think therefore that there is no case at common law.

The pursuer may, however, have an action under the Employers Liability Act, as in terms of the provisions of that Act an employer is made liable for the faults committed by the person in charge of a locomotive-engine.

He has two conclusions, one for £1000 at common law, and another for £182 under the statute. I think we should dismiss as irrelevant the action as far as laid at common law, and allow an issue in the action as far as brought under the Employers Liability Act.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

THE COURT pronounced the following interlocutor:—"Find that the action is irrelevant so far as laid at common law, and dismiss the same so far as regards the first conclusion of the summons: Approve of the issue so far as founded on the Employers Liability Act as the issue for the trial of the cause, and decern, reserving all questions of expenses," &c.

ROBERT STEWART, S.S.C.—GILL & PRINGLE, W.S.—Agents.

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JAMES ALEXANDER ROBERTSON (Liquidator of the International Exhibition Association of Electrical Engineering and Inventions, 1890), Petitioner.—*Murray—A. S. D. Thomson.*

THE BRITISH LINEN COMPANY, Respondents.—*Comrie Thomson—C. J. Guthrie.*

Company—Limited by guarantee—Right in security—Pledge—Power to hypothecate guarantee letters in security of advances—Ultra vires—Companies Act, 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 9.—In the memorandum and articles of association of a company registered under the Companies Act, 1862, as a company limited by guarantee and empowered to create a guarantee fund, the subscribers to which were in the event of a winding-up, and there being a deficiency of assets, to contribute to the assets of the company to the extent of their guarantee, it was provided that the company might borrow money, and, in security thereof, assign or hypothecate to the lender the guarantee obligations, letters, and rela-

* Decided Dec. 12, 1890.

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tive documents from subscribers to the guarantee fund. The executive council having borrowed a sum of money from a bank in terms of the above provisions, hypothecated the letters of guarantee to the bank in security of the advance.

In a voluntary liquidation, under supervision of the Court, the liquidator presented a note praying the Court to ordain the bank to deliver the letters to him, and to declare that the bank had no valid security or preference over the guarantee fund or letters of guarantee for payment of their advances.

The Lord Ordinary (Stormonth Darling) *granted* the prayer of the petition, holding (1) that as the guarantee fund had no existence until the company went into liquidation, and then only in the event of there being a deficiency of assets, and for the purpose of equal distribution among the creditors, it was *ultra vires* of the executive council to create a security over it in favour of any particular creditor; and (2) that in any view the hypothecation or pledge of the letters was ineffectual to constitute a preference over the fund in competition with the liquidator, who was entitled to possession of the letters as accessories of the fund.

Outer-House Ld. Stormonth Darling, Ordinary.

THE INTERNATIONAL EXHIBITION ASSOCIATION OF ELECTRICAL ENGINEERING AND INVENTIONS, 1890, was upon 13th December 1889 incorporated under the Companies Acts, 1862 to 1886, as a company by guarantee (section 9 of the Act of 1862), and by licence of the Board of Trade under section 23 of the Companies Act, 1867 (30 and 31 Vict. c. 131), it was registered with a limited liability, but without the word "limited" added to its name.

By the memorandum of association, section 3, the objects for which the association was established were stated, *inter alia*, to be:— . . . "(*E*) To sell, assign, convey, or otherwise dispose of, or deal with the whole property and effects of the association. . . . (*G*) To borrow money upon bonds, bills, promissory-notes, or other obligations or securities of the association, or in such other manner as the association shall think fit, and to execute and grant cash-credit or other bonds, and make, accept, indorse, and execute promissory-notes, bills of exchange, or other negotiable instruments, and in particular, to hypothecate or assign to any corporation or person who shall lend money to the association, the guarantee obligations, letters, and relative documents from corporations, firms, or persons, who shall have agreed, or shall hereafter agree, to become members of the association, or shall have become, or shall hereafter become, subscribers to the guarantee fund of the said Exhibition. . . ."

Section 7 of the memorandum provided that every member of the company should be liable, in the event of the same being wound up during the time that he was a member, to contribute to the assets of the company for the payment of its debts such an amount as might be required, not exceeding £1.

Section 37 provided (1) that "in the event of a loss or deficiency arising," the same should be assessed first upon the subscribers to the guarantee fund (whether members of the association or not), and when that fund was exhausted, upon the members in respect of their liability under clause 7 of the memorandum; (2) that the subscribers to the guarantee fund (whether members or not) should be liable to the amount of their respective subscriptions, but no further, for any resulting loss arising from other subscribers (whether members or not) failing to pay their proportioned shares of the loss or deficiency in whole or in part; (3) that in addition to the guarantee provided by the 7th article of the memorandum every member subscribing to the guarantee fund should undertake to contribute to the assets of the association, in the event of the same being wound up, such amount as might be required, not exceeding the amount of his subscription.

By sections 28, 29, and 30 of the articles, the powers and duties of certain persons constituted by section 25 as the executive council of the

association, were defined, section 30 more particularly providing that the executive council should be trusted with, and might exercise and perform, all or any of the following powers and duties, viz.:—"(6) To borrow any sum or sums of money, not exceeding *in cumulo* the amount of the guarantee fund, for the purposes of the association, and that either on cash-credit or otherwise, and to assign and hypothecate on security thereof all or any part of the property and effects of the association, and in particular, the guarantee obligations, letters, and relative documents, from corporations, firms, or persons who shall have agreed, or shall hereafter agree, to become members of the association, or shall have become, or shall hereafter become, subscribers to the guarantee fund of the Exhibition."

In accordance with the aforesaid provisions a number of corporations, firms, and persons agreed to become members of the association, authorising the secretary, by printed form duly filled in by them, to place their names on the list of subscribers to the guarantee fund.

In the end of 1889 the executive applied to the British Linen Company for an overdraft, and the bank ultimately agreed to give the advances on condition that the executive council should assign and hypothecate to them the guarantee obligations in terms and under the powers of the memorandum and articles of association.

At a meeting of the council of the association held on 10th January 1890 a resolution was passed by which the council hypothecated to the bank the letters of guarantee granted by the subscribers to the guarantee fund, and undertook that all necessary proceedings should be taken at their instance to recover the sums for which the several guarantors were respectively liable under the letters, and to apply the same in reduction of the advances. There was also an undertaking to assign to the bank when called upon the whole pecuniary rights and benefits to which the council were entitled under certain contracts about to be entered into. The secretary was also authorised to deliver to the bank the letters of guarantee.

In conformity with this minute the whole letters of guarantee were delivered by the council to the bank, and a circular was upon 24th October 1890 sent by the law-agents of the bank to each of the guarantors, intimating that the executive council, "as empowered by the articles of association, have hypothecated to the bank in security of advances the letters of guarantee," and further stating,—"You will please take notice that your letter of guarantee is now in the hands of the bank, and that in the event of there being any call upon you under your guarantee, the amount of such call will fall to be paid to the bank."

The company went into voluntary liquidation on 5th November 1890, and on 7th November the liquidator presented a petition to the Court to have the liquidation placed under supervision of the Court.

On 10th November the liquidator applied to the bank for delivery of the letters of guarantee that the sums due under them might be collected, under reservation of all questions as to the bank's right to the guarantee fund, but the bank refused to part with them "except on payment of the amount of their advances."

On 13th November the Court pronounced an order directing the voluntary winding-up of the association to be continued subject to the supervision of the Court.

On 22d November the liquidator presented a note under the 100th section of the Companies Act, 1862, in which he prayed the Court to ordain the bank to deliver forthwith into his hands "all the said letters of guarantee, so far as in their possession, or held by anyone on their behalf, and thereafter to find and declare that the said [British Linen]

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company have no valid security or preference over the said guarantee fund for repayment of their said advances."

The amount advanced by the bank was £18,312, 6s. 4d., exclusive of interest.

In the note the liquidator denied that the bank had obtained a valid security over the letters of guarantee or the guarantee fund, and he contended that the liability undertaken by the members of the association by way of guarantee to contribute to the liabilities of the association was *sua natura* not assignable, *et separatim*, was not assigned to the bank, and further, that the so-called hypothecation of the *ipsa corpora* of the letters of guarantee could and did create no right or security whatever.

On 25th November the bank lodged answers, in which they maintained that under the minute dated January 1890, and the proceedings following thereon, the guarantee obligations were validly hypothecated and assigned to them, and that they thereupon became vested in the sole right and title to the sums contained in the obligation. Further, that the only right of the liquidator in the obligation was to receive payment from the bank of any balance which might remain over of the sums received by them after satisfying the amount of the advances made by them to the council, and interest thereon.

On 5th December the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having reported the note and answers to the Second Division of the Court, when the parties were heard, ordains the British Linen Company to deliver forthwith into the hands of the liquidator all the letters of guarantee referred to in the said note so far as in their possession or held by anyone on their behalf, under reservation of all questions of preference and security over the said guarantee fund and letters, and under the special declaration that any such question shall be decided as if the said British Linen Company had remained in possession of the said letters, and decerns."

On 12th December the Lord Ordinary pronounced this interlocutor:—"Finds and declares that the British Linen Company have no valid security or preference over the guarantee fund or letters of guarantee mentioned in the said note for repayment of the advances made by the said British Linen Company also mentioned in the said note: Finds the liquidator entitled to possession of the said letters of guarantee, and decerns: Finds the said British Linen Company liable in expenses to the liquidator."*

DAVIDSON & SYME, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

* "OPINION.—The preliminary question as to delivery of the letters of guarantee having been disposed of, without prejudice to the pleas of parties, I have now to decide whether the British Linen Company have any valid security or preference over the guarantee fund or the letters for repayment of their advances. In my opinion they have not.

"It is necessary, in the first place, to attend to the nature of the association or company with which we are dealing. It was 'a company limited by guarantee' in the sense of section 9 of the Companies Act, 1862. Accordingly, the memorandum of association contained a declaration (art. 7) that 'Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and of the costs, charges, and the expenses of winding-up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding one pound, or in case of his liability becoming unlimited, such other amount as may be required in pursuance of the last preceding paragraph of this memorandum.'

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"By article 10 there was a further provision to the effect that the limitation of liability under article 7 should not affect the liability, if any, of any member of the association who might subscribe to the guarantee fund of the association, or authorise his name to be placed on the list of subscribers thereto, under clause 37 of the articles of association, to the extent of his subscription to the guarantee fund. And by clause 37 of the articles of association there was a 'provision for loss or deficiency' the effect of which was (*a*) that persons might subscribe to the guarantee fund without becoming members of the association; (*b*) that any loss or deficiency should be assessed first upon the subscribers to the guarantee fund (whether members or not) and then upon the members in respect of their liability under article 7; (*c*) that the subscribers to the guarantee fund (whether members or not) should be liable to the amount of their respective subscriptions, but no further, for any resulting loss arising from other subscribers (whether members or not) failing to pay their proportioned shares of the loss or deficiency in whole or in part; and (*d*) that, in addition to the guarantee provided by the 7th paragraph of the memorandum of association every member subscribing to the guarantee fund undertook to contribute to the assets of the association, in the event of the same being wound up, such amount as may be required not exceeding the amount of his subscription.

"Under the Companies Acts a company limited by guarantee may, or may not, have its capital divided into shares. This company had no share capital. It was not formed for purposes of gain, there being a provision in the memorandum that no part of its income or property should be paid, directly or indirectly, by way of profit to its members, and accordingly it was, by licence of the Board of Trade, under sec. 23 of the Companies Act, 1867, registered with limited liability, but without the addition of the word 'limited' to its name.

"It will thus be seen that it had to start with no capital or property whatever. It had the prospect of a very considerable income from various sources, but so far as its members and subscribers were concerned, it had no claim upon them except an obligation to contribute, within the limit of their subscriptions, such sums as might be required in the event of a winding-up.

"Very shortly after its formation the association required an advance of money from the bank, and the executive council (which corresponded to the board of directors in an ordinary company), on 10th January 1890, passed a resolution which is set out in the note. By this resolution the council hypothecated to the bank the letters of guarantee granted by the subscribers to the guarantee fund, and undertook that all necessary proceedings should be taken at their instance to recover the sums for which the several guarantors were respectively liable under the letters, and to apply the same in reduction of the advances. There was also an undertaking to assign to the bank, when called upon, the whole pecuniary rights and benefits to which the council were entitled under certain contracts about to be entered into. Further, the secretary was authorised to deliver to the bank the letters of guarantee, and this was afterwards done.

"Whatever may be the legal effect of this transaction, it was undoubtedly in accordance with the memorandum and articles of association. By the memorandum (3 G) one of the objects of the association was declared to be (after a general power of borrowing money and executing cash-credit or other bonds, bills, promissory-notes, and so forth) 'in particular to hypothecate or assign to any corporation or person who shall lend money to the association the guarantee obligations, letters, and relative documents,' from members and subscribers to the guarantee fund. By the articles [30 (6)] the executive council were empowered 'to borrow any sum or sums of money, not exceeding *in cumulo* the amount of the guarantee fund, for the purposes of the association, and that either on cash-credit or otherwise, and to assign and hypothecate in security thereof all or any part of the property and effects of the association, and in particular the guarantee obligations, letters, and relative documents from corporations, firms, or persons who shall have agreed, or shall hereafter agree, to become members of the association, or shall have become, or shall hereafter become, subscribers to the guarantee fund of the exhibition.'

"The first question which arises is, whether the power so conferred and exer-

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cised is consistent with the general scope and tenor of the Companies Acts? Of course neither the memorandum nor the articles of association can confer power upon directors to do anything contrary to the statutes by which limited liability is allowed. Of this there are two very recent illustrations in Scotland (*Klenck* v. *East India Co. for Exploration and Mining, Limited*, Dec. 21, 1888, 16 R. 271, and *General Property Investment Company and Liquidator* v. *Matheson's Trustees*, Dec. 21, 1888, 16 R. 282) where it was held *ultra vires* of a company in the one case to issue its shares at a discount, and in the other to purchase its own shares, although there was power to that effect in the memorandum and articles. These cases were decided in conformity with *Trevor* v. *Whitworth* in the House of Lords (1887, 12 L. R. App. Cas. 409), which was also a case of a company purchasing its own shares, and the *ratio decidendi* in all of them was, not that there was any express prohibition in the Companies Acts against the things done, but that under the statutes the creditors of the company were entitled to rely on the preservation of the capital, both called and uncalled, for their behoof, except in so far as it was diminished by the operations of the company in pursuit of its lawful business. In the one case (of the company buying its own shares) this principle was infringed by what was practically a return of a portion of the paid-up capital to the shareholder who sold, and in the other case (of the company issuing its shares at a discount) by what was practically a discharge of a portion of the unpaid capital which *ex facie* of the share the shareholder was bound to pay.—(See opinion of the Lord President at p. 277 of 16 R.)

"Now, these were all cases of companies limited by shares, where of course the directors have a power of making calls while the company is still in operation. The peculiarity here is that the guarantee fund is an asset which can only be called up when the company is in liquidation, and then only if there happens to be a deficiency. The intention of the Act of 1862, as expressed in section 133, is, that in a winding-up 'the property of the company shall be applied in satisfaction of its liabilities *pari passu*.' The knowledge that such an asset exists *in spe* may be, and no doubt is, a source of credit to the company while it is in operation, but that is a very different thing from holding that a contingent fund of this sort, intended for the purpose of meeting its liabilities in the event of a winding-up, and never under the control of the directors while it is a going concern, can be anticipated by them in favour of a particular creditor for the purpose of meeting its immediate necessities.

"This question was fully discussed in the recent English case *In re Py'-Works*, 1890, L. R. 44 Ch. Div. 534. The company there was one limited by shares, and the directors had exercised a power contained in the articles to 'borrow on mortgage of all or any part of the property of the company,' and to include in any such mortgage 'all or any definite proportion of the capital of the company then uncalled.' It was held by the Court of Appeal that the calls to be made by the liquidator in the winding-up were bound by the mortgages, and that the several mortgagees were entitled to have the calls applied in payment of their mortgage debts in priority to the general creditors. But the judgment was expressly put on the ground that it was impossible to draw a distinction between calls made in fact by the directors and calls made in fact by the liquidator, and that the latter were as much part of the assets or capital of the company as the former. In this respect the learned Judges distinguished the case of a company limited by shares from the case of a company limited by guarantee. Lord Justice Cotton said (p. 574)—'We are considering the case of a call made in the winding-up of a limited company, not of a company limited by a guarantee, nor of an unlimited company. In the case of an unlimited or of a guarantee company, what can be called for in the winding-up may not be, and I think is not, considered as part of the capital of the company.' Similarly Lord Justice Lindley (p. 584) said—'Those moneys which are payable only on a winding-up, and which by the Act are excluded from the capital of the company, are never under the control of the directors, and cannot, I apprehend, be dealt with in any way by them. Those moneys form a statutory fund which only comes into existence when the company is in liquidation—that is to say, when the powers

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of the directors have ceased.' And later on he illustrated his meaning by reference to those banks and other unlimited companies which were allowed by the Companies Act, 1879, to register as limited by declaring that a portion of their capital should not be called up except in the event and for the purposes of the company being wound up. He said 'The Companies Act, 1879, sec. 5, enables a limited company to divide capital into two parts, one of which shall only be called up in the event of a winding-up. When the capital of the company has been so divided, that part which can only be called up in the event of a winding up ceases to be subject to the control of the directors, and cannot, I apprehend, be charged or disposed of by them.' Now, the case of a guarantee fund seems to me *a fortiori* of the case of a company under the Act of 1879, for while there might be some plausibility in holding that the uncalled capital of the latter was capital of the company from the beginning, I do not see any reason for treating a guarantee fund as capital until the commencement of the winding-up.

"If this be so, there is a manifest repugnancy in article 30 (6) which first authorises the executive council to assign and hypothecate 'all or any part of the property and effects of the association,' and then goes on to specify in particular 'the guarantee obligations' which *ex hypothesi* are not part of such property or effects so long as it is a going concern. At all events, it seems to me that whether they be regarded as the property of the association prior to liquidation or not, they are appropriated by the statute for the satisfaction of the company's liabilities *pari passu*, and are therefore not capable of being used for the purpose of giving a preference to any particular creditor.

"Even, however, if I am wrong on this point, the question remains, whether the minute of 10th January 1890, gave the bank a valid preference as regards the guarantee letters over the general body of creditors.

"The respondents maintain that the effect of the minute was to give them an assignation to the debts contained in the letters, and that they duly intimated the assignation by the circular of their law-agents issued to the guarantors on 24th October 1890. I cannot so construe the minute. It seems to me, that having the choice under the memorandum and articles of assignation or hypothecation, the executive council deliberately selected the latter, and that the undertaking to use all necessary proceedings at their own instance for recovery of the sums guaranteed was consistent with hypothecation and inconsistent with assignation.

"To meet this alternative the respondents say, that although they may have no claim to the debts contained in the letters, and consequently no right to recover directly from the debtors, they still have a good hypothecation, and consequently a right to retain possession of the letters till their claim is paid in full. Whatever might have been their rights in a question with the executive council, who possibly might have been barred from pleading that the hypothecation was ineffectual, it by no means follows that the liquidator is under any such disability. Not only is it his duty to ingather and distribute the estate for behoof of the general body of creditors, but his position since the Companies Act of 1886 is very much assimilated to that of a trustee in bankruptcy. A winding-up by or under the supervision of the Court is now, by section 3 of that Act, equivalent, *inter alia*, to an arrestment in execution and decree of furthcoming, and the question therefore is, whether the pledgee of documents like these, having no title to the debts which they instruct, can successfully maintain a preference over a creditor who has used the appropriate diligence in the hands of the debtors and followed it up by a decree of furthcoming. In considering this question it is of no moment to say that the constitution of the company permitted such hypothecation, for the memorandum and articles in the present case can no more validate a security which is bad at common law than the special resolution of the company in *Clark, &c.* v. *West Calder Oil Co., &c.*, June 30, 1882, 9 R. 1017, could make good an assignation of leases and moveables on which no possession had followed.

"It is contended by the liquidator that the proper subjects of pledge are corporeal moveables, and that documents of debt cannot be effectually pledged (at all events in competition with anyone having a title to the debt itself) except where the debt is inseparable from the document, as in bills, or

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bonds payable to bearer. His main authority for this contention is the case of *Christie* v. *Ruxton*, June 27, 1862, 34 Scot. Jur. 568, 24 D. 1182, which related to the title-deeds of an estate pledged for an advance of money, but the case was decided on the broad ground stated by Lord Benholme (and concurred in by Lord Justice-Clerk Inglis) that, 'by our law it is incompetent to impignorate title-deeds or mere documents of debt, so as to give a title of possession of these moveable subjects capable of competing with right to vindicate their possession competent to the proprietor of the estate or the creditor in the bond who has acquired right to the estate or to the debt by singular and onerous title from the impignorator.' His Lordship quotes a passage from Baron Hume's Lectures which fully sustains the general principle, and supplies an illustration exactly meeting the present case, for, after asserting the preference of an assignee to a bond who has intimated his assignation but has never possessed the bond over one who has got delivery of the bond but has not intimated, Baron Hume adds, 'In the same way he who duly arrests has right to the document of debt arrested, wherever that document may be.' If that be the law of Scotland, as I believe it is, the liquidator is in the position of having 'duly arrested,' and is therefore preferable to the mere pledgee of the document.

"It was urged for the respondents that Mr Bell in his Commentaries had adopted a different view. But whatever may be said of some observations about the deposit of title-deeds, it is plain that he agrees with Baron Hume as to documents of debt, for at p. 24 of vol. ii. (Lord M'Laren's edition) he says, —'It seems in the same way inconsistent with the true principles of law to sanction a burden on the real right even to moveables or debts, without an act of permanent or temporary transference of the right itself, unless in the case already mentioned of the debts and vouchers being inseparable.' And,—'It is not necessary, in order to transfer a debt, that the instrument or bond should be delivered to the assignee, but the debt itself may be attached by arrestment in whose hands soever the bond may happen to be, so that the possession of the document gives no apparent property.' And the paragraph concludes with the general statement,—'The pledge of the document cannot therefore be the regular way of constituting a security over such a subject.'

"Two recent cases were cited by the respondents—*Meikle and Wilson* v. *Pollard*, Nov. 6, 1880, 8 R. 69, and *Robertson* v. *Ross*, Nov. 17, 1887, 15 R. 67, which were said to recognise a pledge of books and papers as effectual to the full extent here contended for. But I do not read these cases as inconsistent with the general principle laid down by Baron Hume and Mr Bell. In both cases the question arose with trustees under voluntary deeds—a not unimportant distinction—and in both, the right to retain the documents was claimed, in the one case by an accountant, and in the other by a factor, merely until they were paid for the work in connection with which the documents had been delivered to them. In neither case therefore was there any question of the validity of a pledge in security for money lent of documents of debt where a right to the debt itself had been acquired by arrestment. Indeed, the cases were treated as falling under the same principle as the right of an artificer to retain possession of an article entrusted to him for repair until payment of his account.

"I need hardly add that the respondents rest their case on the express contract contained in the minute of January 10th, and not on the right of retention known as bankers' lien. The latter would not avail them, for it extends merely to 'unappropriated negotiable instruments belonging to the customer in the hands of the banker'—*Horsbrugh* v. *Royal Bank*, October 24, 1890, 28 S. L. R. 35, *per* Lord President, 39, 18 R. 12, Lord President, 16.

"I therefore come to the conclusion (1) that it was *ultra vires* of the executive council to create a security over the guarantee fund in favour of a particular creditor, and (2) that in any view the hypothecation or pledge of the letters was ineffectual to constitute a preference over the fund in competition with the liquidator, who is entitled to possession of the letters as accessories of the fund. All that I require to do is to find and declare that the respondents have no valid security or preference over the guarantee fund or the letters of guarantee for repayment of the advances mentioned in the petition."

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AGENT AND PRINCIPAL. *Title to sue—Foreign principal.*

1. When a person enters into a contract in his own name for an undisclosed principal, the latter, on disclosing himself as principal, has a title to sue upon the contract, but is subject to all pleas which the defender could have maintained against the agent if the latter had raised the action. Bennett v. Inveresk Paper Co., June 19, 1891, p. 975.
2. Although there may be a general usage in the foreign trade which raises a presumption that a British commission-merchant contracts as a principal and not as agent for a foreign trader, the presumption will give way to

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to extend the credit by £1000 on receiving an additional obligation from two of the obligants. *Held* (1) (following *Reddie* v. *Williamson*, 1 Macph. 228) that the bank by debiting the account with the year's interest in each year extinguished the claim for that interest, and converted it into an advance of principal; and therefore (2) that the personal obligants were only liable under the cash-credit obligations for the £1500 and £1000 of principal, with interest thereon from 31st October 1887, the date of the last balance, and that a voluntary liquidation of the company had not the effect of closing the account. Commercial Bank of Scotland, Limited, v. Pattison's Trustees, Jan. 31, 1891, p. 476.

Stock Exchange—Fraud.

3. A stockbroker, whose bank account was overdrawn, paid into it a sum of money by endorsing a cheque received by him from another broker, to whom he had sold certain shares, on instructions from a body of trustees to sell and invest the price on deposit with certain colonial banks. The ordinary course of business on the Stock Exchange is that the selling broker receives the buying broker's cheque, and makes payment to his own customer by his own cheque, or, where he has instructions to re-invest, by delivery of the new investments. The sum paid by the broker into his account did not extinguish the overdraft. The broker made no re-investment for the trustees, and within a few days absconded without having further operated on his bank account to any substantial extent. The trustees sued the bank for the sum paid in. The bank officials deponed that they believed the money to have come into the broker's hands in the course of his business as a broker. *Held* that the bank was not liable to the trustees. Dunlop's Trustees v. Clydesdale Bank, Limited, March 19, 1891, p. 751.

See *Bill of Exchange*, 4.

BANKRUPTCY. *Notour Bankruptcy—Diligence—Poinding—Bankruptcy Act*, 1856, *secs.* 7, 9, 12—*Debtors Act*, 1880, *sec.* 6.

1. Section 12 of the Bankruptcy Act, 1856, which equalises arrestments and poindings used within sixty days prior to, or four months subsequent to "the constitution of notour bankruptcy," contemplates the original constitution of notour bankruptcy only; and subsequent proceedings, which would of themselves have constituted notour bankruptcy, do not form a new constitution of notour bankruptcy to the effect of equalising diligence, notwithstanding the proviso of section 9 of the Act. Wood v. Cranston & Elliot, Jan. 13, 1891, p. 382.

Sequestration—Contingent Debt—Claim for expenses in litigation—Decree for interim execution pending appeal—Bankruptcy Act, 1856, *sec.* 14.

2. *Held* that a claim for the expenses of a Court of Session action for which the successful party had obtained decree for interim execution pending an appeal by his opponent to the House of Lords, was a "contingent" debt, and could not therefore support a petition for sequestration under the above enactment. Forbes v. Whyte, Nov. 29, 1890, p. 182.

Sequestration — Discharge — Appeal — Competency — Bankruptcy (Scotland) Act, 1856, *sec.* 170.

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BANKRUPTCY—*Continued.*

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Preference—Arrestment—Consignation—Act 1696, *c.* 5.

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Delivery of goods within sixty days—Act 1696, *c.* 5.

7. A spirit-merchant, whose goods were stored in a bonded warehouse, of which he was tenant, obtained advances of money on the security of certain goods in the warehouse, for which he granted to the lender delivery-orders addressed to the excise officer, but did not deliver the goods to him from the warehouse till within sixty days of bankruptcy. *Held* that the delivery was void and null under the Act 1696, c. 5, and that the goods so delivered belonged to the bankrupt's estate. Rhind's Trustee v. Robertson & Baxter, March 4, 1891, p. 623.

Husband and Wife—Debt by husband to wife—Married Women's Property Act, 1881, *sec.* 1, *subsecs.* 1 *and* 4.

8. A husband six days prior to his sequestration granted to his wife a promissory-note, payable one day after date, for £1370, as the amount of sums lent to him at various times by his wife out of her separate estate. On the same day the wife assigned the promissory-note and the sum contained therein to a relative in consideration of a payment of £50. The wife's assignee thereafter lodged a claim for £1370 in the husband's sequestration. *Held* that, having regard to subsecs. 1 and 4 of sec. 1 of the Married Women's Property (Scotland) Act, 1881, the wife's assignee was only entitled to be ranked upon whatever assets might remain after the whole

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claims of the ordinary creditors of the bankrupt had been satisfied. Cochrane v. Lamont's Trustees, Jan. 24, 1891, p. 451.

Computation of time—Arrestment—Bankruptcy Act, 1856, *secs.* 5 *and* 108.

9. *Held* that the 108th section of the Bankruptcy Act of 1856 applied in a case where an arrestment had been used on 20th April and sequestration had taken place on June 19th, according to the computation of time prescribed by the 5th section of the Act. Stiven v. Reynolds & Co., Jan. 20, 1891, p. 422.

Trustee—Adoption of bankrupt's contract.

10. A lease provided that the rent "payable for the last crop of the lease shall be exigible by the proprietor previous to the removal of any part of said crop from the ground," the tenant having the option of either paying the rent in advance, with certain discount, or finding security for payment. The tenant became bankrupt three months before the end of the lease, and his trustee thereafter directed and controlled all farm operations, keeping a large number of milch cows, subletting some pasture, and generally ingathering the crops. The landlord sought to interdict the trustee and the tenant from removing any part of the crop, on the ground that the stipulation in the lease quoted above was good against the tenant, and therefore good against the trustee, in respect he had adopted the lease. *Held* that, assuming the clause to be good against the tenant, the actings of the trustee did not constitute an adoption of the lease, but were done in discharge of his duty of realisation of the estate. M'Gavin v. Sturrock's Trustee, Feb. 27, 1891, p. 576.

Trustee—Vesting of heritable estate in trustee—Latent trust—Tantum et tale—Bankruptcy Act, 1856, *sec.* 102.

11. *Held* (*diss.* Lord M'Laren) that a sequestration vests in the trustee for behoof of the creditors heritage to which the bankrupt holds an unqualified feudal title in his own name, although he holds it only in trust for the true owner. Heritable Reversionary Co., Limited, v. M'Kay's Trustee, July 14, 1891, p. 1166.

Appointment of new trustee—Discharge of both trustee and bankrupt—Abandonment of claim—Nobile officium.

12. *Certain creditors upon a sequestrated estate on which both the trustee and the bankrupt had been discharged, the latter without composition, presented a petition for a remit to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a new trustee, averring that there were funds belonging to the sequestrated estate which had not been recovered, and that the petitioners had not been paid their debts in full. It was objected that all claim to these funds had been abandoned by the trustee.* Held (aff. *judgment of First Division*) *that the petition fell to be granted.* Whyte v. Northern Heritable Securities Investment Co., June 16, 1891, H. L., p. 37.

Cessio—Decree of cessio in debtor's absence—Form of interlocutor granting decree—Bankruptcy and Cessio Act, 1881, *sec.* 9.

13. In a petition for *cessio*, the Sheriff pronounced this interlocutor:—"Having heard parties' procurators, in respect the debtor has failed to appear at this diet for examination as ordered by last interlocutor, and has not taken means to satisfy the Sheriff-substitute that his absence was not wilful, decerns the debtor . . . to execute a disposition *omnium bonorum*." The Court *reduced* the decree in respect that the Sheriff-substitute had set forth a reason for granting decree other than that he was satisfied that the debtor's absence was wilful. Mackenzie v. Ewart, June 13, 1891, p. 925.

Sale of bankrupt estate—Purchase by law-agents employed by trustee in sequestration—Bankruptcy Act, 1856, *sec.* 120.

14. The law-agents who had been employed by the trustee in a sequestration bought certain of the sequestrated effects which had been exposed by the trustee for sale by public roup. An unsuccessful bidder brought an action for reduction of the sale, and for declarator that he had become the pur-

BANKRUPTCY—*Continued.*

chaser of the subjects at the upset price, which was offered by him, on the ground that the law-agents had arranged with the trustee not to hold him personally liable for payment of their account, that there were no assets to which the agents had to look for payment save the subjects sold, and that the value of the subjects did not exceed the amount of their account. He pleaded that the sale was thus truly made for their behoof, and that they were not entitled to bid. The Lord Ordinary (Kyllachy) held that the fact that the defenders had substantially the sole interest in the sale would at common law have disqualified them from bidding at the sale, but that as creditors they were entitled to do so under section 120 of the Bankruptcy Act, 1856. On a reclaiming note, *held* that at common law the agents were not disqualified from bidding by the interest they had in the sale, the subject sold being the property of the trustee, and the offer to purchase being made *bona fide* and not for the purpose of increasing the price.

Opinions (*per* Lord Young and Lord Rutherfurd Clark) that a law-agent employed by the trustee in a sequestration is not in respect of his account a creditor in the sequestration in the sense of the 120th section of the Bankruptcy (Scotland) Act of 1856. Rutherfurd v. MacGregor & Co., July 4, 1891, p. 1061.

See *Sale*, 2.

BILL OF EXCHANGE. *Charge—Suspension—Caution—Partnership.*

1. One of six partners of a trading firm, which had sold its business to a limited company, granted a promissory-note, to which he signed the firm name as well as his own. The other partners having been charged to pay brought a bill of suspension. The respondents averred that the complainers had adopted the promissory-note. *Held* that, as the firm's signature could not bind the partners after the dissolution of the firm, and it lay upon the respondents to prove their averments of adoption, the bill should be passed without caution. Goodwin v. Industrial and General Trust, Limited, Dec. 6, 1890, p. 193.

Partnership—Firm signature.

2. A partner in a firm of builders, who by the contract of copartnery was precluded from signing bills, adhibited the firm name to certain promissory-notes in favour of a money-lender, with whom he discounted them at the rate of 40 per cent per annum. The notes were not granted in the course of the firm's business, and the proceeds were applied to the partner's own use. The firm, having been charged upon the notes, brought a suspension. *Held* that the loss occasioned by the fraudulent granting of the notes must fall upon the money-lender, who discounted them in suspicious circumstances without inquiry, and not upon the partners of the firm, as they were ignorant of the transaction, and as the transaction was not in the course of the firm's business or for its behoof. Paterson Brothers v. Gladstone, Jan. 15, 1891, p. 403.

Proof—Parole—Competency—Bills of Exchange Act, 1882, *sec.* 100.

3. The National Bank of Australasia, holders of a bill of exchange for value drawn upon Phipps, Turnbull, & Company of Melbourne, which Phipps, Turnbull, & Company had refused to accept, and which had been protested against the drawers for non-payment, brought an action on the bill against the drawers. The defenders averred that for many years prior to 1881 they had acted as agents in this country for Phipps, Turnbull, & Company for the purpose of procuring and forwarding consignments of such goods as Phipps, Turnbull, & Company desired for the Australian markets, and that all transactions were financed by bills drawn by the defenders upon Phipps, Turnbull, & Company under arrangement with the National Bank of Scotland, Limited, who agreed to discount all bills drawn by the defenders upon the said Phipps, Turnbull, & Company, on receiving indorsed the bills of lading of the various consignments, and to look to Phipps, Turnbull, & Company alone for payment; that in 1881 Phipps, Turnbull, &

BILL OF EXCHANGE—*Continued.*

Company made similar arrangements with the pursuers' London office, and "explained to the pursuers that Phipps, Turnbull, & Company were alone to be liable on any bills discounted by the pursuers drawn by the defenders on them, on receipt of the bills of lading indorsed, which the pursuers agreed to. . . . At the date of said arrangement the defenders were wholly unknown to the pursuers. . . . Though the bills libelled bear to be drawn by the defenders, they personally received no value for them. It was a fact well known to the pursuers that the defenders were to act merely as the agents of Messrs Phipps, Turnbull, & Company, and it was agreed to by them that Messrs Phipps, Turnbull, & Company, on whom they relied solely for payment, were alone to be liable under the bills condescended on." *Held* that the defence could not be admitted to probation, the Lord President and Lord M'Laren holding that notwithstanding the terms of the 100th section of the Bills of Exchange Act, 1882, it was incompetent for the defenders to contradict by parole their liability as it appeared on the face of the bill, and Lord Adam and Lord Kinnear holding that the averment was irrelevant inasmuch as the agreement founded on therein must be construed as an agreement to come into operation only in the event of bills being accepted by Phipps, Turnbull, & Company, which was not averred.

Opinion (*per* Lord Adam) that under the 100th section of the Bills of Exchange Act, 1882, it was competent for the drawer of a bill, in a question with a holder for value, to prove a parole agreement contradicting his liability on the face of the bill. National Bank of Australasia v. Turnbull & Co., March 5, 1891, p. 629.

Payment and discharge—Cancellation without authority—Liability of agent employed to collect bill.

4. *The agent of a bank offered to try to obtain payment of a bill which had been protested for non-payment, and the holders accepted the offer. The acceptors offered to pay the bill and the protest charges on the condition that they should not be called upon to pay interest and expenses. The bank's agent communicated this condition to the holders, and without waiting for authority took payment of the bill and protest charges, marked the bill paid, and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the condition on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, and received back the bill cancelled, the money being repaid to the acceptors. The holders then raised an action against the acceptors for the amount of the bill, with interest, and for the expenses of the action, and obtained decree, but the estates of the acceptors became bankrupt before diligence could be used against them. The holders thereupon raised an action against the bank, concluding for the amount of the bill, with interest, and for the expenses of their action against the acceptors.* Held (aff. *judgment of First Division*) *that the evidence shewed that if the bill had not been cancelled through the error of the agent of the bank, the holders might have recovered payment by summary diligence before the acceptors had become bankrupt, and that the bank was liable.* Bank of Scotland v. Dominion Bank, June 9, 1891, H. L., p. 21.

BURGH. *Dean of Guild—Jurisdiction.*

1. *Held* that the Dean of Guild has jurisdiction to require the plans of all new buildings proposed to be erected within burgh to be laid before his Court, although such buildings may be entirely within the enclosed property of the person who is erecting them, and at such a distance from the outside boundaries of it as not to threaten any encroachment on neighbouring properties or danger to persons using the public thoroughfares. Eglinton Chemical Co., Limited, v. M'Jannet, Oct. 30, 1890, p. 34.

Dean of Guild—Appeal—Competency.

2. *Held* that a petition for a lining presented to the Dean of Guild of Glasgow was a common law proceeding, and that his judgment thereon, without a

BURGH—*Continued.*

record having been made up, was not excluded from review by the Glasgow Police Act, 1866. Allan v. Whyte, Dec. 20, 1890, p. 332.

3. In terms of sec. 384 of the Glasgow Police Act, 1866, the Master of Works gave notice to the proprietor of a back court, requiring him to fence it, and intimating that if he had any objections he must lodge the same in writing with the clerk to the Police Commissioners within six days. No objections were lodged, and thereafter the Dean of Guild, on the application of the Procurator-fiscal, after hearing the proprietor's objections, but without a record having been made up, pronounced an interlocutor, granting a warrant for the execution of the work at the proprietor's cost on the ground that there was danger to persons using the court from the want of a fence. The proprietor having appealed, the Procurator-fiscal objected that the appeal was incompetent under sec. 277 of the Act, in respect that no record had been made up. The appellant contended that, as the public had no right of access to the court, the want of a fence could not be "dangerous" in the sense of the Act, and that the Dean of Guild had exceeded his jurisdiction in granting the warrant. *Held* that the interlocutor was in pursuance of the Act, and that the appeal was incompetent, as no record had been made up. Walker v. Lang, June 13, 1891, p. 928.

4. An interlocutor by a Dean of Guild refusing to sist as respondent a person who alleges a material interest to appear in a petition for authority to take down and rebuild a house is a final interlocutor *quoad* that person, and therefore appealable. Lawrie v. Jackson, July 15, 1891, p. 1154.

Dean of Guild—Petition for authority to erect new buildings—Right of neighbouring proprietor to be sisted as a party to the process.

5. Circumstances in which the Court (*diss.* Lord M'Laren) *recalled* an interlocutor of a Dean of Guild refusing to sist as a respondent to a petition for authority to erect new buildings a proprietor whose property did not immediately adjoin that on which it was proposed to erect the new buildings. Lawrie v. Jackson, July 15, 1891, p. 1154.

Dean of Guild—Nuisance.

6. *Opinion* that it was beyond the jurisdiction of the Dean of Guild of Glasgow to decide whether a proposed erection would be a nuisance. North British Railway Co. v. Moore, July 1, 1891, p. 1021.

Reparation—Wrongous apprehension—Glasgow Police Act, 1866.

7. In an action of damages for wrongous apprehension against two police-constables and the Magistrates and Town-Council of Glasgow as Police-Commissioners, the Magistrates and Town-Council were assoilzied on the ground that the constables were not their servants, the control and management of the police being vested in another statutory body—a committee of the Police Commissioners—and the Sheriff. Young v. Magistrates of Glasgow, May 16, 1891, p. 825.

Free space for air—Dean of Guild—Glasgow Police Act, 1866.

8. *Held* that the Dean of Guild of Glasgow was not entitled to refuse his sanction to plans lodged in a process of lining because there was not exclusively on the applicant's own ground the free space required by the Glasgow Police Act, 1866, sections 367 and 370, to be in front of a room intended to be used as a sleeping apartment, seeing that there was in existing circumstances sufficient free space over ground belonging to a different proprietor. Allan v. Whyte, Dec. 20, 1890, p. 332.

Private court—"House"—General Police and Improvement Act, 1862, *sec.* 177.

9. The 177th section of the General Police Act of 1862 provides that it shall not be lawful to build any court of less than a certain specified width, and that "to any such court in which there shall be more than eight houses there shall be an additional width of one foot for every such additional house," and that there shall be an entrance of the full width of the court open from the ground upwards. *Held* that the section applied to courts to be formed on back-ground exclusively private property. Couper v. Surveyor of Maryhill, March 6, 1891, p. 642.

BURGH—*Continued.*

Trade incorporation—Member—Qualification.

10. A tailor in Annan, who was born and received his education in Ayr, brought an action against the Incorporation of Tailors of Ayr for declarator that he was entitled to be admitted a member of the Incorporation as being the son of a member, and averred that by immemorial usage the sons of members were as such entitled to be admitted, although not resident in Ayr. The defenders did not dispute that the pursuer's father had been a member at his death, but denied the averment of usage. The Lord Ordinary assoilzied the defenders, holding that the averment of usage was not proved. On a reclaiming note the pursuer abandoned the averment of usage, and contended that he was entitled to admission as being a tailor in Scotland, and offered, if necessary, to amend his summons to that effect. *Held* that the proposed amendment, even if competent, would be irrelevant. Loudon v. Tailors of Ayr, Feb. 20, 1891, p. 549.

See *Police*, 1.

CARRIAGE. *Railway—Common carriers—Traders' waggons.*

A railway company conveyed a trader's waggons containing coal along their lines, and after delivery of the coal conveyed the empty waggons back to the collieries, the sole charge made being a rate of 1s. 7½d. per ton, whereas the rate for the conveyance of coal on waggons belonging to the company was 2s. On the return journey some of the waggons were destroyed through an accident to the train caused by a latent defect in the waggon of another trader, which was in the same train. *Held* that the railway company were not liable for the safe delivery of the waggons as under a contract of carriage. Barr & Sons v. Caledonian Railway Co., Nov. 21, 1890, p. 139.

See *Railway*, 2, 5.

CAUTIONER. *Conditions—Guarantee for servant's fidelity—Failure of master to use checks stipulated for.*

An insurance association entered into a contract with a merchant and a traveller employed by him by which the association agreed, on payment of a premium, to guarantee the employer to a certain amount against loss by embezzlement on the part of the traveller. The contract set forth that the employer had delivered to the association a proposal containing certain statements, and a declaration setting forth, *inter alia*, "the checks to be kept upon" the traveller's "accounts, and has consented that such proposal and declaration, and each of the statements therein referred to or contained, shall form the basis of the contract," and this agreement is granted on the condition that the business of the employer shall be conducted in every particular in accordance with the said proposal, statements, and declaration, except with the consent of the association in writing." The proposal referred to contained the following questions to and answers by the employer:—"(Q.) How often will the employer balance and settle the applicant's accounts? (A.) Monthly. (Q.) Specify the checks which the employer will use to secure accuracy in the applicant's accounts. (A.) Statements sent to customers by employer. (Q.) In particular, will the employer send accounts direct to customers, and if so, how often? (A.) Every three months." In an action by the employer against the association for payment of the amount of a sum embezzled by the traveller, it was proved in defence that no monthly settlements had been made between the employer and the traveller, and that the practice had been that, at the end of three months from the date of an order, the employer sent the account, not to the customer direct, but to the traveller himself for collection. *Held* that the employer had failed to comply with the conditions of the contract, and that the defenders were not liable. Haworth & Co. v. Sickness and Accident Insurance Association, Limited, Feb. 26, 1891, p. 563.

See *Bill of Exchange*, 1—*Process*, 9.

CESSIO. See *Bankruptcy*, 13.

CHURCH. *Encroachment on burying-ground—Powers of kirk-session—Heritors.* *Held* that the heritors in a parish, as proprietors in trust of the parish church and churchyard, along with the kirk-session, as administrators thereof, were entitled, in a case of high expediency, to encroach upon the burying-ground in enlarging the church, although this involved the removal of soil from a portion of the ground which had for a long period been used as a common burying-ground—no private rights being interfered with, sixteen years having elapsed since the last interment, and the churchyard having been closed as a burying-ground.

Observed that the rights of a kirk-session in regard to the church and burying-ground of a parish are rights of administration only.

Observed that a singular successor in an estate has no right of sepulture in part of a burying-ground which has been acquired by his predecessor in title. Steel v. Kirk-Session of St Cuthbert's Parish, June 12, 1891, p. 911.

CITATION. See *Jurisdiction*, 2—*Process*, 1—*Sheriff*, 1.

COMPANY. *Promotion-money—Preliminary expenses—Liability to account—Personal bar.*

1. A public company, formed for the purpose of introducing a new system of tramways in Edinburgh, entered into an agreement with contractors for the execution of the works at a certain price, one provision being that the expenses of procuring the Act should be met by the contractors. M. and B., the company's solicitor and engineer, who had also been its chief promoters, on the next day executed a second agreement with the contractors on their own behalf, by which they undertook to relieve the contractors of their obligation for expenses in consideration of a sum of £17,000. The company having brought an action some years afterwards calling M. and B. to account for any moneys received by them under that agreement, the defenders pleaded, *inter alia*, that the transaction had been known to the company, or to all who were members of it at the time, and that the company was therefore barred from now challenging it. *Held* that the defenders' fiduciary relation to the company precluded them from deriving any private advantage from the agreement, and that they were bound to account to the company for sums received by them under it. Edinburgh Northern Tramways Co. v. Mann, July 14, 1891, p. 1140.

Rectification of register—Misrepresentation—Misrepresentation of reason why certain directors had retired—Companies Act, 1862, *sec.* 35.

2. The memorandum of association of a company, registered under the Companies Acts, 1862-1886, bore that the registered office of the company would be in England, but in the copy of the memorandum of association printed on the back of the prospectus it was stated that the registered office would be in Scotland. In consequence of this discrepancy no allotment of shares was made, the company was wound up, and a new company was formed, with its registered office in Scotland. The prospectus of the original company bore that Mr Esslemont, M.P., was to be the chairman, and Dr Clark, M.P., one of the directors of that company, and in a circular sent along with the prospectus of the new company to persons who had applied for shares in the original company it was stated, after explaining the necessity for the formation of the new company, that, "as the company will now fall to be managed in Glasgow, Messrs Esslemont and Clark, the two members of Parliament (whose parliamentary duties will prevent their attendance at the board), and Mr M'Cankie [another original director] have retired." This circular then requested the applicants to renew their applications for shares. Certain persons who had applied for shares in the original company, and had had shares allotted to them in the new company on their renewed application after receiving the above circular, sometime afterwards petitioned the Court to order the removal of their names from the register

COMPANY—*Continued.*

of the new company. They averred that they had applied for shares on the faith of the representation that Mr Esslemont was to be chairman, and Dr Clark a director of the company; that they had renewed their application only in consequence of the statement that these gentlemen had retired from the board because their parliamentary duties made it impossible for them to attend the meetings of the board in Glasgow; and that this statement was false, and was calculated to deceive, as the true reason why Messrs Esslemont and Clark had retired was that they were dissatisfied with the prospects of the company. The company denied these averments, and pleaded that they were irrelevant. The Court *refused* the petition, holding that as the petitioners had applied for shares after the distinct statement that Messrs Esslemont and Clark were not to be on the board, it was irrelevant to inquire into the truth of the reasons stated for their retirement. Chambers v. Edinburgh and Glasgow Aërated Bread Co., Limited, July 3, 1891, p. 1039.

Resolution to alter memorandum of association—Confirmation by Court—Companies Memorandum of Association Act, 1890, *sec.* 1.

3. Application for confirmation of resolution to alter a memorandum of association, under the above Act, in part *granted*, and in part *refused*. Glasgow Tramway and Omnibus Co., Limited, v. Magistrates of Glasgow. March 13, 1891, p. 675.

Title to sue—Reduction—Shareholder—Directors.

4. An individual shareholder in a public company brought an action for reduction of an agreement between the company and certain contractors for the construction of certain lines of tramway as authorised by Act of Parliament, the allegations being (1) that the agreement had been entered into in contravention of the Act of Parliament, in respect that there had been no competition for the contract, although there had been previous agreements between the company and the Corporation of Edinburgh and Leith, which were confirmed by the Act of Parliament, to the effect that the works to be executed by the company should "form the subject of competition"; (2) that the directors of the company who had concluded the agreement were disqualified by having interests apart from the interest of the company in the contract to which it related; and (3) that the pecuniary conditions of the contract were such as shewed that it had been carried through by means of a fraudulent scheme whereby the pursuer and the minority of the shareholders were defrauded by the majority. The parties to the agreement were all called as defenders. The Court repelled the reasons of reduction and *assoilzied* the defenders, holding (1) that the stipulation as to competition being one between the company and the two corporations, the pursuer had no title to enforce it; (2) that in point of fact there was no such conflict between the personal interests of the directors and their duty to the company as would disqualify them from acting, and that, even if there had been, such objection had been obviated by the homologation of the company at a general meeting; and (3) that although a minority of the shareholders had a title to plead fraud, it had not been proved that there had been any fraud practised by the majority upon them, or that a bad bargain had been made knowingly or in disregard of the interests of the company, with the intent to sacrifice the interests of the company and of the minority. Rixon v. Edinburgh Northern Tramways Co., Dec. 18, 1890, p. 264.

Surrender of shares—Purchase of shares—Companies Acts, 1862 *and* 1867.

5. Circumstances in which *held* that a limited company was entitled to accept a surrender of shares by an insolvent shareholder without reserving its right to recover unpaid calls, as a fair compromise of the company's claims against the shareholder, and that when the company afterwards went into liquidation the liquidator was not entitled to reduce the transaction on the ground that it was *ultra vires* of the company. General Property Investment Co., Limited, and Liquidator v. Craig, Jan. 15, 1891, p. 389.

COMPANY—*Continued.*

Creation of preference shares by company—Ultra vires—Companies Act, 1862, *sec.* 12.

6. The memorandum of association of a company registered under the Companies Act, 1862, and limited by shares, provided that the capital of the company should be £1,000,000 divided into 100,000 shares of £10 each. The articles of association provided that the company might, by special resolution, increase the capital, and might "determine the conditions on which such increase shall be made, the number and amount of the shares into which such increased capital shall be divided, and the time, mode, and terms at, and according to which, such last-mentioned shares shall be issued, and how the premium, if any, on such shares shall be applied." *Held* that a special resolution of the company to increase the capital of the company by the creation of preference shares was *ultra vires*. Ramsbotham v. Scottish American Investment Co., Limited, Feb. 25, 1891, p. 558.

Shares—Certificates fraudulently issued by secretary of the company—Right of bona fide holder for value—Damages for failure to place on register.

7. A person advanced money to B on the security of share certificates bearing that B had a certain number of fully paid £10 shares in a limited company. The certificates bore the common seal of the company, and the signatures of two directors and of the secretary. In an action by the lender against the company for damages arising from their refusing to register the shares in terms of the certificates, the company pleaded that B had only paid £1 per share, that the certificates had been issued by the secretary without the authority of the company, that he had fraudulently allowed them to remain in B's hands, and that B was a party to the fraud. *Held* that the objection could not be sustained, as the pursuer was entitled to rely upon the validity of the certificates. Clavering, Son, & Co. v. Goodwins, Jardine, & Co. March 11, 1891, p. 652.

Division of profits—Rights of preference and ordinary shareholders.

8. The shares of a limited company were divided into A or preference, and B or ordinary shares, the former to rank prior to the latter on the profits of each year for a dividend at the rate of 10 per cent on the amount paid up, and the latter to rank on the balance of the profits of each year remaining after payment of the preferential dividend, also for a 10 per cent dividend. Any surplus was to belong to both classes of shares without any priority between them. It was also provided that "no deficiency in dividend in any year shall be made good out of the profits of future years." For several years there was a loss on the revenue account resulting in a debit balance at 30th April 1889 of £7867. During the year ending 30th April 1890 net profits were earned to the amount of £6909, which sum was applied in reducing the debt previously incurred, and no dividends were declared. During next year, ending 30th April 1891, net profits were earned sufficient to wipe out the remainder of the debt, and leave a surplus for division, after paying a 10 per cent dividend to the A shareholders as for that year. In a special case between the A and B shareholders the former contended that they were entitled to have this surplus applied in payment to them of a 10 per cent dividend, as for the year ending 30th April 1890, in respect of the net profits of £6909 earned during that year. *Held* that the A shareholders were not entitled to a dividend for the year ending 30th April 1890, Lord Adam and Lord M'Laren holding that the profits of that year had been properly applied in reducing the debt, Lord Kinnear holding that the A shareholders were barred from raising the question by the statement in the case that the sum of £6909 was not available for dividend in that year. Niddrie and Benhar Coal Co., Limited, v. Hurll, March 20, 1891, p. 805.

Reserve and depreciation fund—Distribution among shareholders on sale of undertaking.

9. The directors of a gas company, as authorised by the articles of association, from time to time carried parts of the company's profits to a reserve fund and a depreciation fund. The directors paid repairs of the works out of

COMPANY—*Continued.*

revenue, and applied the whole of the reserve and depreciation funds to the extension of works and other capital purposes of the company. The company's undertaking having been sold, a question arose between the preference shareholders, who had always received their full dividend, and the ordinary shareholders, as to the mode in which these funds should be dealt with. *Held* that the ordinary shareholders were entitled to both funds, and that they fell to be deducted from the price of the works before a distribution among all the shareholders was made. Partick, Hillhead, and Maryhill Gas Co., Limited, v. Taylor, July 1, 1891, p. 1017.

Sale of undertaking—Parliamentary proceedings.

10. *Held* that the expenses incurred by a gas company in parliamentary proceedings, which resulted in an arrangement under which the company's undertaking was sold, should not be charged against the revenue of the year preceding the sale, but against the price obtained for the undertaking. Partick, Hillhead, and Maryhill Gas Co., Limited, v. Taylor, July 1, 1891, p. 1017.

Winding-up—Creditor—Voluntary winding-up placed under supervision—Resolution to wind up—Companies Act, 1862, secs. 79 and 129.

11. A company was incorporated under the Companies Acts, 1862 to 1886, for the purpose, *inter alia*, of carrying on an Exhibition of Electrical Engineering, &c. "during the year 1890." A few days before 1st November, when the Exhibition was to be closed, a creditor presented a petition stating that the company was unable to pay its debts, and praying that it be wound up by the Court. On 5th November the company at a general meeting passed a resolution that the company should be wound up voluntarily, and appointed a liquidator. The liquidator, with concurrence of certain creditors, applied to the Court by a note in the creditor's petition for an order placing the voluntary liquidation under the supervision of the Court. The Court *held* (1) that the resolution (though neither extraordinary nor special) was competent under sec. 129, subsec. (1), of the Companies Act, 1862; (2) that notwithstanding the prior petition by the creditor for judicial liquidation, the voluntary liquidation was lawful and expedient, and ought not to be interfered with; and (3) that the note by the liquidator in the creditor's petition craving an order placing the liquidation under the supervision of the Court should be granted, and the appointment of the liquidator confirmed. The creditor's petition was accordingly *refused*. Drysdale & Gilmour v. Liquidator of International Exhibition of Electrical Engineering and Inventions, Nov. 13, 1890, p. 98.

Winding-up—Prosecution by liquidator of action raised by third party—Sanction of Court.

12. An action was raised by the trustee in a sequestration in the interests and on the guarantee of a company registered under the Companies Acts. The defender in these actions was assoilzied, with expenses, in the Outer-House, and the pursuer reclaimed. Thereafter a winding-up order was pronounced, and the liquidator of the company petitioned the Court to sanction the prosecution of the reclaiming note by him either in his own name or in that of the original pursuer, and in the latter case to approve of his guaranteeing the pursuer his expenses. The liquidator stated that he had been advised by counsel that the judgment of the Lord Ordinary was such as ought to be brought under review. The Court *authorised* the liquidator to prosecute the reclaiming note in his own name, holding that having obtained the opinion of counsel he was justified in insisting in the reclaiming note, but that, as an officer of Court, he ought to be master of the process. Millar, Nov. 29, 1890, p. 179.

Winding-up—Expenses of endeavour to form new company—Liquidator—Companies Act, 1862, sec. 161.

13. By special resolutions of 10th June 1889 a limited company resolved to wind up voluntarily, appointed a liquidator, with full powers under section

COMPANY—*Continued.*

161 of the Companies Act, 1862, to accept shares or other like interests in any other joint stock company, in payment or part payment for the company's assets, and appointed a committee to confer with him as to a proposed reconstruction or amalgamation scheme. The liquidator incurred considerable outlay in endeavouring to form a new company to take over the company's business. These endeavours proved unsuccessful. The funds of the company proved insufficient to pay all its debts, and on 15th March 1890 a creditor obtained an order placing the liquidation under the supervision of the Court, removing the liquidator, and appointing another in his place. The sanction of the Court to the resolution of 10th June was not applied for. *Held* that the liquidator who had been removed was not entitled in accounting for his intromissions to credit for his outlay in endeavouring to form a new company. Liquidator of Scottish Assurance Corporation v. Miller, Feb. 6, 1891, p. 496.

Winding-up—Forfeiture of shares prior to liquidation—Liability for unpaid calls—Fraud.

14. When shares in a public company are forfeited for non-payment of calls, the holder of such shares ceases to be a member, and becomes merely a debtor of the company, and therefore is not barred by the subsequent liquidation of the company from pleading in answer to a demand for payment of the calls that he was induced to take the shares through the fraudulent misrepresentations of the company. Liquidators of Mount Morgan (West) Gold Mine, Limited, v. M'Mahon, March 19, 1891, p. 772.

Winding-up—Agreement to give fully paid-up shares—Companies Act, 1862, *sec.* 25.

15. A person who had sold a paper mill, &c. to a limited company, formed for the purpose of acquiring it and carrying on the business, for the sum of £12,000, agreed to take £8500 of the price in fully paid-up shares of the company. This agreement appeared in the minutes of the directors of the company, and was carried out by the issue of shares to the vendor, but was never filed with the Registrar of Joint Stock Companies. The company having become insolvent and gone into liquidation, the liquidators proposed to place the vendor on the list of contributories in respect of shares so issued and still held by him, with liability to the amount of the uncalled capital effeiring to them. The vendor maintained that the shares must be treated as fully paid up, and that no liability attached to him in respect of them. *Held* (*aff.* judgment of Lord Stormonth Darling) that he must be placed on the list of contributories with liability as contended for by the liquidators, *diss.* Lord Young, who was of opinion that the transaction, following on the agreement, was virtually a payment in cash for the shares to their full value by the vendor. Liquidators of Coustonholm Paper Mills Co., Limited, v. Law, July 8, 1891, p. 1076.

Company limited by guarantee—Right in security—Pledge—Power to hypothecate guarantee letters in security of advances—Ultra vires—Companies Act, 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 9.

16. In the memorandum and articles of association of a company registered under the Companies Act, 1862, as a company limited by guarantee and empowered to create a guarantee fund, the subscribers to which were in the event of a winding-up, and there being a deficiency of assets, to contribute to the assets of the company to the extent of their guarantee, it was provided that the company might borrow money, and, in security thereof, assign or hypothecate to the lender the guarantee obligations, letters, and relative documents from subscribers to the guarantee fund. The executive council having borrowed a sum of money from a bank in terms of the above provisions, hypothecated the letters of guarantee to the bank in security of the advance. In a voluntary liquidation, under supervision of the Court, the liquidator presented a note praying the Court to ordain the bank to deliver the letters to him, and to declare that the bank had no valid security or preference over

or letters of guarantee for payment of their advances. (Stormonth Darling) *granted* the prayer of the petition, the guarantee fund had no existence until the company ɔn, and then only in the event of there being a deficiency he purpose of equal distribution among the creditors, it ıe executive council to create a security over it in favour :editor; and (2) that in any view the hypothecation or ı was ineffectual to constitute a preference over the fund ı the liquidator, who was entitled to possession of the ı of the fund. Robertson v. British Linen Co., July 18,

ıquidate damage—Agreement by purchaser to deposit a in the event of failing to implement.
ɣotiations for the purchase of a business, the intending ɔ deposit in bank in the joint names of himself and of sum "as part payment of the price," it being stipu- ent of his failure "to pay the balance of the purchase- certain date, the deposit should "be forfeited to" the isfaction of all causes of action, and the purchaser shall ı to endorse the deposit-receipt" for the money. The complete the purchase by payment of the purchase price. s were entitled, without going into any proof of damage, ɔy deposited. Commercial Bank of Scotland, Limited, 90, p. 80.

ɔlisher.
ıng, Lord Rutherfurd Clark, and Lord Trayner) that the ı author and a publisher, by which the publisher takes profits are halved, is a contract of sale of the right to of the book to which the contract refers. Cunningham ewart's Trustee, Jan. 29, 1891, p. 460.

—*Lex loci actus.*
1888 an agreement was entered into in New York be- behalf of Hannay, of Glasgow, the inventor of a new ıg white lead, and Shedlock and Hudson, of New York, ɔentions for the two Americas, and to designate to them aid process" upon certain terms. The agreement was ned by Hannay at Glasgow subject to certain conditions ɔd in writing by Shedlock and Hudson at New York. rought an action of damages in Scotland against Hannay ad sold his rights in connection with the invention, and d the agreement, *held* that as the agreement was made w York, its validity and meaning fell to be determined York. Shedlock v. Hannay, March 11, 1891, p. 663.

ɔe of heritage. Dowie v. Tennant, June 23, 1891, p. 986.

ɔ pamphlet—Drawings.
a certain kind of cement for increasing the strength of ɔ them damp-proof, issued a pamphlet of twelve pages ment, in which were set forth the virtues of his cement, of construction to which it was applicable, and the ɔ it. This pamphlet, which was registered under the ıd 6 Vict. c. 45), contained a drawing of a double brick wo single brick walls with a small space between them, inclined on the top of one of the walls to guide the ɔity between the two. Another manufacturer issued a ɔ forth the virtues of his cement for increasing the

COPYRIGHT—*Continued.*
strength of walls and rendering them damp-proof. He mentioned several kinds of construction to which it was applicable, which had been mentioned by the other manufacturer, and to illustrate the method of application he gave a drawing of a brick wall at the same angle of perspective, with the same number of courses of bricks, and with a tray inclined on its top at the same angle and with the same supports as in the other person's drawing. The former manufacturer having brought an action of interdict on the ground of infringement of his copyright in the pamphlet, *held* that the nature and extent of the similarity between the text and the illustration of the two advertisements were not such as to constitute any infringement of copyright. White v. Briggs, Dec. 10, 1890, p. 223.

Copyright of design—Patents, Designs, and Trade-Marks Act, 1883—*Extra-territorial effect—Infringement.*

2. *Held* that the copyright of design, which is protected under the Patents, Designs, and Trade-Marks Act, 1883, has no extraterritorial effect, and that the manufacture and sale by British subjects in a foreign country of goods, the design of which is protected under the statute, is not an infringement of that copyright. Potter & Co. v. Braço de Prata Printing Co., Limited, Feb. 6, 1891, p. 511.

CROFTER. See *Jurisdiction*, 5—*Lease*, 6, 7, 8, 9.

CURATOR BONIS. See *Judicial Factor*, 4, 5, 6, 7, 8.

DEAN OF GUILD. See *Burgh*, 1 *to* 6, 8.

DEATHBED. See *Heritable and Moveable*, 4—*Prescription*, 3—*Succession*, 10, 11—*Trust*, 5.

DELIVERY. See *Right in Security*, 2.

DEPOSIT. See *Bank*, 1.

DILIGENCE. *Service—Messenger-at-arms.*

1. Warrant *granted* to sheriff-officers to execute a diligence in respect that there was no resident messenger-at-arms. North of Scotland Bank, Limited, Jan. 27, 1891, p. 460.

Meditatio fugæ—Debtors Act, 1880, *sec.* 4—*Contingent debt.*

2. *Held* that the rule of the common law that a debtor cannot be apprehended as being *in meditatione fugæ* if imprisonment is incompetent on account of the debt which he owes, applies to cases in which imprisonment has been rendered incompetent by the above Act.

Question whether such diligence could in any case be used in respect of a contingent debt. Hart v. Anderson's Trustees, Nov. 28, 1890, p. 169.

See *Bill of Exchange*, 1—*Reparation*, 20 *to* 24.

DISCHARGE. *Confusio—Right in security—Ground-annual.*

1. A lady, by trust-disposition and settlement, directed her trustees to dispone certain heritable subjects to a person named, "under burden of any heritable securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it." Prior to the date of her settlement the truster had obtained assignations to the only ground-annuals affecting the subjects. She subsequently paid up a bond affecting the subjects, and took an assignation thereto. *Held* (1) that the bond had been extinguished *confusione*, and that the disponee was entitled to the property free of the burden of this bond, but (2) that he must take the property under burden of the ground-annuals, that being the intention of the truster as expressed by her settlement. Murray v. Parlane's Trustee, Dec. 18, 1890, p. 287.

Implied discharge—Annuity.

2. A widow was entitled under her marriage-contract to an annuity from her husband's estate. In an action by her for payment of certain half-yearly portions of this annuity her husband's trustees admitted that during the

she had not received the annuity directly, but stated
eriod she had resided with her husband's mother, who
the estate, that the money had been paid to the latter,
ıer had agreed to her maintenance during that period
ıer annuity. They produced a minute of a meeting of
ıtees, of whom the pursuer was one, and at which she was
ıute, which was not signed by the pursuer, bore,—"This
ton stated, had not been paid directly to her, but as she
y with the late" mother-in-law, "out of whose funds and
'anton's property the house expenses were defrayed, she
the annuity be set off against her maintenance." The
hat she did not understand what took place at the meet-
never agreed to give up her claim to the annuity during
ed with her mother-in-law. Parole evidence was led to
suer acquiesced in and approved of the manner in which
ıeen applied. The trustees also produced eleven receipts
'ments of the annuity subsequent to the death of the hus-
Held that no intention to discharge the trustees had been
ı v. Panton's Trustees, March 19, 1891, p. 728.

ıes for personal injury.

*eller, who had been injured in a railway accident, accepted
ı the railway company, and granted them a receipt bearing
accepted by him "in full of all claim competent" to him
y and loss sustained by him in the accident in question.
nths after granting this receipt he raised an action of
he company concluding for £5000. The company pleaded
the terms of the receipt they were entitled to be assoilzied.
e was led—as to the pursuer's state of mind and body at
ng the receipt, and at the time of the proof—as to the in-
in giving and taking the receipt, and—as to the capacity
understand it. The pursuer at the time of granting the
isited by the railway company's surgeon, but not by any
y himself. He had no external injuries, but had sustained
He had no legal advice, and the receipt was granted nine
ident. The Lord Ordinary awarded him £500, and to
Second Division adhered. The House of Lords, being of
riting signed by the pursuer was a discharge, that there
ıt on the part of the railway company to mislead the pur-
capable of understanding the meaning of the writing, and
ı no understanding between him and the person who acted
at there was any reservation of claims made by the pur-
the discharge was granted*, reversed *these judgments and
ders.* North British Railway Co. v. Wood, July 2, 1891,

Bill of Exchange, 4.

iction, 3.

ion, 13.

*ehold Franchise—Tenant and Occupant—Lease—Valua-
usive on question of occupancy—Representation of the
sec.* 5.

oprietor, became tenant, in 1885, under a lease for seven
premises used for the printing and publication of his
887 the business was converted into a limited company,
ging director and editor, and occupying, by arrangement
ectors, a room on the premises of the annual value of
r his editorial work, as well as for his own private busi-
he was entered on the Valuation-roll as tenant and

ELECTION LAW—*Continued.*

occupier of the premises. The rent and taxes of the premises were paid by the company to the landlord, who was also secretary of the limited company, but there was no assignation of the lease to the company. *Held* that M. was entitled to remain on the roll as tenant and occupier of the premises. Mackenzie v. Fraser, Dec. 20, 1890, p. 346.

Household Qualification—"Inhabitant occupier"—Residence—Representation of the People Act, 1884, *secs.* 2 *and* 7, *subsec.* 4—*Representation of the People Act*, 1868, *sec.* 3.

2. A person whose principal residence was in Glasgow, resided for three or four months in summer in a cottage, at a rent of £3 a-year, in Arran. He did not sublet the cottage, and kept it locked up when he was not living in it. *Held* that he was not entitled to be entered upon the Valuation-roll as an inhabitant-occupier of the cottage in the sense of the Representation of the People Acts, 1868 and 1884. Stewart v. M'Fadzean, Dec. 20, 1890, p. 349.

Burgh Occupation Franchise—Residence within burgh—Sheriff-substitute necessarily resident out of burgh—Sheriff Courts (Scotland) Act, 1838, *sec.* 5—*Reform (Scotland) Act*, 1832.

3. The Sheriff-substitute of Forfarshire, at Dundee, claimed to be entered on the roll of voters for the burgh of Edinburgh under section 11 of the Reform (Scotland) Act, 1832, as owner of a house in Nelson Street, Edinburgh. Except in the month of April (when he resided almost continuously in Edinburgh) he occupied lodgings in Dundee during eleven days and nights out of each fortnight, and during the remaining three days and nights of each fortnight he resided in Northumberland Street, Edinburgh, in which his wife and family resided. *Held* that he must be assumed to be resident in Dundee in compliance with the provisions of the Sheriff Courts (Scotland) Act, 1838, and that therefore his residence in Edinburgh was only incidental, and did not entitle him to be enrolled as a voter. Smith v. Falconer, Dec. 20, 1890, p. 343.

Burgh Occupation Franchise—Combination of period of occupancy as lodger with period of occupancy as tenant—Representation of the People Act, 1868.

4. A period of occupancy as lodger cannot be combined with a period of occupancy as tenant and occupant of a dwelling-house within burgh so as to entitle the occupant to the burgh occupation franchise under the Representation of the People Act, 1868. Falconer v. Lessels, Dec. 20, 1890, p. 351.

Burgh Franchise—Lodger—Residence—Absence from lodgings during part of the year—Representation of the People Act, 1868, *sec.* 4.

5. A son occupied, as a lodger, rooms of the statutory value in his father's house, for which he paid rent to his father, residing in them during nine months of the year. During the remaining three months he was absent in the country, and the house was shut up, but he had access to it at any time he desired. *Held* that he had been resident during the statutory period required by the 4th section of the Representation of the People (Scotland) Act, 1868. Falconer v. Dunlop, Dec. 20, 1890, p. 342.

Burgh Franchise—Lodger—Occupancy "separately and as sole tenant"—Representation of the People Act, 1868, *sec.* 4.

6. A son, as a lodger, paid his mother rent for the exclusive use of a bedroom, and for the joint use with her of other rooms. The clear annual value of his rights of use or occupation was sufficient, but the value of the bedroom taken alone was insufficient. *Held* that he did not occupy lodgings of the statutory value "separately and as sole tenant," and was therefore not entitled to the franchise under the 4th section of the Representation of the People (Scotland) Act, 1868. Gray v. Deuchar, Dec. 20, 1890, p. 341.

County Franchise—Household Franchise—Payment of rates—Failure to pay—Notice—Representation of the People Act, 1884, *sec.* 2, *and sec.* 7, *subsec.* 4—*Representation of the People Act*, 1868, *secs.* 3 *and* 18.

7. In the parish of C it was the practice to assess the owner of premises where

ELECTION LAW—*Continued.*

the rental was under £4 for the tenant's share of parochial rates, leaving it optional to the owner to recover from his tenant the latter's share of the rates. In such cases no assessment notice was sent to the tenant, although his name appeared on the Valuation-roll for the assessment leviable in respect of his tenancy. R. was tenant of a house of the value of £3, 10s. in the parish of C., and, though he had never paid rates, he had been entered upon the roll as an inhabitant-occupier, and tenant of the house. In 1890 the owner was exempted by the parochial board from payment of rates, but no notice of assessment was sent to R. An objection was taken to R.'s name remaining on the roll in respect he had failed to pay poor-rates in the sense of section 3 of the Representation of the People (Scotland) Act, 1868. *Held* that R. was not disqualified, as no statutory notice of assessment had been sent to him in terms of section 18 of that Act. Neilson, Dec. 20, 1890, p. 338.

County Franchise—Service Franchise—Son working on father's farm with no contract of service—Representation of the People Act, 1884, *sec.* 3.

8. A son worked as a farm-servant upon his father's farm but without any contract of service. He took his meals in family with his father and received from him what money he required from time to time. He had the exclusive use, rent free, of a room in a cottage on the farm which was occupied by his grandmother, who paid no rent for the house to the father. *Held* that he was not entitled to be entered upon the roll as an inhabitant-occupier by virtue of "service" under section 3 of the Reform Act, 1884, as there was no proof that his occupancy was connected with service. Aitchison v. Lothian, Dec. 20, 1890, p. 337.

ENTAIL. *Heir in possession—Provisions to children, authority to charge fee and rents with, by bond and disposition in security—Entail Amendment Act*, 1848, *sec.* 21.

1. A deed of entail, dated in 1769, conferred power upon heirs of entail to grant provisions to their younger children, "to affect the rents of the lands, . . . such provision to be given by each heir of tailzie to his or her children, . . . not exceeding three years' rent of the estate, and which provisions shall only affect the persons of the succeeding heirs of tailzie possessing the estate and the rents thereof, to the extent of one-half of whatever the heir does possess yearly, and any estate, real or personal, belonging to them, other than the said entailed estate or rents thereof, until the provisions given in manner foresaid to the children of the former heirs of entail shall be satisfied and paid, at least shall affect the same no further than to the extent of what shall have been paid, or otherways extinguished of the provisions given to the children of the former heir, so that the whole provisions shall at no time exceed the sum of three years' rent." In 1818 A, the heir of entail then in possession, granted a bond of provision to his younger children to the amount of three years' rents. B, the succeeding heir, possessed from 1820 to 1859 without having paid off any of the bond. C, the next heir, having in 1889 presented a petition for disentail, the question arose whether the bond was one which could be made to affect the fee of the estate under sec. 21 of the Rutherfurd Act. C contended that it could not, in respect that it was not intended to be a permanent burden, but to be paid off each year by the heir in possession to the amount of one-half of the rents, and that B's representatives were liable for the debt. *Held* that the bond was one which could have been made to affect the fee of the estate under sec. 21 of the Rutherfurd Act, and that it fell to be paid by the disentailer. Jardine v. Grant, June 2, 1891, p. 870.

Disentail—Obligation to secure descent of estate undertaken in marriage-contract—Entail (Scotland) Act, 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 17.

2. By antenuptial marriage-contract dated in 1870, an heir of entail in possession made the provisions allowed under the Aberdeen Act for "the child or children to be procreated of the said intended marriage, who shall not succeed to the said entailed lands." It was also declared that the "provi-

ENTAIL—*Continued.*

sions before written to children of the said intended marriage are hereby declared to be in full satisfaction to the whole children of the said intended marriage (including the heir who will succeed to the foresaid entailed lands and estates) of all bairns' part of gear, legitim," &c. The deed contained no provision in favour of the child who should succeed to the entailed estate. It was provided that "execution shall pass hereon at the instance" of certain persons named "for the implement of the whole provisions hereinbefore written, conceived in favour of" "the child or children of the said intended marriage." There were no children born of the marriage, but the spouses were still alive when the husband brought a petition for disentail of the estates without having obtained the consent of the persons appointed under the deed to see its provisions implemented. *Held* by Lord Low (Ordinary) that there was no obligation in the marriage-contract securing the descent of the estates upon issue of the marriage, and therefore that the consent of these persons was not required. Pringle v. Pringle, June 12, 1891, p. 895.

Disentail—Expectancy of substitute heirs—Valuation of estate.

3. In a question between an heir of entail petitioning for disentail and substitute heirs as to the value of the estate, *held* that the estate fell to be valued at twenty-six years' purchase, the average value of estates in the district, although the estate in question was in a dilapidated condition. Pringle v. Pringle, June 12, 1891, p. 895.

Disentail—Entail Act, 1882.

4. The conditions upon which the Court is authorised to dispense with the consent of an heir under the above Act are imperative, and must be strictly complied with. Baird v. Baird, July 15, 1891, p. 1184.

See *Sale*, 5, 6, 7.

ERROR. *Issue—Fraud—Reduction—Essential error induced by misrepresentation—"Falsely and fraudulently."*

In a trust-settlement the testator directed that the residue of the estate should "be under the control and at the disposal of my said executor, W. P." W. P. founded on the settlement as giving him a beneficial right to the residue. In an action of reduction of the trust-settlement raised against W. P. by a brother of the deceased the pursuer averred that the deceased had signed the deed under essential error as to its import and effect induced by the false and fraudulent representations of the defender—that the deed merely appointed him the trustee or manager of the estate, and that the pursuer and other relatives were to have the beneficial interest therein. The pursuer contended that he was entitled to an issue of essential error induced by the defender's misrepresentations. *Held* that the issue must bear essential error induced by the defender's false and fraudulent representations. Collie v. Pyper, Jan. 20, 1891, p. 419.

EXECUTOR. *Appointment.*

In a holograph settlement the testator appointed a person, naming him, "judicial factor, to carry out the purposes of this trust." *Held* that the person so named was entitled to be confirmed as executor-nominate. Tod, Nov. 25, 1890, p. 152.

EXPENSES. *Appeal.*

1. Petition for interim execution pending appeal. Expenses of petition and of extract. King, Brown, & Co. v. Anglo-American Brush Electric Light Corporation, Limited, Feb. 7, 1891, p. 540.

Shipping casualty appeal.

2. In an inquiry at the instance of the Board of Trade, the Court, while refusing an appeal by the master against a suspension of his certificate, *found* no expenses due, as the bulk of the evidence led and printed related to a portion of the case which was departed from by the Board of Trade when the case came before the Court of Session. Brown v. Board of Trade, Dec. 18, 1890, p. 291.

EXPENSES—*Continued.*

Arrestments on the dependence—Recall.

3. A defender, against whom arrestments on the dependence had been used, after decree paid the whole sum decerned for. The pursuer having refused extrajudicially to loose the arrestments, the defender presented a petition for that purpose. *Held* that the defender was not entitled to recover from the pursuer the expense of the petition. Roy v. Turner, March 18, 1891, p. 717.

Party conducting his own case.

4. *Held* that a party to an action residing at a distance from the seat of the Court who conducts his own case personally and is found entitled to expenses is not entitled to charge against the opposite party anything in respect of personal expenses while absent from his home attending the litigation. Forbes v. Whyte, March 17, 1891, p. 688.

See *Process*, 6, 7, 9—*Ship*, 10.

FISHING. *Salmon-fishing—Fixed Engine—Net.*

1. Net which was held not to be a "fixed engine," and mode of fishing which was held not illegal. Earl of Wemyss v. Earl of Zetland, Nov. 18, 1890, p. 126.

Salmon-fishings—Property—Title—Barony—Cruive.

2. In an action brought in 1889 by the Duke of Argyll for declarator that he had right to salmon-fishings in the River Awe *ex adverso* of the lands of E on the south or left bank of the river, with the exception of certain pools, the pursuer founded on a crown charter of novodamus of 1667 which contained a grant of the barony of Lochow with the salmon-fishings. The lands of E formed part of the barony of Lochow, and had been feued to the defender's authors under reservation of the fishings in the Awe. It was not disputed that the defender had had possession of the salmon-fishings in question for upwards of forty years. The defender pleaded that the pursuer had no title to sue, and, on the merits, founded on a crown charter of confirmation of 1727, conveying to a predecessor the barony of Kilmaronaig, described as "comprehending," *inter alia*, the lands of Ardchonnel "cum salmonum piscatione aquae de Awe vizt. tractus (lie) draughts salmonum de Polindownan et Polinstuck, et tractus (lie) draughts salmonum de Cruback, et tractus (lie) draughts salmonum de Sanluip jacen in aqua et ore ejusdem cum omnibus earundem privilegiis et pertinen, atqe. (lie) cruives super dictam aquam de Awe." It appeared from the charter of erection of the barony of Kilmaronaig that the lands of Ardchonnel and the Awe fishings attached thereto were not included in the barony; Kilmaronaig and Ardchonnel were both distant from the River Awe. *Held* (1st) that the pursuer's charter of novodamus of 1667 was a valid grant of the barony of Lochow with the salmon-fishings thereof, and by implication included salmon-fishings in the Awe, where it adjoined the lands of the barony, up to the *medium filum* of the river; (2d) that the defender had no title to which his possession of the salmon-fishings could be ascribed, in respect (1) that the defender's crown charter of confirmation of 1727, being merely a charter by progress, did not incorporate the lands of Ardchonnel and the fishings in the Awe with the barony of Kilmaronaig, so as to give the defender a barony title to salmon-fishings in the Awe; (2) that the defender's title to the barony of Kilmaronaig could not be connected with his possession of salmon-fishings at a distance from it; and (3) that the defender's title to the lands of Ardchonnel with the salmon-fishings specified could not be construed by possession into a general grant of salmon-fishings, but was limited to the pools and cruives mentioned. Duke of Argyll v. Campbell, July 9, 1891, p. 1094.

FOREIGN. *Jurisdiction—Contract—Lex loci actus.*

1. On 16th November 1888 an agreement was entered into in New York between Duncan on behalf of Hannay, of Glasgow, the inventor of a new process for producing white lead, and Shedlock and Hudson, of New

FOREIGN—*Continued.*

York, "for sale of said inventions for the two Americas, and to designate to them power to handle said process" upon certain terms. The agreement was subsequently confirmed by Hannay at Glasgow subject to certain conditions which were accepted in writing by Shedlock and Hudson at New York. The latter having brought an action of damages in Scotland against Hannay in respect that he had sold his rights in connection with the invention, and had thereby violated the agreement, *held* that as the agreement was made and executed in New York, its validity and meaning fell to be determined by the law of New York. Shedlock v. Hannay, March 11, 1891, p. 663.

Trust—Administration of trust—Jurisdiction of English Court to determine right of administration of English heritage belonging to a Scotsman.

2. A testator, domiciled in Scotland, conveyed to trustees his whole estate, consisting in part of English heritage, and gave them powers of sale. He declared that he desired his affairs to be administered and wound up, as far as practicable, in accordance with the law of Scotland. He left, among other legacies, three legacies to a nephew, who was his heir, and directed that the residue of his estate should be divided among charities. By the English Statute of Mortmain charities cannot take heritage or the proceeds of heritage under a *mortis causa* deed. The trustees raised an action in the Scots Courts, with a conclusion, *inter alia*, for declarator that they were entitled to call upon the heir, as a condition of taking the English heritage, to bear a rateable proportion, corresponding to the value of the real estate, of the whole debts, legacies, and bequests made by the testator, with a view of dividing, under their own administration in Scotland, the whole estate, so as to carry out, as fully as possible, all the trust purposes. The heir thereupon took proceedings in the English Court for the purpose of ascertaining his rights to the English estate, and for obtaining administration of the testator's real and personal estates, but only in so far as it might be necessary or proper for the purpose of obtaining for himself the English real estate free of all liabilities. The Scots Court *sisted* procedure in the declarator, to await the decision of the English Court as to the right to administer the English heritage. Hewit's Trustees v. Lawson, March 20, 1891, p. 793.

Agent and Principal.

3. Although there may be a general usage in the foreign trade which raises a presumption that a British commission-merchant contracts as a principal and not as agent for a foreign trader, the presumption will give way to evidence that the commission-merchant is acting as agent for a foreign trader, and when this is so, the law of principal and agent will apply. Bennett v. Inveresk Paper Co., June 19, 1891, p. 975.

Succession—Interpretation of Settlement—Lex domicilii—Lex loci actus.

4. Questions as to the interpretation of a *mortis causa* deed disposing of moveable estate must be solved by the law of the domicile of the granter of the deed, unless the deed shall disclose an intention on the part of its granter that some other law should be invoked. Circumstances which were held to be insufficient to displace the general rule. Smith v. Smiths, July 3, 1891, p. 1036.

Copyright of design—Patents, Designs, and Trade-Marks Act, 1883—*Extraterritorial effect—Infringement.*

5. *Held* that the copyright of design, which is protected under the Patents, Designs, and Trade-Marks Act, 1883, has no extraterritorial effect, and that the manufacture and sale by British subjects in a foreign country of goods, the design of which is protected under the statute, is not an infringement of that copyright. Potter & Co. v. Braço de Prata Printing Co., Limited, Feb. 6, 1891, p. 511.

See *Husband and Wife*, 3—*Jurisdiction*, 1, 2, 3, 4, 6—*Process*, 11.

FRAUD. See *Bank*, 3—*Company*, 4, 7, 14—*Error.*

GROUND-ANNUAL. See *Discharge*, 1.

GUILD, DEAN OF. See *Burgh*, 1 *to* 6, 8.

HARBOUR. *Bye-law of harbour trustees—Greenock Port and Harbours Act*, 1866, *sec.* 93—*Harbour, Docks, and Piers Clauses Act*, 1847, *sec.* 83.

Greenock Harbour Trustees made a bye-law purporting to regulate the speed of vessels in the fairway of the navigable channel of the River Clyde *ex adverso* of the harbour works. *Held* that as the fairway of the navigable channel of the River Clyde *ex adverso* of the harbour works was not within the harbour, the bye-law was *ultra vires* of the trustees under the above Acts. Kerr v. Auld, Dec. 19, 1890, Just. Cases, p. 12.

See *Ship*, 10, 11.

[ERITABLE AND MOVEABLE. *Succession—Heritable bond—Titles to Lands Act*, 1868, *sec.* 117.

. A truster directed her trustees to divide the residue of her "moveable means and estate" among certain persons, and, "with regard to the disposal and division or destination of" her "heritable estate," she directed it to be valued, and "divided, apportioned, and disposed of" to certain other persons. Besides other property, heritable and moveable, she died possessed of two bonds and dispositions in security in favour of herself and her executors or assignees whomsoever, and of a bond of annuity with disposition in security in favour of herself and her heirs or assignees whomsoever. *Held* that the three bonds were to be regarded as part of ıer moveable estate. Hughes' Trustees v. Corsane, Dec. 19, 1890, p. 299.

:ession—Jus relictæ—Heritable security—Titles to Lands Consolidation ct, 1868, *sec.* 117.

'estatrix directed her trustees "to hold, apply, pay, and convey the whole idue" of her estate for behoof of her three children. The trustees had ower to sell heritage, and to call up investments. One of the sons, who rived his mother, died after the residue had been divided with the exceof a heritable bond for £1500 which belonged to the deceased testatrix. question between the son's widow and daughter, *held* that the son's in the bond was a moveable *jus crediti*, and was subject to *jus relictæ*. an v. Gilligan, Jan. 15, 1891, p. 387.

m—Conversion.

stances in which it was *held* that the exercise of a power of sale was nsable to the execution of the trust, and that therefore the heritage treated as moveable succession. Brown's Trustees v. Brown, Dec. , p. 185.

—Spes successionis—Deathbed.

nee's right to a *spes successionis* to heritable property, though *jus crediti*, is a heritable right, and was subject to the law of prior to its abolition. Thain v. Thain, July 18, 1891, p. 1196.

urchaser—Fixtures—Pictures.

on between the purchaser and seller of a mansion-house, *held* ıre, valued at £100, painted on canvas, and inserted as a panel ire-place in the dining-room, was moveable, although its removal d a stone and lime wall. Cochrane v. Stevenson, July 18,)8.

FE. *Promise to marry—Mora—Acquiescence.*

f damages raised in 1889 for breach of a promise to marry e been made in 1879, the defender admitted the promise, but he pursuer's claim was barred by *mora* and acquiescence. It fore a jury that from 1881 till the raising of the action, the ı living in the same town as the defender, had hardly ever efender, and when passing him in the street simply recog- in 1885, hearing that he was engaged to another woman ed in 1889), she wrote to her intimating her prior engage- returned a verdict for the pursuer. On a motion for a

HUSBAND AND WIFE—*Continued.*
new trial, the Court *refused* to disturb the verdict. Colvin v. Johnstone, Nov. 14, 1890, p. 115.

Married Women's Property Act, 1881, *sec.* 6—*Marriage prior to Act—Jus relicti.*

2. By antenuptial marriage-contract, entered into in 1862 a wife conveyed to trustees her whole estate, heritable and moveable, for payment of the free yearly income to herself during her life, exclusive of her husband's *jus mariti* and right of administration, and after her death for payment to her husband of an alimentary liferent of it, which was to cease on his entering into a second marriage. On the death of the spouses the capital was to be conveyed and paid to the issue of the marriage, if any, and failing them, to the wife's "own heirs whomsoever." The wife predeceased her husband, and there were no issue of the marriage. She left no further writing disposing of her estate. The husband took no benefit from his liferent, and married a second time shortly afterwards. In a special case, to which the husband and the wife's next of kin were parties, *held* that the former was entitled, under section 6 of the Married Women's Property Act, 1881, to take one-half of his wife's estate. Simons' Trustee v. Neilson, Nov. 20, 1890, p. 135.

Surrogatum—Donation inter virum et uxorem—Foreign—Sale of English heritage belonging to wife.

3. *The wife of a domiciled Scotsman, with her husband's concurrence, sold the estate of X, in England, belonging to her, and acknowledged the conveyance before two commissioners in terms of the Act* 3 *and* 4 *Will. IV. cap.* 74, *for the Abolition of Fines and Recoveries, declaring at the same time that she intended to give up her interest in the estate without having any provision made for her in lieu thereof. Her husband received the price and applied it to his own uses. The spouses afterwards separated by mutual consent, and the wife executed a deed of revocation of all donations and provisions made by her in her husband's favour. She then brought an action against him for declarator that the* £18,000 *in his hands was either* (1) *a* surrogatum *for her heritage, and not subject to the* jus mariti, *or* (2) *was a donation to him which she had validly revoked.* Held (rev. *judgment of First Division*) *that by the law of England the husband on his marriage acquired an estate in his wife's heritage, so that at the date of the sale the estate was the heritable estate of the husband as well as of the wife, and that the price could not be regarded as a* surrogatum *for her estate.* Welch v. Tennent, July 28, 1891, H. L., p. 72.

Parent and Child.

4. Custody of Child—Expenses. Hutchison v. Hutchison, Dec. 19, 1890, p. 237.

Process—Reponing—Decree in absence.

5. In an action of separation and aliment by a wife against her husband, the summons was served personally on the defender, and notice of the diet of proof was sent to him by registered letter. He did not lodge defences nor appear at the diet of proof, but decree having been pronounced against him, he lodged a reclaiming note. The pursuer objected to the competency of the reclaiming note and pleaded that the only competent course for the defender was to bring a reduction of the decree. The Court *remitted* to the Lord Ordinary to repone the defender upon such terms as to his Lordship should seem fit. Whyte v. Whyte, Jan. 31, 1891, p. 469.

Bankruptcy—Debt by husband to wife—Married Women's Property Act, 1881, *sec.* 1, *subsecs.* 1 *and* 4.

6. A husband six days prior to his sequestration granted to his wife a promissory-note, payable one day after date, for £1370, as the amount of sums lent to him at various times by his wife out of her separate estate. On the same day the wife assigned the promissory-note and the sum contained therein to a relative in consideration of a payment of £50. The wife's assignee thereafter lodged a claim for £1370 in the husband's sequestra-

HUSBAND AND WIFE—*Continued.*

tion. *Held* that, having regard to subsecs. 1 and 4 of sec. 1 of the Married Women's Property Act, 1881, the wife's assignee was only entitled to be ranked upon whatever assets might remain after the whole claims of the ordinary creditors of the bankrupt had been satisfied. Cochrane v. Lamont's Trustee, Jan. 24, 1891, p. 451.

See *Heritable and Moveable*, 2—*Marriage-contract.*

INNUENDO. See *Reparation*, 13, 16, 18, 19.

INSANITY. See *Judicial Factor*, 5—*Process*, 11.

INSURANCE. *Marine insurance—Collision clause—Vessel under tow—Damage caused by tug to stranger ship.*

In a policy of marine insurance the underwriters insured the ship "Niobe" "from the Clyde (in tow) to Cardiff . . . while there and thence to Singapore," and agreed "that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel . . . any sum or sums of money, . . . " to pay the insured a certain proportion of the sum so paid. Through the fault of the "Niobe" and of her tug the latter came into collision with and sunk another vessel, whose owners recovered damages both from the "Niobe" and the tug. In an action by the owners of the "Niobe" upon the policy against one of the underwriters for payment of his proportion of the sum paid by the pursuers on account of the collision, the defender pleaded that under the policy he was only liable for damage arising from collision with the "Niobe." Held (aff. *judgment of Second Division*), diss. *Lord Bramwell, that in maritime usage the word "ship" was frequently understood to cover a ship and the tug by which it was towed, and that it fell to be construed in this sense in the collision clause of the policy, and that the defender was liable.* M'Cowan v. Baine & Johnstone, July 27, 1891, H. L., p. 57.

See *Arbitration*, 3.

INTERDICT.

It is not a ground for refusing to enforce an established right by interdict that the granting of interdict will cause inconvenience or pecuniary loss to the person resisting the granting of the interdict out of all proportion to the loss which would result to the other party from refusing interdict. Bank of Scotland v. Stewart, June 19, 1891, p. 957.

See *Mines and Minerals*, 3.

INTEREST. See *Succession*, 22, 23.

ISSUE. See *Error—Reparation*, 12, 15, 18, 19, 21, 22.

JUDICIAL FACTOR. *Factor loco tutoris—Appointment of Mother—Guardianship of Infants Act*, 1886, *secs.* 2 *and* 8.

1. *Held* where a father had died without nominating tutors for his pupil children, that it was not competent to appoint the mother as factor loco tutoris to them, as she was already by operation of the above enactment their tutor. Willison, Dec. 11, 1890, p. 228.

Factor loco tutoris—Father's duty as administrator-in-law of pupil child.

2. A father presented a petition for the appointment of a factor loco tutoris to his daughter—in respect of a sum of £9000, to which she had right—with power to prosecute an action of damages for the loss of part thereof—on the ground that the petitioner's interests might conflict with those of his daughter in the prosecution of the action. The Court *refused* the petition on the ground that the petitioner had failed to shew that any conflict of interests would arise. Cochrane, Jan. 24, 1891, p. 456.

Factor loco tutoris—Parent and Child—Custody of child.

3. Circumstances in which authority was granted to a factor loco tutoris to detain the person of his ward in Scotland in opposition to the wishes of the ward's father, who was resident abroad. Moncreiff, July 1, 1891, p. 1029.

JUDICIAL FACTOR—*Continued.*

Curator bonis—Appointment pending brieve of cognition.

4. Circumstances in which the Court *appointed* the nearest agnate, who was suing a brieve of cognition, to be curator bonis to an insane person. Simpson v. Simpson, July 18, 1891, p. 1207.

Insanity—Insane delusion—Opposition of alleged incapax—Necessity for cognition or judicial inquiry.

5. *When a petition for the appointment of a curator bonis to a person alleged to be incapable of managing his own affairs is opposed by him, he is not entitled to demand cognition or a formal judicial inquiry at which witnesses shall be examined on oath, with an opportunity for cross-examination, before the appointment is made, but the Court is entitled to adopt what course it considers best to obtain the information necessary, and, if it sees fit, to proceed on the reports of medical men.*

The wife of a man who was detained in a lunatic asylum presented a petition for the appointment of a curator bonis to her husband. He opposed the petition, maintaining that he could not be superseded in the management of his affairs except under cognition upon a brieve from Chancery. He did not dispute the propriety of his being in the asylum, but stated that such delusions as he might labour under in no way interfered with his business capacity. The First Division, on a consideration of medical reports obtained by the petitioner, by the respondent, and by the Court, granted *the petition. On appeal judgment* affirmed. C B v. A B, June 25, 1891, H. L., p. 40.

Partnership.

6. By the contract of copartnery of a wholesale wine and spirit business it was provided that on a dissolution of the firm the business should be realised by one of the partners named with all convenient speed. This partner contributed no capital to the business. The firm was dissolved in 1888. In 1890 the remaining partners presented a petition for the appointment of a judicial factor on the partnership estates, averring that the partner whose duty it was to realise had been carrying on the business instead of realising. This averment he denied. The accounts were of consent remitted to an accountant, who reported that since the dissolution of the firm the business had been carried on as a going concern. The Court *appointed* an accountant to be judicial factor to wind up the business. Allan v. Gronmeyer, March 20, 1891, p. 784.

Investment—Personal liability.

7. A curator bonis lent funds belonging to his ward on the security of a tenement of houses and shops in a new street which was then in the course of formation in Dundee. When the loan was arranged the buildings were not nearly completed, but when the money was advanced the houses and shops were finished, and were for the most part let, but some workshops, of which the tenement also consisted, were unlet. The loan was made on a valuation by an architect of professional standing in Dundee, employed by the borrower. The valuation was made from plans, the buildings themselves not being examined. The security proved wholly inadequate to meet the loan. In an action by the executor of the ward against the curator bonis *held* that the security was not such as a trustee ought to have accepted, and that the defender was personally bound to replace the sum lent. Crabbe v. Whyte, July 7, 1891, p. 1065.

Process—Recall—Pupils Protection Act, 1849, *secs.* 1 *and* 31—*Distribution of Business Act, sec.* 4, *subsec.* 5.

8. *Held* (after consultation with the Judges of the First Division) that a petition for recall of the appointment of a curator bonis and for appointment of a new curator bonis is incompetent in the Inner-House, and must be presented to the Junior Lord Ordinary. Souter v. Finlay, Nov. 8, 1890, p. 86.

JURISDICTION. *Ownership of heritage in Scotland—Sale—Posting of conveyance.*

1. In a petitory action in the Court of Session against a domiciled American,

DICTION—*Continued.*
whom the pursuers averred to be the proprietor of heritage in Scotland, the defender pleaded no jurisdiction, averring that although he had been at one time the proprietor of such heritage he had sold it before the raising of the action. It appeared that in October 1889 the defender became proprietor of certain heritable subjects in Scotland; that by improbative missives, dated November and December 1890, he sold these subjects; and on 9th January 1891 he executed and on 12th January dispatched by post from America a conveyance of the subjects in favour of the purchaser; and that this conveyance did not reach the purchaser till after the service of the summons, which took place on 21st January. *Held* that as the transference of the subjects had not been completed until after the service of the summons the plea of no jurisdiction fell to be repelled. Dowie & Co. v. Tennant, June 23, 1891, p. 986.
tation—Meditatio Fugæ.
A domiciled Englishman resided in Scotland for six months for the purpose of managing an Exhibition for an association in Scotland. He became bound by a guarantee to contribute, if called upon, a certain sum to the funds of the exhibition, when it should come to be wound up at its close. After it had closed, and the association had gone into liquidation, and when he was about to return to England, he was apprehended as *in meditatione fugæ* at the instance of the liquidator as creditor under the guarantee, but was liberated on finding caution to answer any action to be brought against him for payment of the guarantee within a certain period, on being cited at the Sheriff-clerk's office, Edinburgh. In an action for payment of the guarantee, which was served at the house at which he had resided during his residence in Scotland within forty days of his leaving it, and also at the place of citation assigned under the bond of caution granted by him, he pleaded no jurisdiction, and stated that he was proceeding to reduce the *meditatione fugæ* proceedings as illegal. *Held* that the action being one to enforce a ground of action arising in Scotland, and the defender having (whether the *meditatione fugæ* proceedings were regular or not) undertaken to answer the action in the Scottish Court, on being cited at the place fixed in the bond, and the defender having been so cited, the plea must be repelled.

Question, whether jurisdiction, which has been acquired over a foreigner by forty days' residence in Scotland, endures for forty days after he has left Scotland. International Exhibition, 1890, v. Bapty, May 26, 1891, p. 843.
rum non conveniens—Succession—Domicile.
A Scotsman, who went in 1874 to reside in Manchester, in May 1889 executed a will in English form, in which he declared that his domicile was in England. He died in September 1889, and his executor obtained probate. The testator's only child having presented a petition in the Sheriff Court of Lanarkshire to have it found that the testator died domiciled in Scotland, and obtained interim interdict against the executor distributing the funds without providing for payment of legitim, the executor on 16th December 1889 obtained from the Chancery Division of the High Court of Justice in England an order that, *inter alia*, an inquiry should be made whether the testator was domiciled in England, and appointing a receiver to collect the estate. On 23d December 1889 the testator's daughter raised an action in the Court of Session, concluding for declarator that the testator was domiciled in Scotland, and that she was entitled to legitim. The Court, in respect that the question of domicile was before the Court in England, *dismissed* the action. Ferguson v. Buchanan, Nov. 15, 1890, p. 119.
ust—Forum non conveniens.
In an action by a legatee against two trustees who had taken out confirmation in Scotland under a Scotch trust-deed, the trustees pleaded no jurisdiction in respect that they were not resident in Scotland, and that the

JURISDICTION—*Continued.*

whole estate had been distributed twelve years before. The Lord Ordinary (Kyllachy) *repelled* the plea, holding that the jurisdiction once constituted against them by their obtaining confirmation, and acting as trustees under a Scottish trust, remained unaffected. M'Gennis v. Rooney, March 20, 1891, p. 817.

Forum conveniens—Action in Court of Session—Application to Crofters Holdings (Scotland) Act, 1886, *sec.* 6.

5. *Held* that the jurisdiction of the Court of Session to entertain an action by a proprietor for declarator and interdict against crofters whose holdings adjoined his lands, and who asserted that at the date of the Act they had rights of pasturage over his property, was not ousted by an application made by the crofters prior to the raising of the action, and still pending, to have fair rents fixed for their holdings under the Crofters Holdings (Scotland) Act, 1886. Duke of Sutherland v. Reed, Dec. 18, 1890, p. 252.

Arrestment jurisdictionis fundandæ causa—Possession—Liability to account.

6. Arrestments to found jurisdiction having been used in the hands of O., shipbroker, Bo'ness, Scotland, the defenders, who resided in Sweden, pleaded no jurisdiction in respect that no property had been attached. A proof established the following facts:—The property alleged to have been attached was a lot of twenty tons of iron shipped and consigned by the defenders to W. in England, to whom the defenders were indebted, and who was to sell the iron and apply the price in extinction *pro tanto* of the debt. The goods, through a misunderstanding, were brought to Bo'ness. O., the arrestee, was employed by the captain as ship's broker, and was instructed by W. to store the iron to his (W.'s) order. O. stored the iron in a shed belonging to the Harbour Commissioners, of which shed the Commissioners kept the key, and for the use of which they charged rent. The iron was not stored to anyone's order, it not being the practice of the Commissioners to allow that to be done, and O. could at any time have got possession of the iron on his personal application. The Court *sustained* the plea of no jurisdiction and *dismissed* the action, on the ground (1) that the iron *de facto* was in possession of the Harbour Commissioners and not of O. at the date of the arrestments, and (2) that, assuming O. to have been in possession of the iron, he was under no liability to account therefor to the defenders, but only to W. Young v. Aktiebolaget Ofverums Bruk, Nov. 27, 1890, p. 163.

Suspension—Exclusion of review—Small-Debt Act, 1837, *sec.* 30.

7. A summons in the Small-Debt Court set forth that the defender was owing to the pursuer £12, as per note of claim. The note of claim bore,—"To half year's rent due by the defender, payable in advance . . . £12." The Sheriff gave decree for £12. The pursuer's agent subsequently, in a letter to the defender's agent, admitted that the £12 was the year's rent, but he refused to depart from the decree, as the whole year's rent was due, and executed a poinding upon the decree. In a suspension, *held* that it was incompetent to review the Sheriff's judgment on the merits, and that nothing had occurred since the decree to warrant the Court to suspend diligence. Wilson v. Scott, Dec. 12, 1890, p. 233.

See also *Justiciary Cases*, 1 *to* 4.

Teind Court—Reduction of locality subject to qualification.

8. In 1888 the proprietor of the lands of B. obtained decree of approbation of a report by subcommissioners in 1630 valuing his teinds. In 1890 he brought a reduction of a locality approved final in 1868, in which a stipend in excess of the teinds as reported to be the value in the subvaluation of 1630 had been localled upon his lands. He sought to have the locality set aside as erroneous *ab initio*, on the ground that the teinds were valued by the subcommissioners in 1630, and that their report had been eventually approved by the Court of Teinds. The Court of Teinds *granted* decree of reduction, but the decree "to have effect only from and after the

JURISDICTION—*Continued.*

date of the decree of approbation, 16th July 1888, for the second half of the crop of 1888, and in all time coming." Lord Elibank's Trustees v. Hope, Jan. 23, 1891, p. 445.

Exclusion of Jurisdiction of Court of Session—Contagious Diseases (Animals) Act, 1878, *sec.* 30.

9. In an action against a Local Authority, by the owner of cattle slaughtered by their order, for compensation, the Local Authority founded on a minute of meeting after the date of the action in which they stated their opinion "that the pursuer had not adduced any reason to induce the Authority to pay compensation for these animals in regard to which it is alleged that an offence had been committed" and resolved to withhold compensation, and pleaded that the jurisdiction of the Court was excluded. The Court, in respect that the minute did not state that the defenders had ascertained and determined that the offences had been committed, *adjourned* the case to allow them to supply this defect in their determination, and on a subsequent minute of meeting being produced, setting forth a finding by them that the offences had been committed and their resolution to withhold compensation, the Court *sustained* the plea of no jurisdiction. Calder v. Local Authority of Linlithgow, Oct. 30, 1890, p. 48.

See *Burgh*, 1, 2, 3, 4, 6, 7—*Foreign*, 1, 2—*Ship*, 7.

JUS QUÆSITUM TERTIO. See *Property*, 3.

JUSTICE OF PEACE. See *Administration of Justice*, 1, 2.

JUSTICIARY CASES. *Review—Appeal—Small-Debts Act*, 1837.

1. In an action in the Sheriff Small-Debt Court for payment of £10 alleged to have been lent by the pursuer to the defender, the defender stated that the sum sued for had been given as a present to her by the pursuer. The Sheriff-substitute, on the pursuer's motion, took his oath, and refused to allow the defender to lead any evidence, and decerned against her for the sum sued for. The Court recalled the Sheriff-substitute's judgment, holding (1) that as the defender's admission that she had received the money from the pursuer was qualified by the statement that it was a donation, the Sheriff was not entitled to proceed upon the admission, and the pursuer's testimony that it was not a donation, and to exclude the defender's evidence; and (2) that the irregularity in the procedure was such as to make an appeal competent under the Small-Debt Act, 1837, sec. 31. Gordon v. Mulholland, Jan. 26, 1891, Just. Cases, p. 18.
2. In an action in the Small-Debt Court in which both parties appeared, the pursuer asked and obtained an adjournment on account of the non-appearance of his witnesses. At the adjourned diet the defender failed to appear, and decree was pronounced against him "in respect of his absence," with execution after a charge of ten free days. *Held* that there was no litiscontestation, that the decree was one in absence, and that the defender was therefore entitled to have execution sisted and his case reheard under section 16 of the Small-Debt Act, 1837. Montgomery v. Loughran, Feb. 2, 1891, Just. Cases, p. 25.
3. In an action in the Small-Debt Court by a wife against her husband concluding, *inter alia*, for expenses incurred in connection with a mutual deed of separation, the Sheriff-substitute at the first diet—both parties being present—remitted to the Auditor, before answer to report as to the law and practice with reference to the question as to a husband's liability for such expenses. After the report was lodged the pursuer enrolled the case, and intimated the diet to the defender. The defender appeared at the diet, but the pursuer failed to appear, and decree of absolvitor was pronounced in respect of her absence. She obtained a warrant for rehearing under section 16 of the Small-Debt Act, 1837, and on the case being reheard, decree was pronounced in her favour. *Held* (*per* Lord Wellwood) that there had been litiscontestation at the first diet, and that the

JUSTICIARY CASES—*Continued.*

decree of absolvitor was a decree by default, and not a decree in absence, and that the warrant for rehearing was therefore incompetent, and the decree for the pursuer *recalled*. M'Neill v. M'Neill, March 5, 1891, Just. Cases, p. 38.

4. The tenant of a house who had paid his last half year's rent due at Martinmas 1889, and whose tenancy did not expire till Whitsunday 1890, in January 1890 removed his furniture to a house in another town. The landlord raised in the Small-Debt Court a summons of sequestration in security of the rent to become due, and on the margin of the summons he wrote a minute in which he craved warrant to carry back the furniture to his house, in respect the tenant "had removed to another house the whole of the goods in the house, and subject to the pursuer's right of hypothec for the rent thereof due" in three months' time. No notice of these proceedings was given to the tenant. The Sheriff granted warrant as craved, and a sheriff-officer proceeded to the tenant's new abode and brought back the furniture to the landlord's house. The Court *recalled* the warrant, holding that the minute set forth no circumstances to justify the Sheriff in granting the warrant without notice to the defender. Johnston v. Young, Oct. 27, 1890, Just. Cases, p. 6.

Review—Appeal—Suspension—Competency—Revenue—7 and 8 Geo. IV. c. 53, sec. 79.

5. A person who had been convicted in a Justice of Peace Court of selling beer by retail without having obtained a certificate and excise licence, in contravention of the Act 24 and 25 Vict. c. 91, brought a suspension of the conviction on the ground that the Justices before convicting had seen and considered a previous conviction for a similar offence. The Court *refused* the bill, holding that although the High Court had notwithstanding the provisions of the Act 7 and 8 Geo. IV. c. 53, sec. 79, power to entertain suspensions in certain exceptional circumstances, the averment of the complainer was not such as to entitle him to that remedy. Mackenzie v. Martin, Jan. 26, 1891, Just. Cases, p. 16.

Review—Suspension—Want of citation—Irregularity—Summary Procedure (Scotland) Act, 1864—Schedule F.

6. A warrant of citation to appear before the Sheriff to answer a complaint under the Summary Jurisdiction (Scotland) Acts was executed by serving a copy of the complaint and of the Sheriff's warrant, but there was no formal citation to appear under the signature of the officer in terms of Schedule F of the Summary Procedure (Scotland) Act, 1864. The accused appeared at the diet specified in the Sheriff's warrant and was convicted. In a suspension *held* that as the accused had appeared at the diet he was barred from founding on the irregularity in the mode of citation. Stewart v. M'Niven, Feb. 2, 1891, Just. Cases, p. 36.

Review—Suspension—Relevancy—Specification—Mora.

7. *Held* that an objection to a complaint under the Summary Jurisdiction (Scotland) Acts, on the ground of want of specification of facts of which the accused is entitled to notice, which has not been stated before trial, cannot be entertained by the High Court in a suspension of a conviction on the complaint. Stewart v. M'Niven, Feb. 2, 1891, Just. Cases, p. 36.

Review—Suspension—Sentence—Award of expenses in excess of statutory amount.

8. In a sentence the accused was adjudged to pay a penalty and also a sum of expenses in excess of the amount fixed by statute. The Court suspended the sentence *quoad* the award of expenses but *quoad ultra* allowed the sentence to stand. Stewart v. M'Niven, Feb. 2, 1891, Just. Cases, p. 36.

Review—Appeal—Mandatary.

9. Right of appeal where accused is abroad, and no mandatary is within the jurisdiction. Williamson v. Geddes, June 8, 1891, Just. Cases, p. 55.

JUSTICIARY CASES—*Continued.*

Crimes and Offences—Bankruptcy—Bankruptcy Frauds and Disabilities Act, 1884, *sec.* 4—*Debtors Act*, 1880, *sec.* 13—*Credit obtained by undischarged bankrupt—Complaint—Relevancy.*

10. *Held* that it is not necessary to the relevancy of a complaint under section 4 of the Act of 1884 that the prosecutor should libel "intent to defraud," and that it is not necessary for the prosecutor to prove an intent to defraud.

Question whether the proviso in sec. 13 of the Act of 1880, "unless he prove . . . that he had no intent to defraud," was incorporated by reference into section 4 of the Act of 1884. Howman v. Mackie, Feb. 2, 1891, Just. Cases, p. 30.

Crimes and offences—Cruelty to animals—Dishorning cattle—Cruelty to Animals (Scotland) Act, 1850, *sec.* 1.

11. In a complaint against a cattle-dealer for a contravention of the Cruelty to Animals (Scotland) Act, 1850, alleged to have been committed in the dishorning of cattle, by sawing off their horns close to the skull, it was proved that the operation caused great pain to the animals operated upon, but that it was in common use over a large district in Scotland as the most effectual means of preventing the cattle goring one another when fed in courts. It was further proved that the operation was for the ultimate benefit of the cattle, and had been skilfully performed. *Held* that no offence had been committed under the statute. Todrick v. Wilson, March 13, 1891, Just. Cases, p. 41.

Crimes and offences—Poaching—Poaching Prevention Act, 1862.

12. *Held* that in order to justify a conviction under section 2 of the Poaching Prevention Act, 1862, it was not essential that the person in whose possession poaching implements and game are found should have been seen upon land in search of game or coming from land, but that the Sheriff or Justices are entitled to draw that inference from the possession of the poaching implements and game, and other facts in the case. M'Kenzie v. Lockhart, Oct. 27, 1890, Just. Cases, p. 1.

13. Circumstances in which it was *held* that a Sheriff was entitled to draw the inference that a carrier who had been found carrying in his cart a quantity of rabbits had been accessory before the fact to the act of poaching of the person from whom he had received the rabbits for carriage.

Question whether, if a carrier were found to have been "accessory" after the fact, it would warrant a conviction under the Act. Young v. Jameson, Jan. 26, 1891, Just. Cases, p. 20.

Crimes and offences—Intimidation—Complaint—Relevancy—Conspiracy and Protection of Property Act, 1875, *sec.* 7 (1).

14. A complaint charging J. M. with a contravention of the above Act set forth that the accused, with a view to compel A. C. to abstain from a work in which he was engaged, and which he had a legal right to do, "did wrongfully and without legal authority intimidate A. C. by threatening him while so working" with personal violence if he continued to work. *Held* that the complaint was relevant, although it did not state that the threat had the effect of inducing A. C. to abstain from work. Agnew v. Munro, Feb. 2, 1891, Just. Cases, p. 22.

Crimes and offences—Persuading seaman to desert—Person verbally engaged as storekeeper who had not signed articles—Merchant Shipping Act, 1854, *secs.* 2 *and* 257.

15. A, a storekeeper on a homeward bound vessel, was on her arrival formally discharged, but verbally re-engaged to act in that capacity for the vessel's next voyage, and also to remain by her and to attend to the stores while she lay in harbour. Before he had signed articles for the voyage, an attempt was made to induce him to leave the vessel by a delegate of a Seaman's Union. The delegate on being convicted of an offence under section 257 of the Merchant Shipping Act, 1854, appealed to the High Court of Justiciary on the ground that A was not a "seaman" within the meaning of section 2 of the Act, because he had not signed articles. *Held* that A

JUSTICIARY CASES—*Continued.*

was a seaman in the sense of the Act, and appeal dismissed. Thomson v. Hart, Oct. 27, 1890, Just. Cases, p. 3.

Crimes and Offences—Gaming—"Swindler"—Aberdeen Police and Waterworks Act, 1862, *sec.* 240.

16. A person was charged upon a complaint, which set forth that he "being a swindler within the meaning of the 240th section of the Aberdeen Police and Waterworks Act, 1862, was found in a public street exhibiting a wheel of fortune or some similar instrument for the purpose of inducing, and did induce and entice persons to play at a game of hazard." It was proved that the accused had exhibited a wheel of fortune at which eight persons simultaneously staked a penny each, the winner receiving fivepence, and the accused retaining threepence from the stakes as he had previously intimated. The magistrate convicted the accused. In an appeal, *held* that as there was no evidence that the accused was a swindler the conviction could not be sustained. Melvin v. Lamb, Nov. 3, 1890, Just. Cases, p. 10.

Crimes and offences—Contravention of bye-law of harbour trustees—Greenock Port and Harbours Act, 1866, *sec.* 93—*Harbour, Docks, and Piers Clauses Act*, 1847, *sec.* 83.

17. The Greenock Port and Harbours Act, 1866, by section 93 authorises the harbour trustees to make bye-laws, *inter alia*, "for regulating the conduct of the owners, masters, and crews of vessels propelled by steam with regard to the rate of speed at which they may proceed within the port and harbours." The Harbour, Docks, and Piers Clauses Act, 1847, sec. 83, provides that harbour trustees may make bye-laws for the purpose of "preventing damage or injury to any vessel or goods within the harbour or dock, or at or near the pier." Greenock Harbour Trustees made a bye-law purporting to regulate the speed of vessels in the fairway of the navigable channel of the River Clyde *ex adverso* of the harbour works. *Held* that as the fairway of the navigable channel of the River Clyde *ex adverso* of the harbour works was not within the harbour, the bye-law was *ultra vires* of the trustees. Kerr v. Auld, Dec. 19, 1890, Just. Cases, p. 12.

Procedure—Bail—Forgery—Charge admitted in declaration.

18. A person charged with the crime of forgery admitted the charge in his declaration. The Court *refused* his application for bail, holding that his confession had displaced the presumption of innocence upon which an application for bail is founded. Scott v. Her Majesty's Advocate, Dec. 27, 1890, Just. Cases, p. 15.

Procedure—Competency of leading evidence and convicting of common law offence where statutory offence charged—Criminal Procedure (Scotland) Act, 1887, *sec.* 62.

19. Section 62 of the Criminal Procedure Act, 1887, does not entitle the prosecutor to lead evidence to prove facts not libelled in the indictment, and thereafter to convict of a common law offence which had not been charged in the indictment. Markland v. Her Majesty's Advocate, June 8, 1891, Just. Cases, p. 50.

Procedure—Complaint—Specification—Coal Mines Regulation Act, 1887, *sec.* 49, *rule* 1.

20. A complaint in the Sheriff Court set forth that J. R. having, on 10th June 1890, been manager of a mine, and as manager having been responsible for the due observance in said mine of rule 1 of section 49 of the Coal Mines Regulation Act, 1887, "did, time above libelled, fail to constantly produce an amount of ventilation . . . adequate to dilute," &c. (the words of the rule being quoted without further specification), "in consequence whereof an explosion . . . took place in said level, whereby" certain persons were injured, and this J. R. did contrary to the said Act, sec. 49, rule 1. The Sheriff, after a proof, convicted the accused. The Court *quashed* the conviction on the ground that the complaint upon which

JUSTICIARY CASES—*Continued.*

it proceeded did not state in what respect the system of ventilation in use in the mine was defective, and that it had been proved that the injuries sustained by the miners had not been caused by anything but their own fault. Roberts v. Atkinson, Nov. 3, 1890, Just. Cases, p. 8.

Procedure—Complaint—Specification—Objection not taken at trial.

21. A person was charged with "an offence within the meaning of the General Police and Improvement Act, 1862." There was no specification of the section said to have been contravened, but the acts said to have constituted the contravention were set forth. The accused stated no objection to the complaint in respect of want of specification, and was convicted. In a suspension, the Court, on the ground of want of specification, set aside the conviction, holding that it was incumbent on the prosecutor to set forth the section said to have been contravened as well as the acts said to constitute the contravention. Whyte v. Robertson, July 17, 1891, Just. Cases, p. 56.

Procedure—Certificate—Record—Summary Procedure Act, 1864, *sec.* 16—*Infectious Disease (Notification) Act*, 1889, *sec.* 3, *subsec.* 1 (*b*).

22. *Held* that the failure of a magistrate to note in the record of the proceedings at a trial two documents put in evidence was fatal to the conviction which followed. Provan v. Malloch, June 8, 1891, Just. Cases, p. 53.

Procedure—Expenses—Summary Procedure Act, 1864, *sec.* 22—*Cruelty to Animals Act*, 1850, *sec.* 8.

23. In a complaint under the Summary Jurisdiction Acts, 1864 and 1881, for a penalty incurred by a contravention of the Cruelty to Animals Act, 1850, it was *held* (1) that there was in section 8 of the latter Act an implied power to the Judge in the inferior Court to award expenses against the accused, and therefore, (2) that it was competent to award expenses against the prosecutor. Todrick v. Wilson, March 13, 1891, Just. Cases, p. 41.

LEASE. *Constitution—Period of endurance—Validity.*

1. In an action praying for the removal of a tenant, on the ground that he had no title of possession, the defender founded on a written lease granted by a former proprietor, in which the term of endurance was mentioned only in a clause added at the end of the testing-clause, and on receipts for rent granted by the landlord, shewing that the defender had been in possession of the subjects. *Held* that to instruct a valid contract of lease it was sufficient for the defender to prove that the writing had been delivered to him by the landlord in its present form, and that he was entitled to prove this *pro ut de jure*. Barbour v. Chalmers & Co., March 3, 1891, p. 610.

House rendered uninhabitable owing to mineral workings of persons other than landlord—Reparation.

2. A lease of a house contained a stipulation that the landlord should keep the house wind and water-tight. The house was rendered uninhabitable during the currency of the lease by subsidence caused by the mineral operations of a coal company in the vicinity who were not tenants of the landlord, but who had encroached upon his minerals. The tenant raised an action against the landlord for the damage sustained by the landlord failing to keep the house wind and water-tight. The Court *assoilzied* the defender, holding that he was not bound to restore the subjects to a habitable condition, and was not liable in damages for failing to do so, the house having been destroyed by the fault of others for whom he was not responsible. Allan v. Roberton's Trustees, June 13, 1891, p. 932.

Power of resumption—Construction—Land and buildings.

3. In 1867 a landlord let to a tenant for nineteen years the farm of G., "with the cothouses and smithy at B." A small portion of the farm, including B., lay to the east of a certain public road. The lease reserved power to the landlord "to resume and take off such parts of the lands hereby let on the east side of" the road as he should think proper, on giving to the

LEASE—*Continued.*

tenant certain notice, and allowing him "for the ground so taken off a deduction from the rent at the rate of £6 per acre, besides the value of the unexhausted manure on such land." Upon this detached portion of the farm there were at the date of the lease certain cothouses and a smithy, and soon thereafter the tenant, with the landlord's consent, converted the smithy into a byre, and the landlord built another byre beside the cothouse. Thereafter the tenant sublet the buildings for a dairy. In 1884 the parties agreed to continue the lease, which was about to expire in 1886, upon substantially the same terms. The landlord in 1889 gave notice that he intended to resume the fields to the east of the road in terms of the clause of resumption, and the tenant, while willing to remove from the fields, declined to remove from the buildings. *Held* that the tenant was bound to remove both from the fields and from the buildings. Trotter v. Torrance, May 27, 1891, p. 848.

Removing—Process—Appeal—Act 6 Geo. IV. cap. 120, *sec.* 44.

4. Where a landlord obtained decree of removal against a tenant, on the ground that he had no title to possess, an objection was taken to the competency of an appeal, on the ground that suspension in terms of the 44th section of the Judicature Act was the only competent remedy. Objection *repelled.* Barbour v. Chalmers & Co., March 3, 1891, p. 610.

Long lease—Valuation of buildings at end of lease—Contract—Construction.

5. A lease of ground with houses thereon for ninety-nine years, *inter alia*, provided,—"In regard the present houses on the subjects hereby set are in a most ruinous condition, insomuch as to be only proper for a quarry, and as the said" tenant "and his foresaids may during the currency of this lease erect different houses and buildings on these subjects, it is hereby specially agreed upon between the parties that, at the expiry of this tack, the whole houses and buildings then upon the subjects hereby let shall be valued and apprised by two neutral persons, one to be chosen by each party, and, in the case of variance between the said persons, by an oversman to be named by them"; and the landlord bound himself and his foresaids, at the first term of Whitsunday after the expiry of the lease, to pay to the tenant and his foresaids "the one-half of the sums at which the said houses and buildings shall be so valued and apprised in manner above mentioned." Some years after the date of the lease the tenant sublet a portion of the ground, with the houses thereon, to the War Office, and assigned to the subtenant the whole clauses and obligements incumbent on the proprietor under the principal lease. The War Office converted the houses into barracks, and also erected other buildings for the same purpose. At the expiration of the lease the Lord Advocate, for the War Office, brought an action against the proprietor, concluding for decree ordaining the defender to nominate a neutral person in terms of the principal lease, and to pay one-half the value of the buildings when so ascertained. The defender averred that the barracks were not buildings in the sense of the lease, and pleaded that, at all events, the Court ought to instruct the valuers as to the principle of valuation on which they were to proceed. The Court *ordained* the defender to nominate a neutral person in terms of the lease, and further *found* that the neutral persons to be appointed were to ascertain to what extent, if any, the value of the lands was enhanced by the existing buildings on the lands. Lord Advocate v. Earl of Home, Jan. 15, 1891, p. 397.

Crofter—Crofters Holdings Act, 1886.

6. In April 1889, by order of the Crofter Commissioners, certain lands—part of a farm held under a lease dated subsequently to the passing of the Crofters Act, 1886—were assigned to certain crofters for the enlargement of their holdings. The landlord and tenant of the farm thereafter brought a suspension and interdict to have the crofters interdicted from entering upon the assigned lands, on the ground that they had no title, not having obtained decree conform to the order from the Sheriff in terms of the Act, and obtained interim interdict. After certain procedure decree conform

SE—*Continued.*
was pronounced on 3d March 1890, and the interim interdict was recalled. A second note of suspension and interdict against entering the lands was thereafter brought by the landlord and tenant on the ground that the order and all that had followed upon it was *ultra vires* of the Commissioners, the farm being held under the above lease. In July 1890 the reasons of suspension were repelled. Meantime the tenant had sowed the assigned lands with the necessary seeds for crop 1890. In August 1890 the crofters obtained a decree of ejection against the tenant, and claimed right to the crop sown. In a suspension by the tenant the Court *held* that in the circumstances the tenant had a right to sow the crop, and that the crop so sown by him belonged exclusively to him. Swanson v. Grieve, Jan. 7, 1891, p. 371.
Held that the power conferred on a crofter under section 16 of the Crofters Holdings Act, 1886, of bequeathing his holding was validly exercised in favour of a niece, although there were in existence sons and daughters of the crofter. M'Lean v. M'Lean, June 10, 1891, p. 885.
Held that a subtenant was not a crofter within the meaning of the Act. Livingstone v. Beattie, March 19, 1891, p. 735.
Held that a person who, between 1885 and 1888, lived at a distance from his holding, visiting it only occasionally for a week or a fortnight at a time to do necessary farm work,—the house being at other times during this period unoccupied,—was not a crofter within the meaning of the Act, in respect that he had not complied with the condition as to residence. Livingstone v. Beattie, March 19, 1891, p. 735.
Action in Court of Session—Application under Crofters Act, 1886. Duke of Sutherland v. Reed, Dec. 18, 1890, p. 252.
ankruptcy of tenant.
Trustee—Adoption of bankrupt's contract of lease—Right in security—Security *retenta possessione.* M'Gavin v. Sturrock's Trustee, Feb. 27, 1891, p. 576.
RIAGE-CONTRACT. *Conveyance by wife—Wife's power over income stante matrimonio.*
By antenuptial marriage-contract a wife conveyed her whole estate to trustees, *inter alia*, for payment to herself of the free income during the marriage, "such payment being made exclusive of the *jus mariti* and right of administration" of her husband, "and her own receipt being a sufficient discharge." The wife became a party to a bond and assignation granted by her husband in security of a loan, binding herself to the extent of her "own separate estate and effects all jointly and severally" to repay it. In answer to an action by the creditors in the bond for payment of the free annual income of the wife's estate, it was pleaded that she could not validly convey it away to her own prejudice *stante matrimonio. Held* that she had power to make, and had made, an effectual assignation of the income of her estate whether arising during the marriage or after its dissolution. Reliance Mutual Life Assurance Society v. Halkett's Factor, March 4, 1891, p. 615.
onveyance of property "now belonging or which shall belong to the husband at his death."
A conveyance by a husband to his marriage-contract trustees of all property "now belonging or which shall belong to him at the time of his decease," includes only property belonging to him at these dates respectively, and does not deprive him during his life of any right in or control over property acquired after the date of the contract, and such property will be liable for his debts. Wyllie's Trustees v. Boyd, July 10, 1891, p. 1121.
Property belonging to the husband"—Spes successionis.
A *spes successionis* belonging to a husband at the date of his marriage-contract *held* to be included in a conveyance to the trustees under the contract "of property now belonging to" him, as it appeared from the other parts

MARRIAGE-CONTRACT—*Continued.*
of the deed that he intended so to convey it. Wyllie's Trustees v. Boyd, July 10, 1891, p. 1121.
Implied exclusion of jus relictæ.
4. Terms of antenuptial marriage-contract, executed abroad in foreign form, between a domiciled Scotsman and a foreign lady, from which it was *held* that an exclusion of the *jus relictæ* was to be implied. Durrant Steuart's Trustees v. Durrant Steuart, July 9, 1891, p. 1114.
Postnuptial contract—Revocation.
5. *Held* on the construction of a postnuptial marriage-contract (1) that the husband's conveyance being a reasonable provision for his wife and children could not be revoked by him or surrendered by his wife; (2) that the wife's conveyance being part of a contract whereby reasonable provisions were made for behoof of herself and the children, if any, she was not entitle to revoke it. Peddie v. Peddie's Trustees, Feb. 6, 1891, p. 491.
Conditio si sine liberis.
6. *Question*, whether the *conditio si sine liberis* is applicable to provisions to children in marriage-contracts. Edwardes v. Hughes, Dec. 19, 1890, p. 319.
See *Discharge*, 2—*Entail*, 2.

MASTER AND SERVANT. See *Reparation*, 4, 5, 6, 7, 8.

MEDITATIO FUGÆ. See *Jurisdiction*, 2.

MINES AND MINERALS. *Right of support—Conveyance of lands reserving the coal—Title—Construction—Extrinsic evidence—Acquiescence.*
1. *Held*, on a construction of a disposition of certain lands under reservation of the minerals, and on a proof of the circumstances as existing at its date, that the disponer must be held to have reserved the right to work the coal in the way in which it was being worked at the date of the disposition, although the result of the working should be to injure the surface, *altering* interlocutor of Lord Wellwood, Ordinary, who held that, upon the construction of the disposition, the disponer was not entitled to work the minerals so as to bring down the surface, but on the proof that the disponee had acquiesced in his doing so.
Opinions per curiam contra on the question of acquiescence. Bank of Scotland v. Stewart, June 19, 1891, p. 957.
Right to support—Subsidence—Gas pipes belonging to gas company.
2. A gas company entered into an agreement with the proprietor of certain lands to supply his mansion-house with gas, and laid down a branch line of pipes through his lands, it being part of the agreement that the pipes should belong to the company. The proprietor subsequently let the shale in his lands to an oil company, which became bound to pay him for surface and other damage caused by their operations, and to relieve him of all claims against him on account thereof. The result of the operations of the oil company was to cause a subsidence of the ground, which damaged the pipes belonging to the gas company. The gas company, with consent of the proprietor for his right and interest, raised an action against the oil company, praying the Sheriff to ordain them to renew, repair, and relay the pipes. The pursuers did not aver that the defenders had worked the minerals in an improper manner. *Held* that the defenders were not liable for damage caused by the subsidence, as it was not averred that they had worked the mineral improperly, and as they were under no obligation to the gas company, express or implied, to support the pipes. Mid and East Calder Gas-Light Co. v. Oakbank Oil Co., Limited, March 20, 1891, p. 788.
See *Lease*, 2.
Coal Mines Regulation Act, 1887, *sec.* 13—*Check-weigher—Interdict.*
3. In a proceeding by the owner of a mine for removal of J. A., a check-weigher, the Court of summary jurisdiction refused to remove him. The

MINES AND MINERALS—*Continued.*

owner then dismissed the men employed, but re-engaged them on condition that J. A. should not be re-appointed. The miners did not re-appoint J. A. The owner then brought a process of interdict to have J. A. interdicted from entering his premises. *Held* that J. A.'s appointment having fallen, interdict must be granted. Merryton Coal Co. v. Anderson, Dec. 9, 1890, p. 203.

Statutory precautions for safety of mines—Coal Mines Regulation Act, 1887, *secs.* 49, 51.

4. The rules appended to the above Act provide that (Rule 19) "the top . . . of every . . . shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purposes of repair or other operations if proper precautions are taken"; and the special rules of a pit, framed under sec. 51 of the Act, provided that the "pitheadman shall see that no rails are laid up to the mouth of the shaft without some provision being made to prevent waggons being pushed into the shaft." At the mouth of a pit which was being sunk to a greater depth there was no fencing, except that there was a moveable wooden block upon the rails leading to the pit mouth, which it was the duty of the pitheadman not to remove unless he was satisfied that the covering table was on the pit mouth. *Held* that this arrangement was not in breach of the statutory rules. M'Gill v. Bowman & Co., Dec. 9, 1890, p. 206.

See *Justiciary Cases*, 20.

MINOR AND PUPIL. *Pupil with no legal guardian—Custody and education—Nobile officium.*

A boy, seven and a-half years of age, whose father resided in India, was placed by his father as a boarder with a friend at Crieff. The father died about six months afterwards, predeceased by his wife, leaving a trust-settlement, in which he gave no directions as to his son's custody, and made no appointment of a tutor. Before his death the father had expressed himself as highly satisfied with the care taken of the boy by his friend at Crieff. A year after the father's death an application was presented to the Court by the boy's paternal grandmother and by his uncles and aunts on both sides, being his nearest relatives, craving that the custody of the boy should be transferred to his grandmother, with whom he had lived before he was sent to Crieff. The Court *refused* the petition, holding (1) that the petitioners had no legal right to make the demand, and (2) that it would be highly inexpedient in the circumstances for the Court in the exercise of its discretion to interfere with the existing arrangement. Smith v. Smith's Trustees, Dec. 13, 1890, p. 241.

See *Judicial Factor*, 1, 2, 3, 8.

MORA. See *Reparation*, 10.

NOBILE OFFICIUM. *Property—Title.*

1. Where the feudal title to certain heritable subjects stood in the name of an incorporated company which had been dissolved, the trustee appointed in the statutory instrument of dissolution, which gave him power to sell, applied to the Court for authority to execute and deliver dispositions of the heritable subjects which he had sold without completing a feudal title in his person. The Court *refused* the petition. Campbell, Nov. 21, 1890, p. 149.

Proof.

2. Loss of shorthand writer's notes—Sheriff. Yates v. Robertson, July 18, 1891, p. 1206.

See *Minor and Pupil.*

PARENT AND CHILD. *Paternity—Presumption.*

1. Circumstances in which it was held that a husband and wife had failed to displace the presumption of fact that the husband was the father of a child

PARENT AND CHILD—*Continued.*

with which his wife was to his knowledge pregnant when he married her. Kerrs v. Lindsay, Dec. 20, 1890, p. 365.

Father's duty as administrator-in-law of pupil child—Factor loco tutoris.

2. A father presented a petition for the appointment of a factor loco tutoris to his daughter on the ground that the petitioner's interests might conflict with those of his daughter in the prosecution of an action. The Court *refused* the petition on the ground that the petitioner had failed to shew that any conflict of interests would arise. Cochrane, Jan. 24, 1891, p. 456.

Custody of child—Factor loco tutoris.

3. Circumstances in which authority was granted to a factor loco tutoris to detain the person of his ward in Scotland in opposition to the wishes of the ward's father, who was resident abroad. Moncreiff, July 1, 1891, p. 1029.

Custody of child.

4. Petition by father to recover custody of child from mother—Procedure—Right of access—Expenses—Guardianship of Infants Act, sec. 5. Hutchison v. Hutchison, Dec. 13, 1890, p. 237.

Illegitimate children.

5. *The parents of illegitimate children derive no patrimonial rights from their relationship to them.* Clarke v. Carfin Coal Co., July 27, 1891, H. L., p. 63.

Solatium and damages—Death of illegitimate child.

6. Held (aff. *judgment of Second Division*) *that the rule of law which gives to certain relatives of a person killed by the fault of another a right to* solatium *and damages does not extend to the case of the mother of an illegitimate son.* Clarke v. Carfin Coal Co., July 27, 1891, H. L., p. 63.

PARTNERSHIP. *Bill of exchange—Charge—Suspension—Caution.*

1. One of six partners of a trading firm, which had sold its business to a limited company, granted a promissory-note, to which he signed the firm name as well as his own. The other partners having been charged to pay brought a bill of suspension. The respondents averred that the complainers had adopted the promissory-note. *Held* that, as the firm's signature could not bind the partners after the dissolution of the firm, and it lay upon the respondents to prove their averments of adoption, the bill should be passed without caution. Goodwin v. Industrial and General Trust, Limited, Dec. 6, 1890, p. 193.

Liability—Firm signature—Bill of exchange.

2. A partner in a firm of builders, who by the contract of copartnery was precluded from signing bills, adhibited the firm name to certain promissory-notes in favour of a money-lender, with whom he discounted them at the rate of 40 per cent per annum. The notes were not granted in the course of the firm's business, and the proceeds were applied to the partner's own use. The firm, having been charged upon the notes, brought a suspension. *Held* that the loss occasioned by the fraudulent granting of the notes must fall upon the money-lender, who discounted them in suspicious circumstances without inquiry, and not upon the partners of the firm, as they were ignorant of the transaction, and as the transaction was not in the course of the firm's business or for its behoof. Paterson Brothers v. Gladstone, Jan. 15, 1891, p. 403.

Payment of profits to executors of deceased partner for behoof of widow and children—Succession.

3. A contract of copartnery provided that if either of the two partners should die during the continuance of the partnership "leaving a widow, child, or children" surviving him, the surviving partner should, for a period of six months from the date of the deceased partner's death, pay to the latter's executors, "for the benefit of his widow, child, or children, the share of profits to which the said deceased partner would have been entitled had he lived." One of the partners having died leaving a widow and one child, *held* that the share of the profits payable under the contract of copartnership did not form part of the deceased partner's executry estate, but fell to be equally

PARTNERSHIP—*Continued.*
divided between his wife and child. Adamson's Trustees v. Adamson's Executors, July 14, 1891, p. 1133.
See *Judicial Factor*, 6.

PAYMENT. *Receipt—Discharge—Stamp.*
In defence to an action by a widow for certain half-yearly payments of an annuity, to which she was entitled under the will of her husband, his trustees alleged that the pursuer had agreed to hold her maintenance by the liferenter of her deceased husband's estate as equivalent to her annuity for the time, and produced a document titled an "acknowledgment" by her, which set forth certain half-yearly moieties of her annuity, including those sued for, and which concluded,—"I acknowledge that my annuity, as above detailed has been duly accounted for to me by the trustees of the late" husband. It was signed by her, but bore no stamp. *Held* that the document was of the nature of a receipt, and being unstamped could not be looked at as evidence of the alleged agreement. Cameron v. Panton's Trustees, March 19, 1891, p. 728.

PENALTY. See *Contract*, 1.

PERSONAL OR TRANSMISSIBLE. *Real burden—General conveyance—Titles to Land Consolidation Act*, 1868, *sec.* 19, *schedule L.*
By general disposition a testator conveyed his whole estates, heritable and moveable, to his son, declaring in the dispositive clause that the disposition was granted and was to be accepted under the following burdens, &c., "which are hereby declared to be real burdens on the estate and effects hereby conveyed," . . . *inter alia*, that the disponee should be bound to pay to a daughter of the testator an annuity of £35. The disponee made up his title to the different parcels of property that had belonged to his father, by notarial instruments in terms of Schedule L of the Titles to Land Consolidation Act, 1868, each of which set forth the declaration above written at full length, and was duly recorded. *Held* that the annuity in favour of the daughter had not been validly constituted a real burden. Cowie's Trustees v. Cowie, March 17, 1891, p. 706.

POLICE. *Assessment—Construction of Sewers—Purification Works—General Police and Improvement Act*, 1862, *sec.* 97—*Public Health Act*, 1867, *sec.* 94, *subsec.* 2.
1. In a burgh of under 10,000 inhabitants which had adopted the General Police Act of 1862, the Commissioners of Police introduced a system of public sewers at a cost of over £4000, the proceedings in connection therewith being taken under the Act of 1862. They were subsequently compelled, in order to dispose of the sewage, to undertake the construction of a system of sewage purification and disposal works, and in order to get compulsory powers to acquire the land for this purpose they had, as the Local Authority, to obtain a Provisional Order and a Provisional Order Confirmation Act, in terms of the Public Health Act, 1867. The cost of obtaining the Act and of purchasing the ground and constructing the works was about £19,000. The Commissioners having proposed to raise both sums by assessments on owners under the Police Act of 1862, certain owners contended that the latter sum should be raised, under the Public Health Act, by an assessment upon occupiers. In a special case *held* that the expenses incurred in the application under the Public Health Act, 1867, fell upon occupiers in terms of sec. 94, subsec. 2, of that Act, there being a police (but no prison) assessment in the burgh, which was so leviable under sec. 84 of the Police Act of 1862. Police Commissioners of Kirkintilloch v. M'Donald, Oct. 31, 1890, p. 67.

Burgh—General Police and Improvement Act, 1862, *sec.* 177—*Private court —"House."*
2. The 177th section of the General Police Act of 1862 provides that it shall not be lawful to build any court of less than a certain specified width, and

POLICE—*Continued.*
that "to any such court in which there shall be more than eight houses there shall be an additional width of one foot for every such additional house," and that there shall be an entrance of the full width of the court open from the ground upwards. *Held* that the section applied to courts to be formed on back-ground exclusively private property. Couper v. Surveyor of Maryhill, March 6, 1891, p. 642.
See *Burgh.*

POOR. *Settlement—Deserted wife of person having no settlement in Scotland.*
1. A widow, who had at one time acquired by her marriage a derivative residential settlement in the parish of D., and had not lost it by absence, obtained parochial relief in that parish. In an action of relief raised by D. against K., the parish of her birth, the pursuer averred that the pauper had lost her derivative settlement in D. by an irregular marriage *per verba de presenti* with an Englishman who had no settlement in Scotland, that she had been deserted by him, and that she was therefore chargeable to K. as her parish of birth. It was proved that she had gone through an irregular marriage *per verba de presenti* with a person having no settlement in Scotland, and that subsequently she had left him owing to his carrying on improper intercourse with another woman, and further that he denied that he had ever married her. *Held* (1) that it was competent for the Sheriff to decide, for the purposes of the action, the question as to the constitution of the irregular marriage; (2) that that marriage being proved, the derivative settlement in D. was lost; (3) that the circumstances of the separation and the denial by the husband that the irregular marriage had been constituted were equivalent to desertion by him; and therefore (4) that the pauper, as the deserted wife of a person having no settlement in Scotland, was chargeable to K., as the parish of her birth. M'Donald v. Mackenzie, Feb. 6, 1891, p. 502.
2. *Held* that a residential settlement acquired by a Scotswoman was not lost on her marriage to an Irishman who had no settlement in Scotland, and, not having been lost by absence, became available on her becoming a pauper by the desertion of her husband. Reid v. Edmiston, Oct. 28, 1890, p. 25.
3. Special case for the opinion of the Court regarding the liabilities of two parishes in respect to the parochial relief of persons who were resident on a portion of one parish which had under the Local Government Act, 1889, been transferred to the other, *dismissed* in respect that it presented no question of law. Parochial Board of Borthwick v. Parochial Board of Temple, July 17, 1891, p. 1190.

POSSESSION. See *Superior and Vassal*, 1, 2.

PRESCRIPTION. *Triennial—Mercantile Agency—Act* 1579, *c.* 83.
1. *Held* that the triennial prescription did not apply to an account for commission charged by a mercantile agent on the purchase of goods wholesale. Brown v. Brown, June 11, 1891, p. 889.
Triennial—Claim for aliment of illegitimate child.
2. A person who was entrusted with the charge of an illegitimate child by the alleged father, sued him for payment of an account for aliment extending over six years—averring a verbal undertaking by him to repay whatever sums might be expended on the aliment and maintenance of the child. It was not alleged that the terms of payment or the amount of the aliment had been fixed, but the account produced charged £4 for each quarter's aliment. *Held* that as there was no averment of an agreement to make termly payments of aliment the account was to be regarded as a continuous account, and that as three years had not elapsed since the date of the last item, the triennial prescription did not apply. Bracken v. Blasquez, May 13, 1891, p. 819.
Trust—Breach of trust—Deathbed.
3. In 1850 A B disponed on deathbed heritable subjects to which he had

PRESCRIPTION—*Continued.*

merely a personal right, to C D and others, as trustees for behoof of C D in liferent, and E F in fee. C D, who was the truster's heir-at-law, being advised that the conveyance was invalid on the ground of deathbed, and that it was unnecessary for him to reduce it, made up a title in his own person as heir-at-law, and thereafter possessed the subjects for the prescriptive period. At his death he disponed the subjects gratuitously to G H, a singular successor. In an action of declarator and adjudication brought by E F, who claimed to have a right to the subjects under the deathbed deed, against G H, the defender pleaded deathbed. The Court *assoilzied* the defender, the Lord President, Lord Adam, and Lord Kinnear holding that C D was entitled to complete his title as heir-at-law without regard to the invalid deathbed deed, and that as C D would have been entitled to plead deathbed when it was proponed against him, his disponee, standing on his title, was entitled to do so, Lord M'Laren holding that the defender had a prescriptive title to the lands which was not open to challenge unless his author's title was tainted by breach of trust, and that as his author was entitled to reduce the deathbed conveyance, there was no breach of trust in disregarding it. Thain v. Thain, July 18, 1891, p. 1196.

See *Superior and Vassal*, 1, 2—*Teinds*, 3.

PRESUMPTION. See *Parent and Child*, 1.

PRIVILEGE. See *Reparation*, 17, 18.

PROCESS. *Citation—Statute* 1592, *cap.* 141—*Citation Amendment Act*, 1882.

1. A service copy of a petition in a Sheriff Court was sent by registered letter to the defender, with a citation bearing *in gremio* to be executed by A B, a law-agent, but it was not signed by A B, but by C D, another law-agent, for A B. The execution returned upon the petition was in the statutory form, and was signed by A B. In a suspension of a decree in absence obtained against the defender, he pleaded that the citation was invalid. *Held* that as the execution returned upon the petition had not been reduced, the defender was barred from objecting to the citation. Tait v. Johnston, Feb. 28, 1891, p. 606.

Mandatary.

2. The defender in an action for payment of the aliment of an illegitimate child of which he was alleged to be the father went to Spain, and the Sheriff thereupon ordered him to sist a mandatary. The case having been appealed to the Court of Session, the defender returned to this country and undertook to remain in Scotland until the issue of the action. The Court thereupon recalled the order to sist a mandatary. Bracken v. Blasquez, May 13, 1891, p. 819.
3. Circumstances in which a defender, appellant, who had gone abroad, was not required to sist a mandatary *in hoc statu*. M'Donald's Trustees v. Stewart, Feb. 6, 1891, p. 491.

See also *Justiciary Cases*, 9.

Reponing—Decree in absence—Husband and Wife.

4. In an action of separation and aliment by a wife against her husband, the summons was served personally on the defender, and notice of the diet of proof was sent to him by registered letter. He did not lodge defences nor appear at the diet of proof, but decree having been pronounced against him, he lodged a reclaiming note. The pursuer objected to the competency of the reclaiming note and pleaded that the only competent course for the defender was to bring a reduction of the decree. The Court *remitted* to the Lord Ordinary to repone the defender upon such terms as to his Lordship should seem fit. Whyte v. Whyte, Jan. 31, 1891, p. 469.

Amendment—Court of Session Act, 1868, *sec.* 29.

5. A tailor in Annan, who was born and received his education in Ayr, brought an action against the Incorporation of Tailors of Ayr for declarator that he was entitled to be admitted a member of the Incorporation as being

PROCESS—*Continued.*

the son of a member, and averred that by immemorial usage the sons of members were as such entitled to be admitted, although not resident in Ayr. The defenders did not dispute that the pursuer's father had been a member at his death, but denied the averment of usage. The Lord Ordinary assoilzied the defenders, holding that the averment of usage was not proved. On a reclaiming note the pursuer abandoned the averment of usage, and contended that he was entitled to admission as being a tailor in Scotland, and offered, if necessary, to amend his summons to that effect. *Opinion* (*per* Lord President) that the proposed amendment was incompetent, as it would have the effect of converting an action on the pursuer's own account into an action for behoof of the public at large. Loudon v. Tailors of Ayr, Feb. 20, 1891, p. 549.

6. After a judgment had been pronounced by the Lord Ordinary against the defenders in an action, certain defenders, after reclaiming, moved the Court to allow them to amend the record to the effect of stating an entirely new defence, on payment of all expenses already incurred in the action. *Held* (1) that under sec. 29 of the Court of Session Act, 1868, the Court were bound to allow the amendment on such conditions as to the Court should seem proper; and (2) that the amendment should be allowed on payment of the expenses already incurred by the pursuers. Guinness, Mahon, & Co. v. Coats Iron and Steel Co., Jan. 21, 1891, p. 441.

7. Amendment of record, involving considerable alteration of the pleadings or a change of the ground of action, will be allowed in the Inner-House, either in reclaiming notes or in appeals, only on payment of the expenses in the cause from the date of the closing of the record, and the account of expenses must be paid before further hearing by the Court. Morgan, Gellibrand, & Co. v. Dundee Gem Line Steam Shipping Co., Limited, Dec. 9, 1890, p. 205.

Reclaiming—Reclaiming Note without record appended.

8. A reclaiming note against a judgment by a Lord Ordinary sustaining the defenders' pleas, and dismissing an action at the instance of a person who sued *in forma pauperis*, *refused* as incompetent, in respect that the record was not appended. M'Evoy v. Braes' Trustees, Jan. 16, 1891, p. 417.

Caution for expenses—Pursuer in receipt of parochial relief.

9. In an action for declarator of property in a Sheriff Court the Sheriff ordained the pursuer, who was in receipt of parochial relief, and who did not apply for the benefit of the poor-roll, to find caution for expenses. Caution not having been found, the Sheriff assoilzied the defender. The pursuer appealed. No appearance was made for the defender, and from the pursuer's statements it seemed that she had acted for some time as proprietor of the subjects. The Court *recalled* the Sheriff's judgment, and *remitted* to him to proceed with the cause. Johnstone v. Dryden, Dec. 6, 1890, p. 191.

Proof—Jury trial—Verdict—Contributory negligence—Reparation.

10. In an action of damages for personal injury, the jury returned the following verdict,—"Find for the pursuer, but in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300." *Held* that the verdict being either self-contradictory or ambiguous, could not be applied as a verdict for either party, and that it must therefore be set aside and a new trial granted. Florence v. Mann, Dec. 17, 1890, p. 247.

Proof.

11. Form of commission for the examination of a lunatic in a foreign country. Riddell v. Riddell, Oct. 18, 1890, p. 1.

Loss of shorthand writer's notes. Yates v. Robertson, July 18, 1891, p. 1206.

Declarator—Declarator ab ante.

12. *Held* that it was competent for a liferenter, who held an estate in liferent under a disposition which provided that his liferent should be forfeited in the event of his selling it, to raise *ab ante* a declarator of his right to sell without incurring any forfeiture. Chaplin's Trustees v. Hoile, Oct. 30, 1890, p. 27.

PROCESS—*Continued.*

Special case—Competency—Court of Session Act, 1868, *sec.* 63.

13. *Held* that a special case between a limited company and one of its shareholders for the opinion and judgment of the Court upon the question whether special resolutions of the company creating preference shares were *ultra vires*, was a competent form of process, as the question raised might have been tried between the same parties in another form of process. Ramsbotham v. Scottish American Investment Co., Limited, Feb. 25, 1891, p. 558.

14. Special case for the opinion of the Court regarding the liabilities of two parishes in respect to the parochial relief of persons who were resident on a portion of one parish which had under the Local Government Act, 1889, been transferred to the other *dismissed*, in respect that it presented no question of law. Parochial Board of Borthwick v. Parochial Board of Temple, July 17, 1891, p. 1190.

Petition—Judicial Factor—Recall—Pupils Protection Act, 1849, *secs.* 1 *and* 31—*Distribution of Business Act*, 1857, *sec.* 4, *subsec.* 5.

15. *Held* (after consultation with the Judges of the First Division) that a petition for recall of the appointment of a curator bonis and for appointment of a new curator bonis is incompetent in the Inner-House, and must be presented to the Junior Lord Ordinary. Souter v. Finlay, Nov. 8, 1890, p. 86.

Proving of tenor—Untested deed—No written adminicles—Parole evidence.

16. In an action of proving the tenor, the pursuer sought to set up a deed by which he alleged that the defender had, during his lifetime, conveyed away from himself certain property absolutely to A, his deceased wife's sister, with whom he lived as his wife, whose heir-at-law the pursuer was. No draft or other written adminicle was produced, and the deed libelled in the summons as the deed to be set up was undated, unsubscribed, and untested. The *casus amissionis* alleged was that the granter had destroyed the deed while it was in his possession. The pursuer adduced parole proof, and the only material evidence was that of a solicitor who deponed that the deed had been fifteen years before the date of the proof, and some years after its execution, submitted to him for his opinion as to its effect, and while he was unable to speak to its terms, his impression, derived from entries in his ledger, was that it was or must have been an absolute *inter vivos* deed in favour of A and her heirs. The defender, while admitting that he had destroyed a deed in favour of A, deponed that it was *mortis causa* and undelivered. *Held* that the pursuer had failed to prove his case. Rannie v. Ogg, June 12, 1891, p. 903.

Appeal—Sheriff—Judicature Act, 1825, *sec.* 40—*Act of Sederunt*, 11*th July* 1828, *sec.* 5.

17. A Sheriff-substitute allowed a proof on 2d April. On 21st May he sisted the process for a month on the motion of the defender. The pursuer appealed to the Sheriff-principal, who, on 5th June, recalled the sist, and remitted to the Sheriff-substitute to fix a new diet of proof. On 15th June the latter fixed a new diet of proof. On 16th June the defender appealed to the Court of Session for jury trial. *Held* (*diss.* Lord Young) that the appeal was incompetent under section 5 of A. S., 11th July 1828, as the only interlocutor allowing a proof was that of 2d April, and no appeal had been presented within fifteen days thereafter. *Kinnes* v. *Fleming*, Jan. 15, 1881, 8 R. 386, and *Williams* v. *Watt & Wilson*, May 28, 1889, 16 R. 687, *followed*. Davidson v. Davidson's Executor, July 7, 1891, p. 1069.

Appeal—Sheriff—33 *and* 34 *Vict. cap.* 86, *secs.* 12 *and* 13.

18. The Sheriff-substitute of a county divided into two districts by an order of a Secretary of State following on the Statute 33 and 34 Vict. cap. 86, refused a warrant to cite to the Court at the head burgh of the county a defender belonging to another district of the county. *Held* that an appeal against this refusal was incompetent. Davidson v. Davidson, June 9, 1891, p. 884.

Appeal—Sheriff—Local Government Act, 1889, *secs.* 86, 105.

19. The Local Government Act, 1889 (sec. 86), enacts that if under the provi-

PROCESS—*Continued.*

sions thereof a teacher appointed previously to the passing of the Education Act, 1872, shall be prejudiced in his right to school fees, he shall be entitled to compensation from the school board, "and such compensation, failing agreement, may be determined finally by the Sheriff." In an action brought in the Sheriff Court by a teacher against a school board praying for declarator that the pursuer was entitled to a certain sum annually as compensation for fees under the above Act, the Sheriff-substitute appointed the pursuer to lodge a minute giving details as to fees previously received by him. The pursuer having appealed, the Sheriff allowed the pursuer a proof. The defenders appealed to the Court of Session. *Held* that the appeal was incompetent. M'Gilp v. Kilchoman School Board, March 17, 1891, p. 714.

Appeal—Competency—Bankruptcy Act, 1856, *sec.* 170.

20. In a petition in the Sheriff Court by a bankrupt for discharge, the Sheriff-substitute, by interlocutor of 1st October 1890, found the bankrupt entitled to his discharge and appointed him to make a declaration in terms of the statute. Thereafter the Sheriff-substitute, by interlocutor of 10th October, found the declaration made by the bankrupt satisfactory, and discharged him. On 15th October an objecting creditor appealed under the 170th section of the Bankruptcy (Scotland) Act, 1856. *Held* that although the appeal was competent as an appeal against the interlocutor of 10th October, it did not also submit to review the prior interlocutor of 1st October, which was a substantive judgment, and had become final as not having been appealed against within the period prescribed by the Act. Alison v. Robertson's Trustees, Dec. 9, 1890, p. 212.

Appeal—Removing—Act 6 *Geo. IV. cap.* 120, *sec.* 44.

21. Where a landlord obtained decree of removal against a tenant, on the ground that he had no title to possess, an objection was taken to the competency of an appeal, on the ground that suspension in terms of the 44th section of the Judicature Act was the only competent remedy. Objection *repelled.* Barbour v. Chalmers & Co., March 3, 1891, p. 610.

Appeal—Dean of Guild—Glasgow Police Act, 1866, *secs.* 273 *and* 277.

22. *Held* that a petition for a lining presented to the Dean of Guild of Glasgow was a common law proceeding, and that his judgment thereon, without a record having been made up, was not excluded from review by the Glasgow Police Act, 1866. Allan v. Whyte, Dec. 20, 1890, p. 332.

23. Interlocutor which was *held* to be in pursuance of the Act, and consequently to be unappealable, no record having been made up. Walker v. Lang, June 13, 1891, p. 928.

Appeal—Competency—Dean of Guild.

24. An interlocutor by a Dean of Guild refusing to sist as respondent a person who alleges a material interest to appear in a petition for authority to take down and rebuild a house is a final interlocutor *quoad* that person, and therefore appealable. Lawrie v. Jackson, July 15, 1891, p. 1154.

Appeal—Licensing Courts—Certificate.

25. The only appeal from a decision of the Justices of the Peace granting or refusing a public-house licence is to Quarter Sessions, and it is incompetent to bring a reduction of a decision of the Justices refusing a licence on the ground that evidence was improperly admitted or refused, or on any ground except that of excess of jurisdiction. Lundie v. Magistrates of Falkirk, Oct. 31, 1890, p. 60.

See *Sale*, 7.

PROOF. *Admissibility of plan—Property—Marches.*

1. Plan which was *held* to be competent evidence in a dispute as to marches between two landowners. Reid v. Haldane's Trustees, March 19, 1891, p. 744.

Lease—Constitution—Period of endurance—Validity.

2. In an action praying for the removal of a tenant, on the ground that he had no title of possession, the defender founded on a written lease granted by a former proprietor, in which the term of endurance was mentioned only

OOF—*Continued.*
in a clause added at the end of the testing-clause, and on receipts for rent granted by the landlord shewing that the defender had been in possession of the subjects. *Held* that to instruct a valid contract of lease it was sufficient for the defender to prove that the writing had been delivered to him by the landlord in its present form, and that he was entitled to prove this *pro ut de jure*. Barbour v. Chalmers & Co., March 3, 1891, p. 610.

Confidential report by police inspector to procurator-fiscal.
In an action of damages for wrongous apprehension against an inspector of police, *held* that the pursuers were not entitled to recover confidential reports made by the inspector to the procurator-fiscal. Hastings v. Chalmers, Dec. 16, 1890, p. 244.

Ambiguity—Decree of presbytery.
Terms of decree of a presbytery defining the boundaries of a glebe in an excambion, which held (aff. *judgment of Second Division*), *to be unambiguous.* Minister of Lochlee v. Dalhousie's Tutors, June 19, 1891, H. L., p. 72.

See *Bill of Exchange*, 3—*Discharge*, 2—*Judicial Factor*, 5—*Mines and Minerals*, 1—*Process*, 10, 11—*Property*, 2—*Sheriff*, 5.

OPERTY. *Nobile officium—Title.*
Where the feudal title to certain heritable subjects stood in the name of an incorporated company which had been dissolved, the trustee appointed in the statutory instrument of dissolution, which gave him power to sell, applied to the Court for authority to execute and deliver dispositions of the heritable subjects which he had sold without completing a feudal title in his person. The Court *refused* the petition. Campbell, Nov. 21, 1890, p. 149.

Proof—Marches—Admissibility of plan as evidence.
In a dispute in 1889 as to marches between two landowners, whose lands had at one time formed parts of the same barony, the pursuer tendered as evidence a plan bearing the date 1842. It had been found in the possession of a third person, owner of another part of the original barony, who had at one time had a claim over the disputed ground identical with the claims of the pursuer, who had bought up his rights. It was not known on whose instructions or for what purpose the plan had been made. It had at one time passed with the titles of the defenders' predecessors, and a copy of it had been used by them in connection with a projected sale of their lands. *Held* that it was competent evidence. Reid v. Haldane's Trustees, March 19, 1891, p. 744.

"Right and privilege"—Superior and Vassal—Subject feued—Jus quæsitum tertio—Res inter alios acta.
On 19th August 1723 the proprietor of the barony of Struie granted feus of four portions thereof to different persons,—(1) The wester half of Mains of Struie, with the privileges and haill pertinents thereof as marched from the other half, "with half of the right and privilege of the loan leading to and from that hill belonging to the haill Mains of Struie called Douchrie," about 600 yards distant, "according as the said loan lies meithed and marched betwixt the lands of Whitehill and Baulk of Struie." (2) The easter half of Mains of Struie described in the same way, *mutatis mutandis*. (3) Whitehill, "reserving the loan belonging to the Mains of Struie leading to the hill of the said Mains called Dochrie, as the said loan lies and is meithed and marched betwixt the lands of Whitehill and lands of Baulk of Struie from Powstink to the Overnook of Tamacreich Dyke, in which space the said loan is not to be cast upon by the possessors of Mains of Struie." (4) Baulk of Struie, "reserving the loan belonging to Mains of Struie, which leads to the hill of the said mains, . . . all along, as the said loan lies meithed and marched betwixt the said lands of Baulk and Whitehill of Struie." In 1889 the proprietors of the wester half of Mains of Struie, who had also acquired right from the proprietor of the easter half to the latter's right to the hill of Dochrie, and to the loan, brought an action against the proprietor of Whitehill and Baulk for declarator that the pursuer had the right of property in the loan. The

PROPERTY—*Continued.*

defender maintained that it belonged to himself, or alternatively to the superior, who, however, had no right of access to the loan. There was no trustworthy evidence of possession, the whole lands having been possessed together in tenancy for upwards of forty years. *Held* on a construction of the titles, aided by an estate plan dated in 1842, which shewed Whitehill and Baulk as non-contiguous, and included the loaning within the boundary lines of Struie and Dochrie (1) that it was not to be presumed that the property in the loaning had been retained by the superior; (2) that the property in the loaning had not been given out to Whitehill and Baulk; and (3) that the phrase "right and privilege" was sufficient to carry it with Mains of Struie. Reid v. Haldane's Trustees, March 19, 1891, p. 744.

Tenement in burgh—Conveyance of attic story—Right to roof.

4. A, the proprietor of a building feu within burgh, having built thereon a tenement of houses, disponed to B "these two dwelling-houses or flats, being the second flat above the shops and the attic story of the tenement with two cellars, a necessary-house, and a right to the water-pipe in common with the other proprietors, under burden of payment of one shilling of feu-duty, and a fourth part of the expense of upholding the roof of the said tenement." Other flats were disponed to other persons in terms *mutatis mutandis* identical with the above, but the granters retained part of the basement and of the upper flats in their own hands. A disponee of B to the attic flat presented a petition to the Dean of Guild for authority to convert the attic flat into a square story, and to build another story above it. A opposed the petition. The Court *refused* the petition, in respect (1) that as a question of contract each buyer from A obtained right only to the parts of the tenement as described in his disposition, and the claim of the petitioner amounted to a claim to more than that; and (2) that as a question of real right A, the proprietor of the *solum* on which the tenement was built, had not conveyed to B the right of indefinite extension upward, but only the right to the stratum of space occupied by the attic story. Watt v. Burgess' Trustee, March 19, 1891, p. 766.

See *Fishings*, 2.

PROVING OF TENOR. See *Process*, 16—*Title to Sue*, 4.

PUBLIC HEALTH. *Contagious Diseases (Animals) Act*, 1878, *sec.* 30 (7)—*Compensation for slaughtered animals—Local Authority.*

Held that under the above Act to justify a Local Authority in withholding compensation for an animal slaughtered it is necessary that they should ascertain and determine that the offence has been committed, and that such determination should be recorded in the minutes, and that it is not necessary that the outbreak of disease should be traceable to the offence. Calder v. Local Authority of Linlithgow, Oct. 30, 1890, p. 48.

PUBLIC-HOUSE. *Hotel—Tippling Act, sec.* 12.

1. *Opinions* that the 12th section of the Tippling Act does not apply to the case of a guest resident in a hotel who during his stay is supplied from time to time with small quantities of spirituous liquors for his own use and that of friends. Guthrie's Trustees v. Ireland, May 22, 1891, p. 833.

Appeal—Licensing Courts—Certificate

2. The only appeal from a decision of the Justices of the Peace granting or refusing a public-house licence is to Quarter Sessions, and it is incompetent to bring a reduction of a decision of the Justices refusing a licence on the ground that evidence was improperly admitted or refused, or on any ground except that of excess of jurisdiction. Lundie v. Magistrates of Falkirk, Oct. 31, 1890, p. 60.

Administration of justice—Justice of Peace—Licensing Court—Statute 9 Geo. IV. cap. 58, sec. 13.

3. *Held* that a Justice of the Peace was not disqualified from sitting on the bench of Justices for the granting of licences under the 13th section of the Home Drummond Act, 1828, by reason of the fact that he was trustee

c-House—*Continued.*
ıpon a sequestrated estate, part of which consisted of a public-house busi-
ıess. Lundie v. Magistrates of Falkirk, Oct. 31, 1890, p. 60.
*ıinistration of justice—Second trial where conviction on first trial "null
oid"—7 and 8 Geo. IV. cap. 53, sec. 68.*
. person was convicted before two Justices of retailing spirits without hav-
ng a licence. One of the Justices was a person employed in the collection
f certain duties of excise, and the proceedings were therefore declared by
ec. 68 of the above Act to be utterly null and void to all intents and pur-
oses. On the attention of the prosecutor being called to this fact he
epaid the penalty which had been imposed in respect of the conviction.
A new complaint for the same offence was brought, and a conviction again
ollowed, in spite of a plea that this second proceeding was incompetent.
An appeal having been taken to the Quarter Sessions against the second
onviction, a case was stated for the opinion and direction of the Court of
Exchequer. *Held* that a decree by a competent Court was necessary to
leclare the statutory nullity, that the Justices had no jurisdiction to pro-
ıounce any such decree, were not at liberty to disregard the fact of a con-
iction having been already obtained for the same offence, and therefore
ould not entertain the second complaint. M'Intosh v. Waite, Feb. 27,
891, p. 583.

c Officer. *Reparation—Statutory protection against claims of damages
or irregularities in execution of office —Ultra vires—Public Health (Scot-
and) Act, 1867, sec. 118.*
Where a Local Authority had partly demolished an untenanted house within
heir district on the ground that the state of the roof was dangerous to
ıublic safety, *held* that the local authority were not protected by the 118th
ection of the Public Health Act, 1867, against a claim for damages by the
ıwner, the demolition of houses on account of their danger to public safety
ıeing outwith the powers of Local Authorities under the Act. Edwards v.
Parochial Board of Kinloss, June 2, 1891, p. 867.
ıof—Confidential report by police inspector to procurator-fiscal.
n an action of damages for wrongous apprehension against an inspector of
ıolice, *held* that the pursuers were not entitled to recover confidential
eports made by the inspector to the procurator-fiscal. Hastings v. Chalmers,
Dec. 16, 1890, p. 244.
ı *Reparation*, 23, 24.

ıay. *Rates—Preference—Agreements and contracts.*
. railway company agreed with a coalmaster to carry his coals to Ayr at
he following lump rates:—From A (two miles) at 6d. per ton, from B
six miles), from C (seven miles), and from D (eight miles) at 8d. per ton;
ınd that in the event of the railway company carrying coals to Ayr for
ıny other coalmaster at lower rates it should be bound to reduce the rates
ınder the agreement to those lower rates. In an action raised by the coal-
naster for repayment of alleged overcharges the pursuer averred that the
ailway company had been carrying coals to Ayr from the L. colliery, twenty-
hree miles distant, for 1s. 7d. per ton, being a rate under 1d. per ton per
nile, while the pursuer had been paying, in terms of the agreement, on coals
arried from the D pit to Ayr 1d. per mile, and from the B and C pits a
ıigher rate per mile. *Held* that the rates fixed by the agreement were lump
ates not based on considerations of mileage alone, but graduated according
o distance, a higher rate per mile being charged for short distances than
or long distances, and that therefore it did not appear from the pursuers'
tatement that the rates charged against the L. colliery for carriage for
wenty-three miles were lower rates than those charged against the pursuers
or short distances, and action *dismissed* as irrelevant. Taylor & Co. v.
Glasgow and South-Western Railway Co., July 3, 1891, p. 1031.
rriage of passengers—Expulsion of passenger.
he servant of a railway company who has, without taking any objection,

RAILWAY—*Continued.*

accepted from one of the passengers in a railway carriage tickets as for all the occupants of that carriage, is not entitled, on discovering that one of these tickets is defective, to remove from the carriage the person from whom he had so accepted the tickets and treat him as if he had been the holder of the defective ticket. Harris v. North British Railway Co., June 30, 1891, p. 1009.

Common carriers—Haulage contract—Liability for loss of traders' waggons.

3. A railway company conveyed a trader's waggons containing coal along their lines, and after delivery of the coal conveyed the empty waggons back to the collieries, the sole charge made being a rate of 1s. 7½d. per ton, whereas the rate for the conveyance of coal on waggons belonging to the company was 2s. On the return journey some of the waggons were destroyed through an accident to the train caused by a latent defect in the waggon of another trader, which was in the same train. *Held* that the railway company were not liable for the safe delivery of the waggons as under a contract of carriage. Barr & Sons v. Caledonian Railway Co., Nov. 21, 1890, p. 139.

Running powers—Use of joint station—Act 29 and 30 Vict. cap. cccl.

4. In 1864 the Scottish North-Eastern and the Great North of Scotland Railway Companies built a joint station at Aberdeen, which was by statute declared to be their joint property. It was provided that the control and management of it should be in a joint committee of the two companies. The Scottish North-Eastern Company with "all the rights, interests, and estate" which it possessed, was afterwards transferred by the Act 29 and 30 Vict. cap. cccl. to the Caledonian Railway Company. The 99th section of the Act, after reciting that the railways of the North British Company formed, with other railways, lines of communication between London and Scotland, &c., and that it was expedient that free and expeditious transit of traffic over the said lines of communication should be secured, enacted that the expression "Scottish East Coast traffic," as used in the Act, should mean traffic of every description on the Scottish North-Eastern line from or to any place on or beyond and *via* the North British lines. And by the 106th section of the same statute it was provided that "the North British Railway Company may, for the purpose of conveying Scottish East Coast traffic, run over and use with their engines, trucks, and carriages of every description, the Scottish North-Eastern lines, or any part thereof, and the stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines." Further, the North British Railway were to be entitled to "the joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, wharfs, stopping, loading, and unloading places, sidings, and junctions of the Scottish North-Eastern lines, including, in so far as the company lawfully may, the station at Aberdeen, and all conveniences therewith connected. . . ." After the North British Railway had been for some years admitted to the station, and had enjoyed its conveniences for their traffic, an action was brought by the Joint Committee and the Great North of Scotland Company for declarator that the North British Company had no right, without the consent of the Great North of Scotland Company, to use the station, and for interdict. *Held* that, the object of the Legislature having been to give every possible facility for the passage of Scottish East Coast traffic upon the lines in question, the North British Company were entitled not only to running powers through the station at Aberdeen, but also to the use of the station itself, and all the conveniences and privileges connected therewith, in so far as these were enjoyed by the Caledonian Company. Aberdeen Station Committee v. North British Railway Co., May 28, 1891, p. 855.

Invitation to passenger to alight—Reparation—Contributory negligence.

5. In an action of damages against a railway company raised by a passenger for injuries received in alighting at night from a train at a railway station—

RAILWAY—*Continued.*

not a terminus—it was proved that the train was of an unusual length, that the last carriage, in which the pursuer was travelling, was stopped opposite the end of the platform, which sloped down to the level of the rails; that the pursuer had failed to observe this when she stepped out of the carriage. The guard deponed that he had shouted to the passengers to keep their seats before the pursuer left the carriage, but in this he was contradicted. The jury found for the pursuer. In a motion for a new trial, on the ground that the verdict was against evidence, *held* (1) that in the circumstances it was the duty of the defenders to have given warning to the passengers to keep their seats; and (2) that the question whether they gave such warning or not was one for the jury. Aitken v. North British Railway Co., May 22, 1891, p. 836.

See *Discharge*, 3.

REAL BURDEN. See *Personal and Transmissible.*

RECEIPT. See *Payment.*

REDUCTION. See *Bankruptcy*, 5—*Company*, 4—*Error*—*Succession*, 31—*Title to Sue*, 4.

REPARATION. *Contributory negligence—Process—Jury trial—Verdict.*

1. In an action of damages for personal injury the jury returned the following verdict,—"Find for the pursuer, but in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300." *Held* that the verdict being either self-contradictory or ambiguous, could not be applied as a verdict for either party, and that it must therefore be set aside and a new trial granted. Florence v. Mann, Dec. 17, 1890, p. 247.

Contributory negligence—Railway—Invitation to passenger to alight.

2. In an action of damages against a railway company raised by a passenger for injuries received in alighting at night from a train at a railway station—not a terminus—it was proved that the train was of an unusual length, that the last carriage, in which the pursuer was travelling, was stopped opposite the end of the platform, which sloped down to the level of the rails; that the pursuer had failed to observe this when she stepped out of the carriage. The guard deponed that he had shouted to the passengers to keep their seats before the pursuer left the carriage, but in this he was contradicted. The jury found for the pursuer. In a motion for a new trial, on the ground that the verdict was against evidence, *held* (1) that in the circumstances it was the duty of the defenders to have given warning to the passengers to keep their seats; and (2) that the question whether they gave such warning or not was one for the jury. Aitken v. North British Railway Co., May 22, 1891, p. 836.

Lease—House rendered uninhabitable owing to mineral workings of persons other than landlord.

3. A lease of a house contained a stipulation that the landlord should keep the house wind and water-tight. The house was rendered uninhabitable during the currency of the lease by subsidence caused by the mineral operations of a coal company in the vicinity who were not tenants of the landlord, but who had encroached upon his minerals. The tenant raised an action against the landlord for the damage sustained by the landlord failing to keep the house wind and water-tight. The Court *assoilzied* the defender, holding that he was not bound to restore the subjects to a habitable condition, and was not liable in damages for failing to do so, the house having been destroyed by the fault of others for whom he was not responsible. Allan v. Roberton's Trustees, June 13, 1891, p. 932.

Master and Servant—Employers Liability Act, 1880.

4. In an action of damages raised by a labourer against his employer, a contractor, at common law and under the Employers Liability Act, 1880, the pursuer alleged that in the course of working as a labourer at the demolition of an old building he fell by part of one of the floors giving way and

REPARATION—*Continued.*

received injuries, that he had been employed at the work under the direction and superintendence of a foreman, to whose orders he was bound to conform, that he had been ordered by him to go upon a floor which was weak through age and decay, and through the removal in the course of the work of certain supports, that he met with the accident by conforming to this order, and that the pursuer was not aware of the danger he incurred by obeying this order, that the foreman was grossly negligent in giving the order to go upon the floor, which he knew or ought to have known was dangerous without guarding against accident, or enabling the pursuer to guard against it, and that the foreman was quite incompetent to be left in charge of the work, and that his want of skill caused or contributed to the accident. *Held* that the pursuer was entitled to an issue. Flynn v. M'Gaw, Feb. 21, 1891, p. 555.

5. In an action of damages against a firm of contractors by the representatives of a labourer who had been killed in the course of his employment, the pursuers averred that the deceased had, along with other labourers, and "under instructions and superintendence of one of the defenders' foremen," been engaged in working in or about a large drain, that the said foreman was a person whose orders the deceased was bound to obey, and for whom the defenders were responsible under the Employers Liability Act, 1880; that the drain was from 7 to 10 feet in depth, and that while the deceased was working at the foot of it, ten feet of the side fell in, and injured him so that he died; that the accident was due to the fault of the defender or of their foreman in causing the deceased to work in the drain without first sufficiently propping its sides with wood; that the duty of seeing that the sides of the drain were sufficiently propped lay with the defenders or their foreman and not with the deceased or his fellow-workmen, and that the deceased relied, and was entitled to rely, on the defenders or their foreman attending to this duty. The pursuer pleaded the common law and sec. 1, subsecs. 1, 2, and 3, of the Employers Liability Act, 1880. *Held* that the pursuer was entitled to an issue. M'Coll v. Black & Eadie, Feb. 6, 1891, p. 507.

6. In an action of damages raised by an engineer against his employers, a firm of shipbuilders and engineers, the pursuer averred that he had been employed in fitting up the boilers in a steamer which had been constructed by his employers, and was in course of completion; that he was in the habit of going to his work by the forward hatch, but as this passage was blocked he had, on one occasion, to proceed by the after hatch and through the engine-room; that in doing so he fell into a manhole in the floor of the engine-room and was injured; that the manhole was unprotected, except for some lead pipes which were lying on one side of it; that he was unaware of its existence, as it had been covered over on the only two occasions on which he had previously been in the engine-room; that at the time of the accident the light in the engine-room was dim; that there was a duty on the defenders to cover or protect the manhole so as to prevent accidents, but that they had failed to do so, although similar occurrences had taken place before; that it was the duty of the defenders to have had the engine-room properly lighted; and that their failure in these respects had led to the accident. *Held* that, having regard to the circumstances stated, there was no relevant averment of fault on the part of the defenders, and action dismissed. Forsyth v. Ramage & Ferguson, Oct. 25, 1890, p. 21.

7. In an action of damages raised by a labourer against his employer at common law, and alternatively under the Employers Liability Act, 1880, the pursuer alleged that he was in the course of his duty, at two o'clock on the morning of 27th March, uncoupling waggons filled with shale, which had been propelled by an engine along a line of railway belonging to the defenders, and that while he was between two of the waggons the engine-driver returned with the engine, and drove it suddenly, without warning, culpably, and carelessly, against these waggons, by reason of which a waggon went

over the pursuer's leg; that at the place where the accident happened there was a hole several feet deep and two feet wide under the railway lines, which ought to have been covered with planks, at least during the night, and that the pursuer, notwithstanding the want of warning, would probably have escaped but for said hole; that one of his feet slipped into it, and that he was thereby unable to get his other foot clear in time. *Held* that, as according to the pursuer's statement, it was the engine-driver's breach of duty that caused the accident at the particular place, there was no relevant case at common law against the defenders. Robertson v. Linlithgow Oil Co., Limited, July 18, 1891, p. 1221.

Mine—Workman in employment of separate contractor—Materials supplied by employer to contractor.

8. A miner in the employment of a person who had contracted with a coalmaster for the sinking of a pit was killed by the fall of a "kettle" used in raising material. The kettle and all the appliances connected with it were supplied by the coalmaster under a written contract, which provided, "the contractor to pay his own pitheadmen, and take upon himself the responsibility of their conduct when at work, and any accident that may befall them in the execution of his orders. He must therefore satisfy himself as to the condition and strength of all materials and tackling provided for him, it being understood that he may stop work till the necessary alterations or repairs are made." In an action at the instance of the representatives of the miner against the coalmaster it was proved that the plant supplied by the defender was reasonably safe and sufficient, though somewhat old-fashioned, and not provided with recent improvements, which would have rendered the accident impossible; further, that the accident occurred through the neglect of the contractor's pitheadman. *Held* that the defender was not responsible. M'Gill v. Bowman & Co., Dec. 9, 1890, p. 206.

Precautions for the safety of the public—Railway—Escape of dog entrusted for carriage.

9. In an action of damages against a railway company by a man who had been bitten by a dog which had escaped from the custody of the company, the following facts were proved:—The dog, with a collar and chain attached, was delivered to the railway company at Kelso for carriage to Perth, the guard being told that it was a quiet animal. At Waverley Station, Edinburgh, where it had an hour and a-half to wait in the parcel-office during change of train, it seemed to get excited, and snapped at its chain. On being led out to rejoin the train it at first went quietly, but soon shewed a disposition to bite, and finally broke away from the porter who was leading it, and escaped from the station. It found its way to a public garden at some distance, where it was secured by the pursuer and two other gardeners, and left in the charge of the pursuer, when it bit him. The jury returned a verdict for the pursuer. The Court *granted* a new trial, on the ground that there was no evidence of fault on the part of the railway company in permitting the dog to escape. Gray v. North British Railway Co., Nov. 4, 1890, p. 76.

Promise to marry—Mora—Acquiescence.

10. In an action of damages raised in 1889 for breach of a promise to marry alleged to have been made in 1879, the defender admitted the promise, but pleaded that the pursuer's claim was barred by *mora* and acquiescence. It was proved before a jury that from 1881 till the raising of the action, the pursuer, though living in the same town as the defender, had hardly ever spoken to the defender, and when passing him in the street simply recognised him; but, in 1885, hearing that he was engaged to another woman (whom he married in 1889), she wrote to her intimating her prior engagement. The jury returned a verdict for the pursuer. On a motion for a new trial, the Court refused to disturb the verdict. Colvin v. Johnstone, Nov. 14, 1890, p. 115.

REPARATION—*Continued.*

Public official—Statutory protection against claims of damages for irregularities in execution of office—Ultra vires—Public Health (Scotland) Act, 1867, sec. 118.

11. Where a Local Authority had partly demolished an untenanted house within their district on the ground that the state of the roof was dangerous to public safety, *held* that the Local Authority were not protected by the 118th section of the Public Health Act, 1867, against a claim for damages by the owner, the demolition of houses on account of their danger to public safety being outwith the powers of Local Authorities under the Act. Edwards v. Parochial Board of Kinloss, June 2, 1891, p. 867.

Slander—Issue—Justification.

12. In an action of damages for slander in respect that the defender had, as was alleged, called the pursuer "a swindler and a thief," "a questionable character," and a person whose "presence was an offence to all honourable men," the defender admitted having said that the pursuer's conduct "was little removed from thieving," but stated in justification that the pursuer and other persons had purchased certain concessions entitling them to work copper mines at Val d'Elsa, Italy, and that the pursuer, though knowing that the prospects of return therefrom were extremely discouraging, had "made false and fraudulent representations to the defender regarding a proposed joint stock company to be formed to take over certain mineral concessions in the Val d'Elsa, Italy, by representing the mines to be of great value, which, in point of fact, he knew they were not, and thus induced the defender to contribute to the capital of the Val d'Elsa Copper Company, in the promotion of which the pursuer was pecuniarily interested as vendor"; that the pursuer further stated that the run by the public upon the shares had been so great that it would be necessary for the defender to take more shares in order to make sure of an allotment, and in reliance upon the truthfulness and accuracy of this, along with the other representations of the pursuer, the defender was induced to take additional shares, while the fact was that only about 25,000 of the 60,000 shares offered to the public were applied for; that the pursuer as vendor was dependent for the carrying out of the sale on a sufficient number of shares being applied for. The Court allowed the defender issues in justification. Macleod v. Marshall, March 20, 1891, p. 811.

Slander—Newspaper—Innuendo.

13. A newspaper published a report of a meeting of a Good Templar Lodge, headed "Mr A.'s Crooked Ways." It was set out in the report that "Brother H.," who had been a candidate for the Grand Chiefship, stated that "Brother A." came to him and urged him to become a candidate, as he had no intention of standing again for the post; that subsequently, without giving him, "Brother H.," any notice of his change of mind, "Brother A." presented himself as a candidate, and was re-elected; and that he, Brother H., felt justified in making these explanations, as his conduct in opposing Brother A. was apt to be misunderstood. The same issue of the paper contained a short leading article, which substantially repeated the statement attributed to "Brother H." in the report, and added,—"It is to be hoped that this sharp practice, which is of a piece with the other proceedings of the official clique at the head of the Order, will not be lost upon the members." The news-bill of the day also contained the words,—"Mr A. and his Crooked Ways." In an action by A. against the proprietors of the newspaper for slander, alleged to be contained in the above publications, which were innuendoed to mean that the defenders intended to represent, and did represent, that the pursuer had been guilty of deceitful and dishonourable conduct, and that he habitually indulged in conduct that was unfair, deceitful, and dishonourable, the Court *held* (*rev.* judgment of Lord Wellwood) that the publications would not bear the innuendo proposed, and *assoilzied* the defenders. Archer v. Ritchie & Co., March 19, 1891, p. 719.

REPARATION—*Continued.*

Slander—Malice—Statement regarding candidate for county council by one not a voter in the district.

14. Where a parish was divided into two electoral divisions for county council purposes, and a voter in one division was sued by a candidate for the other for damages for falsely and calumniously stating that it would be useless to elect the pursuer as he would soon be bankrupt, *held* that the defender was not privileged, and that malice need not be put in the issue. Anderson v. Hunter, Jan. 30, 1891, p. 467.

Slander—Issue.

15. Form of issue where slander is said to have been uttered in Gaelic. Anderson v. Hunter, Jan. 30, 1891, p. 467.

Slander—Innuendo—Threat to report matter to procurator-fiscal.

16. In an action of damages for slander the pursuer averred that his firm of Ramsay Brothers had been in the practice of collecting accounts for the firm of MacLay & Co., of which also he had formerly been a partner; that he had sold his interest in the latter firm to the other partners on 4th April 1889; that on 28th December 1888, and on 5th March 1889, the cashier of Ramsay Brothers had collected two accounts due to MacLay & Co. by a customer for £5, 5s. and £4, 4s. respectively, and that these sums had been credited to MacLay & Co.; that Ramsay Brothers had been sequestrated on 6th May 1889; that on 20th February 1890 the defenders had written to the pursuer—"We are surprised at having had no reply to ours of the 3d inst., regarding the a/cs of Wilson, Saline, which you collected and have not accounted for. It seems to us you do not realise the seriousness of your position in the matter, but should we be forced to insist on Mrs Wilson paying us the accounts she has already paid to you, and which is quite within our right, as she holds no receipt from us, and those she had from you are no legal discharge of a/cs due to MacLay & Co., she threatens to place the affair in the hands of her law-agent, and you may then find yourself in an awkward situation, as he will in all probability report to the fiscal. If you wish to save yourself from unpleasant consequences you will let us hear from you without delay"; that by this letter the defenders had falsely, calumniously, and maliciously represented that the pursuer, without any authority from MacLay & Company, had collected money due by a customer to them, and had dishonestly appropriated the same, or part thereof, to his own purposes, and been guilty of breach of trust and embezzlement. The pursuer did not deny on record the liability of his firm to account, or their failure to do so, and, although allowed delay in order to explain what had become of the money, intimated that he had no explanation to give. *Held* (1) that the pursuer was entitled to an issue, and (2) that the word "maliciously" should not be inserted in the issue. Ramsay v. MacLay & Co., Nov. 18, 1890, p. 130.

Slander—Privilege—Privilege of litigant in stating matter pertinent to action.

17. In an action by a tenant against his landlord for damages for breach of contract in taking possession before the expiration of the lease of the shop let to the pursuer, the defender *inter alia* averred that the tenant had gone to England, and had left the shop in charge of J. S., that J. S. "was seldom sober" during the time he was on the premises. In an action of damages for slander raised by J. S. against the landlord, *held* that the defamatory statement made by the landlord in the other action being pertinent to the cause was privileged, and that as the pursuer had failed to set forth facts from which malice could be inferred the action fell to be dismissed. Selbie v. Saint, Nov. 8, 1890, p. 88.

Slander—Innuendo—Privilege—Issue.

18. In an action of damages for slander the pursuer averred that he had let a cutting machine on hire to W., and that on W. becoming insolvent, and granting a trust-deed, he (the pursuer) had removed the machine from his premises; that the defender, the trustee's agent, wrote to the pursuer a letter, stating,—"I have been instructed by the trustee, who has already

REPARATION—*Continued.*

written you twice on the subject, to apply to you for evidence of your right to remove from W.'s premises a cutting machine, which you removed without his permission. Unless I have this evidence, or delivery of the machine, by Tuesday morning, I shall place the matter in the hands of the fiscal without further notice"; that the statements in the letter were false and calumnious, and falsely and calumniously implied, and were intended by the defender to imply and represent, that shortly before the date of the letter the pursuer was guilty of the crime of theft by having stolen a cutting machine from the premises of W.; that the said letter was written and sent, and the said charge of theft made by the defender against the pursuer, maliciously, without instructions from his client, the trustee, and although he well knew there were no grounds for it, for the purpose of concussing the pursuer into an abandonment of his right to the machine, and in order to gratify the feeling of ill-will. *Held* (1) that the letter would bear the innuendo, and that the pursuer was entitled to an issue; and (2) that the word "maliciously" should not be put in the issue. Wilson v. Purvis, Nov. 1, 1890, p. 72.

Slander—Innuendo—Ironical meaning attachable to words.

19. *A person who conceived that his reputation had been unfairly attacked through questions put by a Member of Parliament in the House of Commons, wrote to him, and sent to a newspaper a letter in which he denied the charges alleged against himself. He went on to put the case that he should induce one of the political opponents of the member addressed to put questions in the House of Commons implying that that member had had* delirium tremens, *and had been intoxicated in public. Such a course, the writer stated, would be as justifiable as the conduct of the Member of Parliament had been to him. In his letter he also spoke of his illustrations of* delirium tremens *and drunkenness as "imaginary stories," adding "it is doubtless painful for you to hear of these stories as it is painful for me to imagine them true for the sake of bringing home to your mind the impropriety of your unfair questions." In an action of damages at the instance of the Member of Parliament against the proprietor of the newspaper in which the letter was published,* held (aff. *judgment of the First Division) that the pursuer was entitled to an issue whether the letter represented him as a drunkard; that meaning being capable of being put upon the letter, and it being for a jury to say whether there was or was not a libel.* Ritchie & Co. v. Sexton, March 19, 1891, H. L., p. 20.

Wrongous use of diligence.

20. In an action of damages for wrongous use of diligence, the pursuer averred that in the course of an action of maills and duties raised against him by an investment company,—a heritable creditor,—for whom the defenders acted as law-agents, proposals had been made that the pursuer should grant trust-conveyances for behoof of his creditors of certain heritable subjects belonging to him, and that the defenders should in return deliver to the pursuer discharges by the investment company and by themselves of certain securities; that the defenders wrote to the pursuer, "upon exchange of these documents all personal claims against you at the instance of the investment company or ourselves shall be held as discharged"; that, in terms of this arrangement, the trust-deeds were delivered and became operative; that notwithstanding the arrangements the defenders, after taking decree in the action of maills and duties against the pursuer for £28, 10s. 7d. of expenses, had wrongfully executed a charge upon the decree. The defenders maintained that the action was not relevant, in respect that it appeared from the pursuer's statement that he had after due notice allowed decree to go out against him in the action of maills and duties. *Held* that the pursuer was entitled to an issue whether the defenders, having obtained a decree against the pursuer for £28, 10s. 7d., wrongfully and in breach of an agreement, the terms of which are contained in the letter, charged the pursuer to make payment of said sum. Sturrock v. Welsh & Forbes, Nov. 14, 1890, p. 109.

RATION—*Continued.*
'ongous use of diligence—Law-Agent—Malice—Issues.
In an action of maills and duties by heritable creditors against the proprietor ınd tenants of the subjects in which there was a conclusion for expenses ›nly in the event of the defenders appearing and offering opposition thereto, ıppearance was entered for A, the proprietor, who wished to be kept in-'ormed of the proceedings. A took no further step. Decree was afterwards aken by the pursuers' agent against A for expenses without intimation being nade to him. A charge was given upon the extract decree, and a petition 'or cessio threatened. A having taken objection to the proceedings as rregular, the chargers agreed to a suspension of the charge. A then brought ın action of damages against the chargers and their agent for wrongous use ›f diligence, but subsequently asked an issue against the agent only. *Held* 1) that the alleged use of diligence was wrongous, and (2) that the agent vas liable in damages therefor, and that it was not necessary to prove malice ınd want of probable cause. MacRobbie v. M'Lellan's Trustees, Jan. 31, 1891, p. 470.
'ongous use of diligence—Issues.
'orm of issue adjusted for the trial of a case of wrongous use of diligence ıgainst an agent of the person in whose interest it was used. MacRobbie *v.* M'Lellan's Trustees, Jan. 31, 1891, p. 470.
'ongous apprehension—Burgh—Police Commissioners—Glasgow Police Act, 1866, *secs.* 84-86.
ın an action of damages for wrongous apprehension against two police-con-ıtables and the Magistrates and Town-Council of Glasgow as Police Com-nissioners, the Magistrates and Town-Council were assoilzied on the ground hat the constables were not their servants, the control and management of he police being vested in another statutory body—a committee of the Police Commissioners—and the Sheriff. Young v. Magistrates of Glasgow, May 16, 1891, p. 825.
'ongous apprehension—Public officer—Malice.
ın action of damages for wrongous apprehension on a charge of importuning ınder the Glasgow Police Act, 1866, was brought against two constables,—he pursuer alleging that the defenders had at first declined to state any ground for her arrest or to allow her to acquaint her mother, who lived close ›y; that the apprehension had been made with unnecessary violence; that he had been roughly treated and hustled in presence of a large crowd on he way to the police-station; that the charge preferred against her was ıtterly groundless; and that the defenders had acted maliciously and with-›ut probable cause. *Held* that malice and want of probable cause must be ›ut in issue, and that the averments were sufficient to infer malice. Young *v.* Magistrates of Glasgow, May 16, 1891, p. 825.
'atium—Executor—Competency of new action where pursuer died from his injuries after action brought.
A workman who had received injuries while working in his master's employment raised an action against him for damages. The record was closed, and issues were adjusted. Thereafter he died intestate and ınmarried, and his mother was appointed his executrix, and was sisted in he action in his room. Thereafter she raised against the employer an ıction for damages and *solatium* for his death, which she alleged to be due o the accident, and craved to have that action remitted to the same jury who were to try the first action. *Held* that the second action was incom-›etent. Darling v. Gray & Sons, July 14, 1891, p. 1164.
'atium and damages—Death of illegitimate child.
Held (aff. *judgment of Second Division*) *that the rule of law which gives to certain relatives of a person killed by the fault of another a right to* solatium *ınd damages does not extend to the case of the mother of an illegitimate son.* Clarke v. Carfin Coal Co., July 27, 1891, H. L., p. 63.
Discharge, 3—*Railway*, 5—*Ship*, 10, 11.

RES JUDICATA. *Decree dismissing action as incompetent.*

The proprietor of a farm presented a petition in the Sheriff Court for interdict against the crofters on adjoining lands pasturing their cattle on pasture land upon his farm. The Sheriff found that the crofters had been in possession of the pasturage *qua* crofters at the date of the passing of the Crofters Act, and that, therefore, the action was incompetent. In a subsequent action raised by the pursuer in the Court of Session, concluding for declarator that the crofters had no right to pasture their cattle, &c., on his farm and for interdict against the defenders entering upon certain pasture lands which he alleged to be part of his farm, but which the defenders alleged to be part of their crofts as pasturage, the Court repelled a plea of *res judicata*.

Question, whether any decree in the Sheriff Court can support a plea of *res judicata* in the Supreme Court. Duke of Sutherland v. Reed, Dec. 18, 1890, p. 252.

See *Teinds*, 4.

RETENTION. *Bank—Deposit.*

A bank has a right to retain all negotiable instruments belonging to a customer and in its possession, for the purpose of securing a debtor balance on general account, but this right may be excluded by agreement, express or implied. Robertson's Trustee v. Royal Bank of Scotland, Oct. 24, 1890, p. 12.

REVENUE. *Income-Tax—Application for certificate of over-assessment—Appeal—Competency—Income-Tax Act*, 1842, *sec.* 133—*Taxes Management Act*, 1880, *secs.* 57 *and* 58.

1. A banking company on 12th October 1888 discovered that they had been over-assessed, on their own return, for the year 1888-9, but they made no claim under the above section until 10th July 1890. The General Commissioners granted a certificate of over-assessment, holding, *inter alia*, that the claim for overpayment had been made "within a reasonable time." The Surveyor of Taxes appealed to the Court of Exchequer. The bank objected to the competency of the appeal, on the ground that an application for a certificate of over-assessment was not an appeal to the Commissioners within the meaning of the Taxes Management Act, 1880, and therefore, that an appeal from the determination of the Commissioners to the Court of Exchequer was incompetent; and, on the farther ground, that the appeal was an appeal against the determination of the Commissioners on a question of fact, viz., the reasonableness of the delay in applying for a certificate of over-assessment. The Court *sustained* the appeal, *reversed* the determination of the Commissioners, and remitted to them to refuse the certificate, holding that the bank, by failing to make the application within or at the end of the year of assessment, had lost their remedy under the Income-Tax Act, 1842, sec. 133. Russell v. North of Scotland Bank, Limited, Feb. 20, 1891, p. 543.

Income-tax—Abatement—Income-Tax Act, 1842, *Schedule D, Case II., Rule I.—Income-Tax Act*, 1853, *sec.* 51—*Customs and Inland Revenue Act*, 1876, *sec.* 8.

2. The Customs and Inland Revenue Act, 1876, sec. 8, provides for an abatement of income-tax in the case of any person whose "total income from all sources" is less than £400. A bank-agent, who had an income of £374 and occupied rent free a house forming part of the bank premises, which was of the annual value of £50, was disallowed the abatement by the Assessor of Income-Tax, on the ground that the value of the house fell to be reckoned as part of his income, and that his income was not under £400. The bank-agent objected, on the ground that it was part of his duty as bank-agent to occupy the house, and that he could not sublet the house or vacate it even temporarily without consent of the directors and without another bank official being appointed to occupy it in his absence, and that he was liable to be removed at any time. The house was suitable for the bank-agent, and if it had not been provided he would have required another of the same annual value. *Held* that the annual value of the house occu-

REVENUE—*Continued.*
pied by the bank-agent fell to be reckoned as part of his income. Tennant v. Inland Revenue, Jan. 21, 1891, p. 428.
See *Justiciary Cases*, 5.

RIGHT IN SECURITY. *Lease—Bankruptcy—Security retenta possessione.*
1. A lease of a farm from Martinmas 1858 to Martinmas 1878 provided that in the event of the tenant's bankruptcy the lease should, in the option of the landlord, be null and void, and come to an end at the next Martinmas term. It was also provided that the rent "payable for the last crop of the lease shall be exigible by the proprietor previous to the removal of any part of said crop from the ground," the tenant having the option either of paying the rent in advance, with certain discount, or finding security for payment. After 1878 the tenant continued to possess by tacit relocation, and became bankrupt in August 1890. The landlord sought to interdict the tenant and his trustee, in virtue of the clause of the lease quoted, from selling or removing any part of the crop. *Held* that that clause could not be made effectual as against creditors, in respect it was an attempt to create a security in the landlord's favour over moveables, the possession of which remained with the tenant, and interdict *refused*. M'Gavin v. Sturrock's Trustee, Feb. 27, 1891, p. 576.

Constructive delivery—Bonded warehouse.
2. A spirit-merchant, the tenant of a general bonded warehouse, which could not be opened except by using two keys, one of which was kept by the tenant and the other by an officer of excise, obtained advances on the security of certain casks of wines and spirits belonging to him in the warehouse, for which he granted to the lender delivery-orders addressed to the excise officer, who made entries of the transfer in his books. In a question between the trustee on the tenant's sequestrated estate and the lender, *held* that there had been no constructive delivery of the goods to the lender, and that the security was not effectual. Rhind's Trustee v. Robertson & Baxter, March 4, 1891, p. 623.

Transmission of personal obligation against singular successor—Conveyancing Act, 1874, *sec.* 47.
3. A disposition of heritage, which was burdened under a bond and disposition in security, contained a clause exempting the bond from the warrandice, and also this clause,—Which sum of £800 it has been agreed is to remain on the security of the said subjects and others as aforesaid, and the said disponee is to take upon himself the obligation to repay the same; and it is further agreed that the disponee, by acceptance hereof, declares and agrees that the personal obligation to pay principal and interest and penalty contained in said bond and disposition in security shall be a burden upon his title in the same manner as it was on that of the disponer, without the necessity of a bond of corroboration or other deed or procedure, and the personal obligation may be enforced against the disponee by summary diligence and otherwise, in the same manner as against the disponer. The disposition was recorded on behalf of the disponee. *Held* (1) that this was an agreement in the sense of the 47th section of the above statute; and (2) that it was not necessary to its validity that the creditor in the bond should be a party to it. Wright's Trustees v. M'Laren, May 23, 1891, p. 841.
See *Discharge*, 1.

RIVER. *Navigation trustees—Powers and duties—Undertaking.*
The undertaking of the Clyde Navigation Trustees was defined by the Clyde Navigation Consolidation Act, 1858, to embrace, *inter alia*, "The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry-slips, approaches, embankments or river dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained." Under one of the recited Acts, the Act of 1840, the Trustees of the Clyde Navigation (sec. 11) were "empowered to make and main-

RIVER—*Continued.*

tain" a variety of works, including the quays of Erskine Ferry on the Clyde, which were authorised to be reconstructed. By section 50 of the Act of 1840 it was enacted that "the said quays shall, at expense of the said trustees, be repaired, so that the working of the said ferry and quay shall be made as convenient, and the working thereof as easy as before" the operations of the trustees. In an action by the proprietor of the quays at Erskine Ferry for declarator that the trustees were bound to maintain the quays, the defenders contended that their obligation under sec. 50 of the Act of 1840 was fulfilled once for all as soon as they had repaired the quays, and that sec. 11 imposed no obligation on them, but merely conferred a power. *Held* that the construction and maintenance of the quays constituted together an accommodation work intended to compensate the owner for interference with his property, and that the pursuer was entitled to decree. Lord Blantyre v. Clyde Navigation Trustees, Dec. 6, 1890, p. 197.

ROAD. *Road trustees—Powers—Level-crossing—Removal.*

Held that when road trustees have sanctioned the formation of a railway level-crossing over one of their roads they are not entitled arbitrarily to demand its removal or to impose unreasonable conditions upon its continuance. Middle Ward of Lanarkshire Trustees v. Lord Belhaven's Trustee, June 16, 1891, p. 949.

See *Servitude.*

SALE. *Auction—Printed conditions of sale—Sale by sample or by bulk.*

1. The purchaser of certain cases of apples, at a sale of apples by auction, having rejected the apples as being disconform to sample, the auctioneer brought an action against him for the price, denying that the sale was by sample, and founding on the following condition, which he averred was one of the conditions of the sale:—"3. Goods to be delivered to the purchaser as they now lie, with all faults and defects, without any allowance for inaccurate description of marks, quality, quantity, and condition, and intending buyers are requested to thoroughly inspect the bulk." From a proof it appeared that printed conditions of sale, including that above quoted, were hung up in front of the auctioneer's rostrum, but the auctioneer neither read the conditions out to those attending the sale nor directed their attention to them. The defender deponed that he had not read the conditions, though in his evidence he did not dispute that he knew of them. The apples in bulk were stored in cases in a cellar underneath the auction-room, and the auctioneer's cellarman took six of these cases at random, and having opened them, placed them on a dais in the auction-room in sight of those attending the sale. The auctioneer referred to these six open cases as containing specimens of the apples for sale. The defender discovered on delivery that most of the apples he had bought were much decayed. *Held* that the sale was not a sale by sample, that the condition above quoted applied, and imposed on the defender the duty of satisfying himself as to the condition of the apples in bulk, and therefore that decree fell to be granted as concluded for. W. N. White & Co., Limited, v. Dougherty, June 19, 1891, p. 972.

See *Bankruptcy*, 14.

Author and publisher—Bankruptcy.

2. *Held* that the contract between an author and a publisher, by which the publisher takes the risk, and the profits are halved, is a contract of sale of the right to publish the edition of the book to which the contract refers. Cunningham v. Maclachlan & Stewart's Trustee, Jan. 29, 1891, p. 460.

An author and a publisher entered into an agreement "regarding the publication" of an edition of a book. The publisher agreed to relieve the author of the expenses of publication. The author agreed to furnish the drawings for the woodcuts. The expenses were to form a first charge against the book, the proceeds of sales to be divided equally, after these charges had been paid. Copies sold were to be accounted for "at the

.E—*Continued.*
usual trade sale price." The publisher became bankrupt, and his trustee offered (1) to find another publisher to take the place of the bankrupt, or (2) to hand over the whole stock of books to the author at a valuation, or (3) to buy the author's interest at a valuation. All these offers were rejected, and the trustee sold the stock of books, after an interval of two months and a-half, to a bookseller considerably below the trade price. He tendered the whole of the price so received to the author. The author raised an action against the trustee for accounting and declarator that the defender must account to him for the books at the usual trade sale price. Action *dismissed*,—Lords Young, Rutherfurd Clark, and Trayner holding that the agreement constituted a sale of the right to publish the edition of the book in question, and that therefore the property in the books belonged to the trustee; the Lord Justice-Clerk holding that in the circumstances the pursuer was not entitled to require the trustee to do more than he had offered to do. Cunningham v. Maclachlan & Stewart's Trustee, Jan. 29, 1891, p. 460.

'e of heritage—Posting of conveyance.
n a petitory action in the Court of Session against a domiciled American, /hom the pursuers averred to be the proprietor of heritage in Scotland, 'e defender pleaded no jurisdiction, averring that although he had been ; one time the proprietor of such heritage he had sold it before the raising ' the action. It appeared that in October 1889 the defender became pro- ietor of certain heritable subjects in Scotland; that by improbative mis- 'es, dated November and December 1890, he sold these subjects; that 9th January 1891 he executed and on 12th January dispatched by post m America a conveyance of the subjects in favour of the purchaser; and t this conveyance did not reach the purchaser till after the service of the ımons, which took place on 21st January. *Held* that as the transfer- ; of the subjects had not been completed until after the service of the mons the plea of no jurisdiction fell to be repelled. Dowie & Co. v. ıant, Jan. 23, 1891, p. 986.

'heritage—Agreement to accept title subject to all exceptions.
greement for the sale of heritage contained a stipulation that the pur- r should accept the title to the subjects "as it at present stands, and ct to all exceptions of any nature." *Held* that the purchaser was not l by that stipulation to accept a title which was not marketable and could not be made marketable by any expenditure on his part. v. Lornie, Dec. 20, 1890, p. 353.

eritage—Title—Montgomery Act, sec. 5—Stipulation to build dwel- uses.
ıntgomery Act, which gave power to heirs of entail to grant building or ninety-nine years, provided by sec. 5,—"That every such lease ntain a condition that the lease shall be void, and the same is hereby l void, if one dwelling-house at least not under the value of £10 shall not be built within the space of ten years from the date of the or each half acre of ground let. The tenant in a ninety-nine years' ler the Act, which contained a stipulation that the tenant should lwelling-house of the value of £50 within three years, and that s doing so the lease should be void, erected a factory, but no dwel- e, within the three years, and thereafter entered into an agreement le of the subjects, the purchaser becoming bound to accept the it at present stands, and subject to all exceptions of any nature." , whether the building of the factory was or was not sufficient of the obligation to build in a question with the heir of entail, as not a title which the purchaser was bound to accept. Carter Dec. 20, 1890, p. 353.

ge—Title—Rutherfurd Act, sec. 24—Consideration other than

of the Rutherfurd Act provides that it shall not be lawful for

SALE—*Continued.*

any heir of entail in granting a feu or long lease to take any grassum, or fine, or valuable consideration other than the rent for granting such feu or lease, otherwise such feu or lease shall be void. In a lease for eighty-one and a-half years, granted by an heir of entail, the consideration was an annual payment of £36, 16s. payable, to the extent of £26, 16s., by the tenant and, to the extent of £10, by an insurance company under a bond of annuity in favour of the heir of entail and his successors in the entail. The tenant entered into an agreement for the sale of the subjects, the purchaser becoming bound to accept the title "as it at present stands, and subject to all exceptions of any nature." *Held* that the obligation by the insurance company to pay an annuity was not equivalent to rent, and that the lease was not a title which the purchaser was bound to accept. Carter v. Lornie, Dec. 20, 1890, p. 353.

Sale of heritage—Title—Tender of valid title pending action for implement.

7. An action was brought by the seller of heritage against the purchaser to have him ordained to implement his part of the contract by accepting a disposition of the subjects and paying the price. After the opinion of the Court had been delivered, to the effect that the title offered by the seller was not such as the purchaser was bound to accept, the seller tendered a minute in which he offered the purchaser a title to which no exception could be taken. The purchaser had obtained possession of the subjects at the date mentioned in the agreement of sale, and had removed the machinery in a factory which formed part of the subjects. The defender pleaded that tender of a good title was now too late, and that he was not bound to accept it. *Held* that the purchaser was bound to accept the title offered. Carter v. Lornie, Dec. 20, 1890, p. 353.

See *Heritable and Moveable*, 5.

SCHOOL. *Dismissal of teacher—Ultra vires—Committee of Council on Education—Public Teachers Act*, 1882, *sec.* 3, *subsec.* 2.

1. In 1888 the Committee of Council on Education in Scotland resolved to give assistance to certain school boards in Scotland on condition, *inter alia*, that the board accepting the assistance should commit the management of their school to three managers, of whom one should be Her Majesty's inspector of schools for the district, which managers should have full power to dismiss the teacher. The School Board of B. adopted this arrangement, and appointed M. and H., two of their number, to be managers along with the inspector of schools for the district. In 1890 the School Board of B., by a majority of the whole members, passed a resolution dismissing the school teacher on three months' notice, the minute of the board bearing that "Mr R., Her Majesty's inspector, and Mr M., in their capacity as managers, concurred in and agreed to the dismissal. Mr H., in his capacity as manager, opposed the same." The teacher having refused to remove from the schoolmaster's house (which formed part of his emoluments) on the ground that his dismissal was illegal, in respect that if the power of dismissal had been validly delegated to the managers, they had not competently exercised it, and that if the power of dismissal remained in the school board it had been invalidly exercised by the inspector taking part in the proceedings, the board brought an action for ejectment. *Held* that the dismissal was valid.

Opinion that the regulation of the Committee of Council making it a condition of giving assistance to school boards that the power of dismissing the teacher should be in the hands of the managers was *ultra vires*, as being inconsistent with the Public School Teachers Act, 1882, sec. 3, subsec. 2. School Board of Barvas v. Macgregor, March 10, 1891, p. 647.

Scheme by the Educational Endowment Commissioners—Alteration of scheme—Educational Endowments Act, 1882, *sec.* 20.

2. Petition for the amendment of a scheme under the above Act *refused*, on the ground that it was truly an application for power to make payments to certain persons, and not for an alteration of the scheme of the nature con-

OL—*Continued.*
templated by the Act. Governors of Dollar Institution, Nov. 28, 1890, p. 174.
Scheme *amended* by the addition of a clause empowering the governors, having regard to the circumstances of any particular case, and with consent of the Scotch Education Department, to make reasonable compensation to teachers or other officers in schools discontinued under the scheme. Governors of Logan and Johnston School, Dec. 5, 1890, p. 190.
hool Bursary—Qualification of candidate—Discretion of School Governors —Educational Endowments Commissioners—Scheme.
By a scheme framed by the Commissioners appointed under the Educational Endowments Act, 1882, it was, *inter alia*, provided that a bursary should be awarded by competitive examination "among those who have been pupils in public or state-aided schools in the parish of B. for at least six months before the date of examination, and whose parents or guardians require aid for giving them higher education. It shall be tenable for such period, not exceeding four years, as the Governors may determine, at a university or school for higher or technical, or professional education, to be approved by the Governors." After an examination, held on 25th April 1889, the Governors awarded the bursary to W., and declared that M. was second in the examination. Circumstances in which *held* that M.'s absence from the school was not such as to disqualify him from competing for the bursary, but that W. having left the school was no longer entitled to compete, and therefore that M. was entitled to the bursary.
Observed that the Court would have been slow to interfere with the award of the Governors on the ground that the successful pupil's father did not require aid in giving his son higher education. M'Quaker v. Governors of the Ballantrae Educational Trust, Feb. 6, 1891, p. 521.
ıe *Sheriff*, 6.

ITUDE. *Road—Constitution—Occasional use as access to shooting ground. mountain path through a projecting tongue of an adjoining property formed a convenient short cut from one part of an estate to another, and from* 1821 *it was used by the proprietors of the estate as the means of going from the one part of the estate to the other when deerstalking in autumn, but it was used by them for no other purpose and at no other time, and between* 1846 *and* 1878 *they hardly used it at all. It was not proved that this use of the path had come to the knowledge of the proprietor of the adjoining estate except on two occasions, in* 1857 *and* 1882, *and on both occasions it was challenged by him. In* 1888 *he brought a note of suspension and interdict against the future use of the path by the respondent.* Held (aff. *judgment of Second Division*) *that the use of the path proved was not sufficient to shew that it was in the assertion of a right, and therefore that the respondent had failed to instruct the existence of a servitude right of way over the path in question.* M'Inroy v. Duke of Athole, July 2, 1891, H. L., p. 46.

RIFF. *Jurisdiction—Citation—Registered letter—Debts Recovery Act*, 1867 *—Citation Amendment Act*, 1882, *sec.* 3.
The proprietor of a fishing station brought an action under the Debts Recovery Act, 1867, in the Sheriff Court of the county in which the station was situated, against his tenant, for arrears of rent. At the date of the summons the defender was in possession of the fishing station, and had thereon fish-curing stock and plant, but had ceased to carry on active operations. He was resident in another sheriffdom, and was cited by means of a registered letter sent by the agent of the pursuer. The defender pleaded (1) no jurisdiction, in respect that he had no domicile, and was not carrying on business in the county; and (2) that he had not been properly cited. *Held* (1) that the Sheriff had jurisdiction, and (2) that the citation was valid. Mouat v. Lee, June 6, 1891, p. 876.
urisdiction—Proof of irregular marriage incidental to civil action.
In an ordinary civil action it is competent for a Sheriff to decide incidentally,

SHERIFF—*Continued.*

for the purposes of the action, whether two persons, not parties to the action, have been irregularly married. M'Donald v. Mackenzie, Feb. 6, 1891, p. 502.

Jurisdiction—Process—Union of several counties into one sheriffdom—Sheriff Court Act, 1853, *sec.* 4—*Sheriffs Act*, 1870, *secs.* 4, 5, 6, 12.

3. In a sheriffdom in which several counties are combined the granting of a warrant to cite a defender to appear at a Court in a county which is not the county of his domicile, is a matter within the discretion of the Sheriff. Tait v. Johnston, Feb. 28, 1891, p. 606.

4. The Sheriff-substitute of a county divided into two districts by an order of a Secretary of State following on the Statute 33 and 34 Vict. cap. 86, refused a warrant to cite to the Court at the head burgh of the county a defender belonging to another district of the county. *Held* that an appeal against this refusal was incompetent. Davidson v. Davidson, June 9, 1891, p. 884.

Proof—Loss of shorthand writer's notes—Nobile officium.

5. When the shorthand writer's notes of the testimony of certain witnesses in a proof taken in a Sheriff Court action had been accidentally destroyed, the Court, on the petition of the pursuer, which was opposed by the defender, *remitted* to the Sheriff to take the evidence of these witnesses of new, but expressed the opinion that the Sheriff might have allowed the evidence to be taken of new without such authority. Yates v. Robertson, July 18, 1891, p. 1206.

Appeal—Local Government Act, 1889, *secs.* 86, 105.

6. The Local Government Act, 1889 (sec. 86), enacts that if under the provisions thereof a teacher appointed previously to the passing of the Education Act, 1872, shall be prejudiced in his right to school fees, he shall be entitled to compensation from the school board, "and such compensation, failing agreement, may be determined finally by the Sheriff." In an action brought in the Sheriff Court by a teacher against a school board praying for declarator that the pursuer was entitled to a certain sum annually as compensation for fees under the above Act, the Sheriff-substitute appointed the pursuer to lodge a minute giving details as to fees previously received by him. The pursuer having appealed, the Sheriff allowed the pursuer a proof. The defenders appealed to the Court of Session. *Held* that the appeal was incompetent. M'Gilp v. Kilchoman School Board, March 17, 1891, p. 714.

Small-Debt cases—See *Jurisdiction*, 7—*Justiciary Cases*, 1 *to* 4.

SHIP. *Affreightment—Bill of lading—Exemption of liability of shipowner for default of crew in the "navigation" of the ship.*

1. Goods were shipped under a bill of lading which exempted the shipowner from liability for "any act, neglect, or default whatsoever of pilot, master, or crew in the navigation of the ship in the ordinary course of the voyage." The goods were damaged in consequence of the absence of casing on the pipe of a water-closet, which was broken by the pressure of the cargo in rough weather. It was proved that the master and crew had, shortly before the ship sailed with the cargo in question, removed the casing, and had thought it unnecessary to replace it before sailing, as they relied on other means for protecting the pipe from injury. In an action at the instance of an onerous indorsee of the bill of lading against the owners, *held* that the pipe ought to have been provided with casing, that the failure to provide it was a default of the master or crew in the navigation of the ship in the ordinary course of the voyage, and therefore that the shipowner was not liable. Gilroy v. Price & Co., Dec. 27, 1891, p. 569.

Carriage of goods—Delivery.

2. In discharging a cargo of salt, loaded in bulk, part of the cargo was lost through defects in the gearing of the vessel, by reason of which some of the contents of the buckets in which the salt was swung ashore was jerked out, and fell between the ship and quay. The charter-party bore that the cargo was to be "brought to and taken from alongside." *Held* that this

SHIP—*Continued.*

obligation had not been implemented, and that the ship was liable for the loss. Avon Steamship Co., Limited, v. Leask & Co., Dec. 18, 1890, p. 280.

Demurrage—Charter-party—Delivery retarded by fault of railway company.

3. A ship with a cargo of pit props, at the port of delivery, was berthed at a quay where, by the rules of the harbour, such a cargo could not be deposited. Delay in taking delivery took place in consequence of a railway company failing to provide a sufficient supply of trucks. *Held* that it was no answer to a claim for demurrage that the delay was caused by the fault of the railway company. Kruuse v. Drynan & Co., July 9, 1891, p. 1110.

4. The time occupied in loading a vessel is not, in the absence of stipulation, to be lumped with the time occupied in discharging her to the effect of working off by extra despatch in the one operation demurrage incurred by delay in the other. Avon Steamship Co., Limited, v. Leask & Co., Dec. 18, 1890, p. 280.

Charter—Freight—Hire to cease when ship inefficient.

5. *In a charter-party the charterer became bound to pay hire for a steam-vessel at a certain rate per month, and the owners to provide the officers and crew and stores. It was stipulated that "in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service." On 30th September 1887, on a voyage from the West Coast of Africa to Harburg, the high-pressure engine broke down, and the vessel put in to Las Palmas in the Canary Isles, where she was pronounced to be unfit to proceed on her voyage. As repairs could not be effected in that port, the owners and charterers arranged to send from England a tug to bring the ship to Harburg, it being agreed that the cost should be treated as general average. The ship arrived at the port of discharge by the use of her low-pressure engine and with the assistance of the tug. The charterer paid £867 as his share of the cost of the tug. In an action by the shipowner against the charterer for £341, 4s. 8d., as the hire of the ship from the time she left Las Palmas with the assistance of the tug till she was discharged,* held (1) (diss. *Lord Bramwell,* aff. *judgment of Second Division*) *that the ship had not been "in an efficient state" for completing her voyage from the time of the accident, and that in terms of the charter-party the owner had no claim to hire for the subsequent voyage, but* (2) (diss. *Lord Morris, varying judgment of Second Division*) *that the charterers must pay hire for the full period during which she was engaged in discharging her cargo at the port of arrival, the ship being then in an efficient state for performing that part of the contract.* Hogarth v. Miller, Brother, & Co., Dec. 1, 1890, H. L., p. 10.

Master—Cargo—Excepted perils—Duty of master in regard to goods damaged by excepted perils.

6. There is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods entrusted to him, and, in the event of loss or deterioration resulting from accidents covered by the exceptions in the charter-party, to take reasonable measures in order that the loss or deterioration may be minimised. Adam v. J. & D. Morris, Nov. 26, 1890, p. 153.

Salvage—Merchant Shipping Act, 1854, *sec.* 460—*Jurisdiction.*

7. *Held* that the words "at or near the place where such ship or boat is lying," in the above enactment, mean at or near the place where the ship is brought immediately after the accident, and do not include any place where the ship may afterwards be when a dispute arises.

Opinions that an insurance company, with which a salved vessel is insured, cannot be convened in such proceedings. Summers v. Buchan, June 6, 1891, p. 879.

Liability of owners inter se—Contribution.

8. All the owners of a ship except A, who had one share, were resident in

SHIP—*Continued.*

England, and in an action in the English Courts, in which A was not called, were found liable to owners of cargo in damages caused by its loss. A, who resided in Scotland, was informed of the action, but did not interfere. In an action in the Scottish Courts against A at the instance of the other owners of the ship to have him found liable to contribute his share of the ship's liabilities, *held* that the costs of the English action, at the instance of the cargo owners, fell to be included among these liabilities, and that the defender was liable for his share. Bennett v. Maclellan, June 16, 1891, p. 955.

Shipping casualty appeal—The Merchant Shipping Act, 1854, *sec.* 242—"*Wrongful act or default*"—*Expenses.*

9. Appeal by the master of a ship against a judgment suspending his certificate *refused*, on the ground that his failure, through unreasonable panic, to take measures open to him with a view to saving the ship amounted to a "default" on his part, but no expenses found due, as the bulk of the evidence led and printed related to a portion of the case which was departed from by the Board of Trade when the case came before the Court of Session. Brown v. Board of Trade, Dec. 18, 1890, p. 291.

Reparation — Harbour — Contributory negligence of master of vessel — Expenses.

10. A sailing vessel, on entering a harbour, got aground and suffered damage, for which the owner sued the harbour trustees. At the time of the accident the vessel was within the limits of the jurisdiction of the harbourmaster, but there were two local pilots on board, and it was proved that the accident was due to the fact that a wrong course was steered. Both the harbourmaster, who gave directions from the shore, in answer to inquiries from the vessel, and those on board the vessel were ignorant that the tide had begun to ebb, thus making the navigation more difficult. In an action of damages at the instance of the owner of the vessel against the harbour trustees, *held* that although the harbourmaster was in fault in the directions which he gave, there was contributory negligence on the part of those in charge of the navigation of the vessel, and defenders *assoilzied.*

The defenders were found entitled to expenses. Renney v. Magistrates of Kirkcudbright, Dec. 19, 1890, p. 294.

Collision—Pilot—Compulsory pilotage district—Master—Responsibility for leaving dock—Employment of tug—Merchant Shipping Act, 1854, *sec.* 388.

11. The "Strathspey," a steamship of 992 tons, shortly after leaving the port of Glasgow, and when in charge of a pilot, and within the compulsory pilotage district of the River Clyde, in going down the river, came into collision with, and injured another vessel, the "Islay." The accident was due to the violence of the wind and the "Strathspey's" want of steerageway, arising from an unusually strong ebb tide, and the slow rate at which the vessel was moving in order to comply with the river bye-laws, which forbade more than a certain rate of speed. In an action of damages at the instance of the owner of the "Islay" against the owners of the "Strathspey" the pursuer pleaded that the master of the "Strathspey" was answerable either by himself or in conjunction with the pilot for allowing his ship to leave the dock, and for neglecting to employ a stern tug to assist in steering her, and that the weather and tide conditions were such as to amount to a case of manifest danger, for the disregard of which the presence of the pilot did not relieve him from liability. *Held* that as the pilot was in charge before the vessel left the dock, it was for him to decide whether she could prudently leave her moorings, and whether a tug was required, and that the pursuer, on whom the *onus* lay, had failed to prove contributory negligence on the part of the master; and further, that the local conditions of wind and tide on the day in question did not present a case of manifest danger such as to have made it the duty of the master to have taken his ship out of the hands of the pilot. Owners of the "Strathspey" v. Owner of the "Islay," *et e contra*, July 3, 1891, p. 1048.

—*Continued.*
ersuading seaman to desert—Person verbally engaged as storekeeper who had not signed articles—Merchant Shipping Act, 1854, *secs.* 2 *and* 257.
A, a storekeeper on a homeward bound vessel, was on her arrival formally discharged, but verbally re-engaged to act in that capacity for the vessel's next voyage, and also to remain by her and to attend to the stores while she lay in harbour. Before he had signed articles for the voyage, an attempt was made to induce him to leave the vessel by a delegate of a Seamen's Union. The delegate on being convicted of an offence under section 257 of the Merchant Shipping Act, 1854, appealed to the High Court of Justiciary on the ground that A was not a "seaman" within the meaning of section 2 of the Act, because he had not signed articles. *Held* that A was a seaman in the sense of the Act, and appeal dismissed. Thomson v. Hart, Oct. 27, 1890, Just. Cases, p. 3.
ee *Insurance.*

NDER. See *Reparation*, 12 *to* 19.

LL-DEBT COURT. See *Jurisdiction*, 7—*Justiciary Cases*, 1 *to* 4.

MP. *Receipt—Discharge.*
1 defence to an action by a widow for certain half-yearly payments of an annuity, to which she was entitled under the will of her husband, his trustees alleged that the pursuer had agreed to hold her maintenance by the liferenter of her deceased husband's estate as equivalent to her annuity for the time, and produced a document titled an "acknowledgment" by her, which set forth certain half-yearly moieties of her annuity, including those sued for, and which concluded,—"I acknowledge that my annuity as above detailed has been duly accounted for to me by the trustees of the late" husband. It was signed by her, but bore no stamp. *Held* that the document was of the nature of a receipt, and being unstamped could not be looked at as evidence of the alleged agreement. Cameron v. Panton's Trustees, March 19, 1891, p. 728.

TUTE. *Casus improvisus.*
pecial case for the opinion of the Court regarding the liabilities of two parishes in respect to the parochial relief of persons who were resident on a portion of one parish which had under the Local Government Act, 1889, been transferred to the other, *dismissed*, in respect that it presented no question of law. Parochial Board of Borthwick v. Parochial Board of Temple, July 17, 1891, p. 1190.

TUTES.
579, *cap.* 83. See *Prescription*, 1, 2.
592, *cap.* 141. See *Process*, 1.
696, *cap.* 5. See *Bankruptcy*, 5, 6, 7.
4 *Geo. II. cap.* 40 (*Tippling Act*). See *Public-House*, 1.
0 *Geo. III. cap.* 51 (*Montgomery Act*). See *Sale*, 5.
9 *and* 40 *Geo. III. cap.* 98 (*Thellusson Act*). See *Succession*, 1, 2.
Geo. IV. cap. 120 (*Judicature Act*, 1825). See *Process*, 8, 17, 21.
and 8 *Geo. IV. cap.* 53. See *Administration of Justice*, 2—*Justiciary Cases*, 5.
Geo. IV. cap. 58 (*Home Drummond Act*). See *Public-House*, 2, 3.
and 3 *Will. IV. cap.* 65 (*Reform Act*, 1832). See *Election Law*, 3.
Will. IV. and 1 *Vict. cap.* 41 (*Small-Debt Act*, 1837). See *Jurisdiction*, 7—*Justiciary Cases*, 1 *to* 4.
and 2 *Vict. cap.* 119 (*Sheriff Courts Act*, 1838). See *Election Law*, 3.
and 6 *Vict. cap.* 35 (*Income-Tax Act*, 1842). See *Revenue*, 1, 2.
and 8 *Vict. cap.* 53. See *Justiciary Cases*, 5.
0 *Vict. cap.* 27 (*Harbour, Docks, and Piers Clauses Act*, 1847). See *Justiciary Cases*, 17.

STATUTES—*Continued.*
11 *and* 12 *Vict. cap.* 36 (*Entail Amendment Act*, 1848). See *Entail*, 1—*Sale*, 6.
12 *and* 13 *Vict. cap.* 51 (*Pupils Protection Act*, 1849). See *Process*, 15.
13 *and* 14 *Vict. cap.* 92 (*Cruelty to Animals Act*, 1850). See *Justiciary Cases*, 11, 23.
16 *and* 17 *Vict. cap.* 34 (*Income-Tax Act*, 1853). See *Revenue*, 2.
16 *and* 17 *Vict. cap.* 92 (*Sheriff Court Act*, 1853). See *Sheriff*, 3, 4.
17 *and* 18 *Vict. cap.* 104 (*Merchant Shipping Act*, 1854). See *Justiciary Cases*, 15—*Ship*, 7, 9, 11.
19 *and* 20 *Vict. cap.* 79 (*Bankruptcy Act*, 1856). See *Bankruptcy.*
20 *and* 21 *Vict. cap.* 56 (*Distribution of Business Act*, 1857). See *Process*, 15.
25 *and* 26 *Vict. cap.* 35 (*Public-Houses Amendment Act*, 1862). See *Public-House*, 2.
25 *and* 26 *Vict. cap.* 89 (*Companies Act*, 1862). See *Company.*
25 *and* 26 *Vict. cap.* 101 (*General Police and Improvement Act*, 1862). See *Justiciary Cases*, 21—*Police*, 1, 2.
25 *and* 26 *Vict. cap.* 114 (*Poaching Prevention Act*, 1862). See *Justiciary Cases*, 12, 13.
25 *and* 26 *Vict. cap. cciii.* (*Aberdeen Police and Water-Works Act*, 1862). See *Justiciary Cases*, 16.
27 *and* 28 *Vict. cap.* 53 (*Summary Procedure Act*, 1864). See *Justiciary Cases*, 6, 22, 23.
29 *and* 30 *Vict. cap. clvi.* (*Greenock Port and Harbour Act*, 1866). See *Harbour—Justiciary Cases*, 17.
29 *and* 30 *Vict. cap. ccxxiii.* (*Glasgow Police Act*, 1866). See *Burgh*, 2, 3, 7, 8—*Reparation*, 23.
29 *and* 30 *Vict. cap. cccl.* (*The Caledonian and Scottish North-Eastern Railways Amalgamation Act*, 1866). See *Railway*, 4.
30 *and* 31 *Vict. cap.* 26 (*Debts Recovery Act*, 1867). See *Sheriff*, 1.
30 *and* 31 *Vict. cap.* 101 (*Public Health Act*, 1867). See *Police*, 1—*Reparation*, 11.
30 *and* 31 *Vict. cap.* 131 (*Companies Act*, 1867). See *Company*, 5.
31 *and* 32 *Vict. cap.* 48 (*Representation of the People Act*, 1868). See *Election Law*, 2, 4, 5, 6, 7.
31 *and* 32 *Vict. cap.* 100 (*Court of Session Act*, 1868). See *Process*, 13, 14.
31 *and* 32 *Vict. cap.* 101 (*Titles to Land Consolidation Act*, 1868). See *Heritable and Moveable*, 1, 2—*Succession*, 19, 20—*Personal or Transmissible.*
33 *and* 34 *Vict. cap.* 86 (*Sheriffs Act*, 1870). See *Sheriff*, 3, 4—*Process*, 18.
34 *and* 35 *Vict. cap.* 81 (*Act to Abolish Reductions ex capite lecti*). See *Succession*, 11—*Heritable and Moveable*, 4.
37 *and* 38 *Vict. cap.* 94 (*Conveyancing Act*, 1874). See *Writ*, 1, 2—*Right in Security*, 3.
38 *and* 39 *Vict. cap.* 62 (*Summary Prosecutions Appeals Act*, 1875). See *Justiciary Cases*, 5.
38 *and* 39 *Vict. cap.* 86 (*Conspiracy and Protection of Property Act*, 1875). See *Justiciary Cases*, 14.
39 *and* 40 *Vict. cap.* 16 (*Customs and Inland Revenue Act*, 1876). See *Revenue*, 2.
41 *and* 42 *Vict. cap.* 74 (*Contagious Diseases (Animals) Act*, 1878). See *Jurisdiction*, 9—*Public Health.*
43 *and* 44 *Vict. cap.* 19 (*Taxes Management Act*, 1880). See *Revenue*, 1.
43 *and* 44 *Vict. cap.* 34 (*Debtors Act*, 1880). See *Bankruptcy*, 1—*Diligence*, 2—*Justiciary Cases*, 10.
43 *and* 44 *Vict. cap.* 42 (*Employers Liability Act*, 1880). See *Reparation*, 4, 5, 7.
44 *and* 45 *Vict. cap.* 21 (*Married Women's Property Act*, 1881). See *Husband and Wife*, 2, 6—*Succession*, 24.

STATUTES—*Continued.*
44 *and* 45 *Vict. cap.* 22 (*Bankruptcy and Cessio Act*, 1881). See *Bankruptcy*, 4.
45 *and* 46 *Vict. cap.* 18 (*Public Teachers Act*, 1882). See *School*, 1.
45 *and* 46 *Vict. cap.* 53 (*Entail Act*, 1882). See *Entail*, 2, 4.
45 *and* 46 *Vict. cap.* 59 (*Educational Endowments Act*, 1882). See *School*, 2, 3.
45 *and* 46 *Vict. cap.* 61 (*Bills of Exchange Act*, 1882). See *Bill of Exchange*, 3.
45 *and* 46 *Vict. cap.* 77 (*Citation Amendment Act*, 1882). See *Process*, 1—*Sheriff*, 1.
47 *and* 48 *Vict. cap.* 16 (*Bankruptcy Frauds and Disabilities Act*, 1884). See *Justiciary Cases*, 10.
48 *and* 49 *Vict. cap.* 3 (*Representation of the People Act*, 1884). See *Election Law*, 1, 2, 7, 8.
49 *and* 50 *Vict. cap.* 27 (*Guardianship of Infants Act*, 1886). See *Judicial Factor*, 1.
49 *and* 50 *Vict. cap.* 29 (*Crofters Holdings Act*, 1886). See *Lease*, 6, 7, 8, 9—*Jurisdiction*, 5.
50 *and* 51 *Vict. cap.* 35 (*Criminal Procedure Act*, 1887). See *Justiciary Cases*, 19.
50 *and* 51 *Vict. cap.* 58 (*Coal Mines Regulation Act*, 1887). See *Mines and Minerals*, 3, 4—*Justiciary Cases*, 20.
52 *and* 53 *Vict. cap.* 50 (*Local Government Act*, 1889). See *Statute—Process*, 19.
52 *and* 53 *Vict. cap.* 72 (*Infectious Diseases (Notification) Act*, 1889). See *Justiciary Cases*, 22.
53 *and* 54 *Vict. cap.* 62 (*Companies Memorandum of Association Act*, 1890). See *Company*, 3.

STOCK EXCHANGE. See *Bank*, 3.

SUCCESSION. *Accumulation—Thellusson Act.*
1. *Held* that the Thellusson Act prohibits any accumulation after the lapse of twenty-one years from the date of a testator's death, although the time specified for accumulation may not commence till long after his death. Campbell's Trustees v. Campbell, June 30, 1891, p. 992.

Rents of Heritage—Thellusson Act.
2. In a trust-settlement the testator directed his trustees to pay to his widow the rents of certain lands during her life, and at her death to accumulate the rents for the purchase of additional lands till the death of the longest liver of certain nephews and nieces, and upon that event to execute an entail in favour of the heir of the body of his nephew L. C., whom failing, &c. The deed contained a declaration that notwithstanding the death of the testator's widow the trust should continue till all the trust purposes had been carried into effect, and "declaring also that the institute or heir of entail herein pointed out for the time being who but for the continued existence of the trust hereby created would be in possession of the said lands" "shall be entitled to provide and secure his wife and younger children who shall not succeed to the said lands" "in provisions of the like amount as if such institute or heir were actually in possession of my said lands." The testator's widow survived him for thirty-two years. In an action of multiplepoinding brought by the trustees to determine the right to the rents accrued since the widow's death, held (1) that the Thellusson Act applied so as to prohibit accumulation; (2) that the failure of the trust purpose of accumulation did not accelerate the date for executing the entail, as until the death of the longest liver of the testator's nephews and nieces it was uncertain who should be the institute; (3) that in the meantime each term's rent as it accrued belonged to the person holding at that time the character of heir-at-law of the truster. Campbell's Trustees v. Campbell, June 30, 1891, p. 992.

SUCCESSION—*Continued.*

Accumulations—Uncertainty.

3. Terms of holograph settlement on the construction of which *held* that as a direction to accumulate therein contained was unambiguous, and as it did not appear that at the expiration of the period of accumulation the directions in the will would necessarily be incapable of execution, the direction to accumulate must receive effect in so far as permitted by the statute, and that it was premature to determine *in hoc statu* the rights of parties in the capital and accumulations. Edward's Trustees v. Edward, Feb. 6, 1891, p. 535.

Annuity—Preference.

4. A testator left to his wife an annuity of £400, and to his mother, "if my estate will permit," an annuity of £100. He left no other testamentary provision. *Held* that both annuities were payable out of capital, but that the annuity to the wife was preferable to that of the mother. Adamson's Trustees v. Adamson's Executors, July 14, 1891, p. 1133.

Clause of return.

5. A testator directed his trustees to pay to his wife (1) £2100 with full power of disposal thereof; (2) "£2000 to be held by her during her lifetime, and the uncontrolled possession and profit of which she shall enjoy as long as she lives, which sum, however, should nothing occur to render it necessary to touch upon, or induce her to dispose of it otherwise, which she shall have power to do, the same or balance thereof shall at her death return and form part of my trust-estate." In a supplementary settlement he directed his trustees to pay his wife (1) the said £2100 to be at her sole disposal; and (2) the £2000, "the free and unfettered use of which she shall enjoy so long as she lives, with power even to trench upon the principal should she ever under any emergency require to do so; declaring, however, that the said £2000 so far as not required for my wife's personal use shall at her death return, and, if thought necessary, be ordered by her then to return to my estate." The wife survived. At her death she left the £2000 separately invested from her other means, but disposed of it expressly by will. *Held* that the wife had no power to dispose of the £2000 *mortis causa*, and that it belonged to the husband's trustees. Barr's Trustees v. Barr's Trustees, Feb. 19, 1891, p. 541.

6. *Held* (by a majority of the whole Court) that the implied *conditio si institutus sine liberis decesserit* does not apply to provisions by a testator in favour of his brothers and sisters. Hall v. Hall, March 17, 1891, p. 690.

Conditio si sine liberis decesserit—Inter vivos deed—Destination.

7. By *inter vivos* deed two sisters conveyed certain heritable subjects to themselves and another sister in liferent, and to their nieces *nominatim*, and the survivors or survivor of them, in fee, and infeftment followed for these respective rights. One of the nieces having thereafter died without having altered the destination, her son claimed a third of the fee, pleading the *conditio*. *Held* that he was not entitled to it—*per* Lord Justice-Clerk and Lord Young, in respect (1) that the conveyance was of an isolated subject, and was not part of a general settlement; (2) that it was in favour not of a class but of certain individuals named; and (3) that there was a conditional institution of survivors; *per* Lord Rutherfurd Clark, on the ground that the conveyance contained a destination of the subjects, which must receive effect. Crichton's Trustee v. Howat's Tutor, Dec. 18, 1890, p. 260.

Question, whether the doctrine of the *conditio si sine liberis* can be applied in the case of an *inter vivos* deed. Crichton's Trustee v. Howat's Tutor, Dec. 18, 1890, p. 260.

Question, whether the *conditio* is applicable to provisions to children in marriage-contracts. Edwardes v. Hughes, Dec. 19, 1890, p. 319.

8. Where one member of a class which has been instituted to a bequest has died before the date of the settlement, the *conditio* will not apply in favour of the children of that member. Morrison's Trustees v. Macdonalds, Nov. 29, 1890, p. 181.

SUCCESSION—*Continued.*

Conditional institution—Disposition by husband to wife, "her heirs, executors, and assignees whomsoever."

9. A husband by disposition, on the narrative that it was a duty incumbent on him to settle his affairs in case of his death, and for the love, favour, and affection he bore to E., his wife, disponed to her, "her heirs, executors, and assignees whomsoever," certain heritable property specified, and also his whole other estate, heritable and moveable. The wife predeceased the husband without children. The husband married again, and died without issue and without having altered the settlement. In a question between the first wife's heir-at-law and the husband's heir-at-law, *held* that the former was entitled to the heritable property as conditional institute. Cleland v. Allan, Jan. 13, 1891, p. 377.

Deathbed—Cash payment—34 and 35 Vict. c. 81.

10. A father executed a deed of provision "to come into operation during my lifetime," whereby he conveyed to trustees for behoof of three of his children *nominatim*, the sum of £6000 (£3200 of which I have handed to them in cash) . . ." The deed was delivered immediately after its execution, and the £3200 was at the same time handed by the granter to the trustees by cheque payable to one of them. A child of the granter of the deed, who had not been mentioned in it, sought to have it declared that she was entitled to legitim out of the £3200 handed over in cash, averring that the sum had been handed to the trustees by her father on deathbed. *Held* that the pursuer's averment was irrelevant, in respect the payment of the money was to be regarded as made in implement of the deed of provision, and not as an independent transaction.

Question, whether the Act 34 and 35 Vict. c. 81, abolished the law of deathbed with respect to written instruments only, and not with respect to gifts made without writing. Hay v. Coutts' Trustees, Dec. 16, 1890, p. 244.

Deathbed—Reduction—Title to sue.

11. A woman, by antenuptial contract conveyed her whole heritable and moveable estate to trustees, to hold it for her liferent use, or in the event of her husband's survivance, for his liferent use, and lastly, for the use and behoof of the child or children who might be procreated of her body, declaring that after the death of the survivor of the spouses the "trustees shall pay over or assign the trust funds and estate to the lawful child or children of the said" wife, the wife having a power of appointment, or failing her the surviving husband. It was also to be "lawful and competent" to the wife, whom failing, to the husband, "to restrict, if he or she shall see cause, the right of any of the said children to the liferent merely of their provisions, and to secure the principal to their lawful issue, or failing such issue, to the other children" of the wife, "declaring that the share of each child shall vest and become payable on the death of" the survivor of the spouses, "and on each of the said children attaining the age of twenty-one years complete or being married." The wife died in 1868, predeceasing her husband. There was one child of the marriage, a daughter. The wife had on deathbed executed along with her husband a mutual disposition and settlement, whereby they respectively conveyed their whole estates to the survivor. In 1889 the daughter raised against her father and various disponees from him an action for reduction *ex capite lecti* of the mutual disposition and settlement, and of the deeds following thereon. *Held* that the pursuer's interest as heir was excluded by the marriage-contract, under which her right might at her father's pleasure be reduced to a liferent, and therefore that she had no title to sue. Wyllie v. M'Bride, Dec. 10, 1890, p. 218.

See *Heritable and Moveable*, 4—*Prescription*, 3—*Trust*, 5.

Discharge—Confusio—Right in security—Ground-annual.

12. A lady, by trust-disposition and settlement, directed her trustees to dispone certain heritable subjects to a person named, "under burden of any herit-

SUCCESSION—*Continued.*

able securities that may affect the same, and the feu-duty, ground-annual, and other burdens affecting it." Prior to the date of her settlement the truster had obtained assignations to the only ground-annuals affecting the subjects. She subsequently paid up a bond affecting the subjects, and took an assignation thereto. *Held* (1) that the bond had been extinguished *confusione*, and that the disponee was entitled to the property free of the burden of this bond, but (2) (*diss.* Lord Young) that he must take the property under burden of the ground-annuals, that being the intention of the truster as expressed by her settlement. Murray v. Parlane's Trustee, Dec. 18, 1890, p. 287.

Election—Approbate and Reprobate.

13. A legatee, who has also a claim *ex lege* to part of the testator's estate included by that testator in a general settlement, cannot be called on to make his election between the legacy and his legal right, if, by his abandonment of his legal right, the estate to which that right entitles him will not be surrendered to the uses of the will, but will be treated as undisposed of. Hewit's Trustees v. Lawson, March 20, 1891, p. 793.

Executor—Appointment.

14. In a holograph settlement a testator appointed a person, naming him, "judicial factor, to carry out the purposes of this trust." *Held* that the person so named was entitled to be confirmed as executor-nominate. Tod, Nov. 25, 1890, p. 152.

Faculties and powers—Power to appoint under "conditions, provisions, and limitations."

15. By antenuptial marriage-contract the trustees were directed, after the death of the survivor of the spouses "to pay over" certain funds "to or for behoof of" the surviving child or children of the marriage, "in such shares or proportions, and subject to such conditions, provisions, and limitations" as the spouses or the survivor of them should appoint. By mutual trust-disposition and settlement, in exercise of the reserved power of appointment, the spouses directed their testamentary trustees to hold these funds for behoof of their children in equal shares, and to pay to them the income, it being provided that the shares of the sons should be paid at majority, and that in the case of the daughters the share of each should be settled upon her at marriage for her sole and exclusive use, and held by trustees for her behoof, "with power to her to dispose of the fee of the same by any testamentary deed, and failing her disposing of the same by such deed, the same shall be paid, assigned, and conveyed to her heirs and executors." In regard to the disposal of the fee of the shares of unmarried daughters the trustees were directed to pay or assign the same "according to the direction which each such daughter may leave by any testamentary deed," and failing the execution of such deed "to her heirs and executors." In a question raised after the death of the survivor of the spouses between the trustees under the trust-disposition and settlement and the daughters (none of whom were married), who contended that their parents were not entitled to restrict their rights to a liferent with power to test, *held* that the appointment was valid. Wallace's Trustees v. Wallace, June 12, 1891, p. 921.

Faculties and powers—Conditions annexed to a gift—Ultra vires.

16. By antenuptial marriage-contract the trustees were directed after the death of the survivor of the spouses "to pay over" certain funds "to or for behoof of" the surviving child or children of the marriage, "in such shares or proportions, and subject to such conditions, provisions, and limitations" as the spouses or the survivor of them should appoint. By mutual trust-disposition and settlement, in exercise of the reserved power of appointment, the spouses directed their trustees in making payment to their children of their respective shares of the funds in question to take them bound to repay the same "in the event of such son or daughter succeeding to the said estate of L." The contingency had not occurred at the death of the survivor of the spouses. *Held* that the direction was *ultra vires* and ineffectual, but that

SUCCESSION—*Continued.*

its invalidity did not affect the appointment in other respects. Wallace's Trustees v. Wallace, June 12, 1891, p. 921.

Foreign—Interpretation of settlement—Lex domicilii—Lex loci actus.

17. Questions as to the interpretation of a *mortis causa* deed disposing of moveable estate must be solved by the law of the domicile of the granter of the deed, unless the deed shall disclose an intention on the part of its granter that some other law should be invoked. Circumstances which were held to be insufficient to displace the general rule. Smith v. Smiths, July 3, 1891, p. 1036.

Foreign—Domicile.

18. A Scotsman, who went in 1874 to reside in Manchester, in May 1889 executed a will in English form, in which he declared that his domicile was in England. He died in September 1889, and his executor obtained probate. The testator's only child having presented a petition in the Sheriff Court of Lanarkshire to have it found that the testator died domiciled in Scotland, and obtained interim interdict against the executor distributing the funds without providing for payment of legitim, the executor on 16th December 1889 obtained from the Chancery Division of the High Court of Justice in England an order that, *inter alia*, an inquiry should be made whether the testator was domiciled in England, and appointing a receiver to collect the estate. On 23d December 1889 the testator's daughter raised an action in the Court of Session, concluding for declarator that the testator was domiciled in Scotland, and that she was entitled to legitim. The Court, in respect that the question of domicile was before the Court in England, *dismissed* the action. Ferguson v. Buchanan, Nov. 15, 1890, p. 119.

Heritable and Moveable—Jus relictæ—Heritable security—Titles to Lands Consolidation Act, 1868, *sec.* 117.

19. A testatrix directed her trustees "to hold, apply, pay, and convey the whole residue" of her estate for behoof of her three children. The trustees had a power to sell heritage, and to call up investments. One of the sons, who survived his mother, died after the residue had been divided with the exception of a heritable bond for £1500 which belonged to the deceased testatrix. In a question between the son's widow and daughter, *held* that the son's right in the bond was a moveable *jus crediti*, and was subject to *jus relictæ*. Gilligan v. Gilligan, Jan. 15, 1891, p. 387.

Heritable and Moveable—Heritable bond—Titles to Lands Act, 1868, *sec.* 117.

20. A truster directed her trustees to divide the residue of her "moveable means and estate" among certain persons, and, "with regard to the disposal and division or destination of" her "heritable estate," she directed it to be valued, and "divided, apportioned, and disposed of" to certain other persons. Besides other property, heritable and moveable, she died possessed of two bonds and dispositions in security in favour of herself and her executors or assignees whomsoever, and of a bond of annuity with disposition in security in favour of herself and her heirs or assignees whomsoever. *Held* that the three bonds were to be regarded as part of her moveable estate. Hughes' Trustees v. Corsane, Dec. 19, 1890, p. 299.

Heritable and Moveable—Conversion.

21. Circumstances in which it was *held* that the exercise of a power of sale was indispensable to the execution of the trust, and that therefore the heritage must be treated as moveable succession. Brown's Trustees v. Brown, Dec. 4, 1890, p. 185.

See also *Heritable and Moveable*, 4, 5.

Interest—Legacy.

22. Where the payment of a legacy was postponed for several years owing to the delay of the beneficiary to elect between her legal rights and the provisions under the trust-settlement, *held* that the legatee could not claim a higher rate of interest than had been actually received by the trustees down to the date of her election.

Per the Lord President and Lord M'Laren, that there is no general rule

SUCCESSION—*Continued.*

that the rate of interest payable on legacies is 5 per cent where the trustees are not *in mora*. Inglis' Trustees v. Breen, Feb. 6, 1891, p. 487.

23. A testator bequeathed legacies of £10,000 to each of his children, declaring that these should be "payable as at my death, and on" the legatees "respectively attaining twenty-one years of age, or in the case of females, on their respective marriages before attaining said age, and the same shall not vest until the period of payment." Power was given to the trustees to advance the available income of the legacies for the education and maintenance, or otherwise for the benefit of the children respectively, and to anticipate, if they pleased, the period of vesting and payment. *Held* that the interest accruing on each legacy between the date of the testator's death and the period of payment belonged to the legatee. M'Lean's Trustees v. M'Leans, June 12, 1891, p. 892.

Jus relicti—Husband and Wife—Married Women's Property Act, 1881, *sec.* 6—*Marriage prior to Act.*

24. By antenuptial marriage-contract, entered into in 1862, a wife conveyed to trustees her whole estate, heritable and moveable, for payment of the free yearly income to herself during her life, exclusive of her husband's *jus mariti* and right of administration, and after her death for payment to her husband of an alimentary liferent of it, which was to cease on his entering into a second marriage. On the death of the spouses the capital was to be conveyed and paid to the issue of the marriage, if any, and failing them, to the wife's "own heirs whomsoever." The wife predeceased her husband, and there were no issue of the marriage. She left no further writing disposing of her estate. The husband took no benefit from his liferent, and married a second time shortly afterwards. In a special case, to which the husband and the wife's next of kin were parties, *held* that the former was entitled, under section 6 of the Married Women's Property Act, 1881, to take one-half of his wife's estate. Simons' Trustee v. Neilson, Nov. 20, 1890, p. 135.

Liferent—Clause of forfeiture—Sale—Repugnancy.

25. In a disposition and settlement of landed estate there was a destination of the subjects to one person in liferent and his issue in fee, whom failing, to certain other persons in liferent and fee respectively. The disposition also declared that all who took a beneficial right under it were "prohibited from selling, mortgaging, or otherwise disposing of such interest, excepting always sales or mortgages by parties who are absolute fiars"; such sales or mortgages were declared void, and parties signing them were to lose all their rights under the settlement, and give place to the next in succession. *Held* that the clauses of prohibition and forfeiture were valid and effectual to prevent a sale by the liferenter of his liferent right. Chaplins' Trustees v. Hoile, Oct. 30, 1890, p. 27.

Marriage-contract—Vesting—Alimentary provision—Discharge.

26. *Held* (1) that a clause in a marriage-contract giving, in certain events, the trustees power to pay over the capital on obtaining the husband's discharge of his liferent shewed that it was not intended that the trust should be kept up for the protection of his liferent; (2) that the terms in which provisions to children were expressed in a clause providing for the event of the husband's predecease, making the failure of children "without issue" a condition precedent to the wife's will affecting the capital in the event of her children surviving her and dying before the term of payment, shewed that the provisions to "children" in the clause providing for the event of the wife's predecease were limited to children of the marriage, excluding their issue, and that in the event of the son dying before the term of vesting, whether he left or did not leave issue, the capital would vest in the husband under his wife's will, and therefore that the capital must ultimately vest either in the son or the father, and that they were entitled to payment on their joint discharge. Edwardes v. Hughes, Dec. 19, 1890, p. 319.

SUCCESSION—*Continued.*

Testament—Construction—Legacy to children described as of a certain number—Postnati.

27. A testatrix directed her trustees to divide the free residue of her estate "equally among the children of my late brother A, of whom there are nine, the children of my brother B, of whom there are ten, and the children of my brother C, of whom there are seven, who may survive me." At the date of the will B had ten children. Before the death of the testatrix three other children were born to him. All B's children survived the testatrix. *Held* that all the children of B were entitled to share in the residue. Millar's Trustees v. Rattray, June 26, 1891, p. 989.

Testament—Construction—"Relatives"—Stirpes or capita.

28. A truster directed that the residue of his estate should be "equally divided amongst all my relatives, my sister Maria to get a half more than the others." Of his four sisters and two brothers only one—Maria—survived him, but several nephews and nieces did. *Held* that the testator's sister and all his nephews and nieces were entitled to share in the residue *per stirpes*, the sister receiving half as much again as any of the other *stirpes*. Cunningham's Trustees v. Cunningham, Jan. 13, 1891, p. 380.

Testament—Construction—"Survivors."

29. "Survivors" not construed as equivalent to "others." Hairsten's Judicial Factor v. Duncan, July 14, 1891, p. 1158.

Testament—Holograph—Adoption of writing not holograph—Will partly printed, partly holograph.

30. A B, a domiciled Scotsman, resident in Shanghai, filled up, dated, and signed a printed form of a will drawn in English style, but left the annexed attestation schedule blank, there being no subscribing witnesses. The form contained blanks (1) for the name of the testator, (2) for the names of the legatees, and (3) for the name of an executor. In the first A B inserted his own name and designation, in the second the names of his two brothers, and the words "equally and jointly, if one deceased to the survivor only," and in the third the name of a friend. The words of bequest and the description of the subjects were in print. The whole document, with the manuscript insertions, read as a bequest by A B of his whole heritable and moveable property to his two brothers. The execution of the will was defective according to the law of England, the *lex loci*, but it was founded on as a valid will by the law of Scotland. *Held* (*diss.* Lord M'Laren) that the document could not receive effect as a holograph will. Macdonald v. Cuthbertson, Nov. 14, 1890, p. 101.

Testament—Reduction—Proving of the tenor—Title to sue.

31. Where the heir-at-law and the next of kin of a person deceased brought an action for reduction of certain testamentary deeds executed by the deceased on the ground of facility and circumvention, and for declarator that the succession of the deceased was to be regulated by a prior testamentary deed under which they were residuary legatees, the pursuers did not produce the prior deed founded on, and the defenders alleged that it had been destroyed *animo revocandi*. The pursuers then added an averment that they were respectively heir-at-law and next of kin of the deceased. *Held* that having the alternative title of heirs *ab intestato* and disponees under the deed alleged to have been revoked, they had a title to sue a reduction of later deeds granted to their prejudice, and that the validity of these deeds fell to be decided in the first place in order that a proving of the tenor of the prior deed might be brought. Gilchrist v. Morrison, Feb. 28, 1891, p. 600.

Testament—Revocation—Conditio si testator sine liberis decesserit—Pencil alterations.

32. A solicitor, on 5th February 1884, made a holograph will in favour of his parents should they survive him, and failing them in favour of his nephew. A year afterwards he married, executing a marriage-contract in which he settled part of his estate upon his wife and children. He died in 1889,

SUCCESSION—*Continued.*

leaving a widow and children. After his death the will was found in his repositories altered in pencil in favour of his wife and daughter. The alterations were in his handwriting, but were neither initialed nor signed, and had no date attached to them. *Held* (1) that the will as it originally stood became inoperative by reason of the *conditio si testator sine liberis decesserit*, and (2) that the pencil alterations were to be regarded merely as converting the will into a draft for another will to be afterwards made. Munro's Executors v. Munro, Nov. 18, 1890, p. 122.

33. *Held* that the *conditio si testator sine liberis decesserit* did not apply to a will in respect (1) that it was executed by the testator in the knowledge that his wife was pregnant, and (2) that it was not a general disposition disposing of the *universitas* of his estate. Adamson's Trustees v. Adamson's Executors, July 14, 1891, p. 1133.

Revocation.

34. *Held* that where a testator recalled by a codicil all provisions made in favour of a particular person, and directed her trustees to dispose of the estate so set free among her relatives "according to their legal rights," the person originally favoured was not thereby prevented from taking a share of the latter bequest as one of the heirs *in mobilibus*. Johnston's Trustees v. Johnston, May 13, 1891, p. 823.

Revocation—Revocation of "previous testaments"—Revocable bond of annuity.

35. The heir in possession of an entailed estate granted in favour of his wife a bond of annuity under the Aberdeen Act providing her an annuity out of the estate "during all the days of her life after my decease, in case she shall survive me." He reserved power to revoke the bond. Subsequently he executed a trust-disposition and settlement prepared by a law-agent, whereby he revoked "all previous settlements and all writings of a testamentary nature, with the exception of" the bond of annuity. By a later holograph will he revoked "all previous wills or testaments." *Held* that the holograph will did not revoke the bond of annuity. Maclean v. Maclean, June 5, 1891, p. 874.

Vesting—Revocation of destination over.

36. A testator directed her trustees to "hold, apply, and dispose of" one-half of the residue of her estate to her nephew, payable on his attaining the age of twenty-five, directing her trustees to hold the capital in trust for him till he reached that age, but empowering them to expend the interest for his behoof, and to advance to him sums out of capital; there was then a destination over to a brother of the testator and his children, in the event of the nephew failing to attain twenty-five. By a codicil the testator recalled all the provisions in her settlement in favour of her brother and his children. *Held* that, the destination over being thus recalled, the nephew's interest vested *a morte testatoris*. Johnston's Trustees v. Johnston, May 13, 1891, p. 823.

Vesting—Trust—Direction to convey to beneficiary on occurrence of a certain event.

37. A testator directed his trustees to invest in their names one-third of the residue of his estate and to pay the interest to his daughter, A B, during her life for her aliment and support. The deed then proceeded, "Upon the death of the said A B, I appoint the said third part of said residue" to be divided among A B's children, declaring that it should be payable to each as they respectively attained majority. In the event of a child dying before receiving payment of his or her share leaving lawful children, such children were to succeed to the share, and if a child should die before receiving his or her share but leaving no lawful children, such child's share was to be equally divided among the surviving children and the lawful children of other predeceasing children. After all the children of the daughter had attained majority, their mother desired to renounce her life-rent, and they with her consent sought declarator that the right to the one-third of residue had vested in them. *Held* that no right was conferred

SUCCESSION—*Continued.*

upon the children until the death of their mother. Forbes v. M'Condach's Trustees, Dec. 12, 1890, p. 230.

38. A testator directed his trustees to pay certain legacies and annuities, and to pay the interest of the residue, "after deducting the foregoing bequests and annuities," to his widow during her life, "and at the death of the said" widow and the other annuitants, "I request my trustees to divide the said residue into nine equal shares, and to pay one ninth share to" a nephew, and the remaining shares to other persons. The nephew predeceased the widow. *Held* that the share of residue had vested in the nephew at the testator's death. Home's Trustees, July 14, 1891, p. 1138.

Vesting—Succession "after these payments are made."

39. A testator after making certain provisions for his wife and leaving legacies to each of his daughters, payable after their mother's death, declared that his son was "to succeed to whatever may remain of my estate after these payments are made, whom failing" to his daughters. The wife, the son, and the daughters all survived the testator. The son predeceased his mother and sisters. In a question between the widow as one of the heirs *in mobilibus* of her son, and the daughters, who claimed the whole residue as conditional institutes, *held* that the words "after these payments are made," did not refer to a point of time, but meant "subject to these payments," and that the residue vested in the son *a morte testatoris*. Scott's Trustees v. Scott, July 17, 1891, p. 1194.

See *Error—Partnership*, 3—*Trust.*

SUPERIOR AND VASSAL. *Prescription—Possession.*

1. The vassal in possession of certain lands, held under a lord of erection, in 1818 obtained from the Crown a charter of confirmation, and in 1841 a charter of resignation and confirmation, which bore that the lands were to be holden of the Sovereign as immediate lawful superior,—coming in place of the monastery and abbey of Melrose by virtue of the Acts of Annexation,—for a reddendo of 10s. Scots, payable to the Crown or its donatory, the lord of erection. The vassal for the prescriptive period paid to the lord of erection £3, 10s. Scots, which was the reddendo stipulated in a charter of the lands granted in 1627 by the lord of erection, and on which various writs by progress had followed down to 1776. No vassal had entered with the lord of erection, as superior, after 1776. The lord of erection having raised an action against the vassal for payment of a casualty, as having been impliedly entered with him as superior in 1874, the vassal pleaded that he had prescribed a right to hold of the Crown, and explained the payment made by him as being a payment to the donatory of the Crown under the crown charter. The discrepancy between the sum actually paid and the reddendo in that charter he explained by producing a correspondence in 1866 between the agents of the parties, from which it appeared that a question having then been raised as to whether the reddendo was £3, 10s. or 10s. Scots annually, the vassal agreed to pay the larger sum rather than raise any question. From that correspondence it appeared that the pursuer's agents were then made aware of the existence of the crown charter, and claimed the payments as due to their client as lord of erection and donatory of the Crown, not as feudal superior. *Held* that the vassal had by prescription obtained right to hold of the Crown, and must be *assoilzied*. Duke of Buccleuch v. Boyd, Oct. 21, 1890, p. 1.

2. A person in possession of lands which were alleged to be kirk lands resigned them in 1806 to the Crown for new infeftment and took a charter on a blench tenure for a penny Scots *si peteretur tantum*. Up to this date the lands had been held in feu of a subject-superior (who held his superiority under a strict entail), for a reddendo of £6 Scots. After obtaining the crown charter the vassal held the lands for more than the prescriptive period, but paid the feu-duty of £6 Scots to the subject-superior, who remained infeft in the superiority; no payment was ever demanded by the Crown, except some payment on the charter being granted, the character of which was not

SUPERIOR AND VASSAL—*Continued.*

ascertained. Some of the vassals from 1806 downwards were enrolled as freeholders, and voted as such. The subject-superior having in 1871 brought against the vassal a reduction of the crown title, as having been unwarrantably obtained in prejudice of his rights as superior, the vassal pleaded prescription. *Held* (*per* Lord Gifford, Ordinary) that there had been no sufficient possession by the vassal on that title, and the plea of prescription *repelled*, and the title *reduced*. Duke of Roxburghe v. Scott, Oct. 21, 1890, p. 8.

Entry—Casualty—Composition—Relief—Trust.

3. By an *inter vivos* trust-disposition dated in 1810 a proprietor (not entered with the superior) of lands inherited from a deceased ancestor who was a singular successor of the last entered vassal and who held an *a me* infeftment unconfirmed, disponed the lands to trustees for the following purposes, viz., (1st) for payment of the expenses attending the execution of the trust; (2d) for payment to himself during his life and the subsistence of the trust of a free yearly annuity of £3000, of which £400 was to be paid to his wife during her life and the subsistence of the trust; (3d) for payment of all the just and lawful debts then owing by him; and (4th) in the event of his death, for the purpose of carrying into effect the provisions of any deed of settlement executed or to be executed by him in favour of his wife and children or any other person or persons. Power was granted to the trustees (with the truster's written consent) to sell any part of the lands disponed to them, and the proceeds of the lands, if any, so sold were directed to be applied in the payment of all the just and lawful debts due by the truster, and any residue of money in their hands was directed to be paid to the truster's heirs and assignees, secluding executors. The trust-deed further provided that the trustees should reconvey the remainder of the said lands and estates and other heritable property which should not have been disposed of when the debts had been fully paid off, or if required by writing under the hand of the truster, should so reconvey the lands to the truster at Martinmas 1814 whether the debts had been paid off or not. The truster died in 1811. In 1815 the trustees having obtained decree of adjudication in implement against the truster's heir, and having been infeft thereon, were entered with the superior, but as trustees for the uses and purposes of the trust-deed only, by charter of sale, adjudication, and confirmation, which recited the grounds of the trustees' right, and confirmed the dispositions and unconfirmed infeftments since the date of the last vassal's entry. The trustees paid composition on entry. In 1860 they granted a conveyance of such of the lands as they had not sold to the truster's heir-at-law, who was infeft thereon, and was thereby in 1874 entered with the superior in virtue of the Conveyancing Act, 1874, sec. 4. The last surviving trustee died in 1863. The vassal tendered relief-duty; the superior demanded composition. *Held* that the cases of *Stuart* v. *Jackson*, 17 R. 851, *Duke of Athole* v. *Stewart*, 17 R. 724, and *Duke of Athole* v. *Menzies*, 17 R. 733, did not apply, and that the heir was liable in payment of composition, (*a*) in respect that the entry of the trustees created a new investiture, and was not a mere burden on the former investiture, and (*b*) in respect that even if it did not create a new investiture, the heir was not the heir of an investiture recognised by the superior, as his ancestor had not been entered in his lifetime, and as the subsequent confirmation by the superior operated *retro* only to the effect of confirming prior conveyances and unconfirmed infeftments as transmissions necessary to complete the title of the vassal in whose favour the confirmation was granted. Duke of Buccleuch v. Johnstone, Feb. 28, 1891, p. 587.

Feu-contract—Building restrictions—Jus quæsitum—Rights of feuars inter se—Nuisance—Dean of Guild.

4. A piece of ground in a residential district in Glasgow was feued to different persons by feu-contracts which were practically identical in terms. The feuars were taken bound to erect houses, and were prohibited from carry-

SUPERIOR AND VASSAL—*Continued.*

ing on certain enumerated kinds of business on the ground feued, "or to carry on any other business though not above enumerated which may be nauseous or hurtful to the neighbouring feuars . . . in whose favour it is hereby declared that this provision shall operate as a servitude upon the lands hereby feued." The contracts further contained stipulations limiting the height of buildings to be erected, and as to the making of sewers, and it was declared that these provisions should be inserted in all subsequent dispositions of the lands "until complete fulfilment thereof, otherwise the same shall be void and null." The North British Railway Company, who had acquired one of the feus, applied to the Dean of Guild of Glasgow for authority to erect a shaft on their feu for the ventilation of a tunnel in an underground railway. The superior did not oppose, but objections were lodged by some of the co-feuars. The Dean refused the petition. On appeal the Court *recalled* his deliverance, *holding* (1) with regard to the prohibitions which were declared to be a servitude that there was no contravention unless the proposed erection could be regarded as the carrying on of a nauseous or hurtful business, and that it was premature to decide that the shaft would be nauseous or hurtful; and (2) with regard to the other prohibitions that there was no such mutuality of rights and obligations between the feuars established either expressly or by implication as to give the objectors a *jus quæsitum* which would entitle them to enforce the building restrictions contained in the feu-contracts. North British Railway Co. v. Moore, July 1, 1891, p. 1021.

See *Property*, 3.

SUSPENSION. See *Jurisdiction*, 7.

TEINDS. *Subvaluation—Decree of approbation.*

1. A report of subcommissioners of teinds has no effect as a valuation until it has been approved by the High Commission or by the Court of Teinds. Lord Elibank's Trustees v. Hope, Jan. 23, 1891, p. 445.

Jurisdiction—Reduction of locality subject to qualification.

2. In 1888 the proprietor of the lands of B. obtained decree of approbation of a report by subcommissioners in 1630 valuing his teinds. In 1890 he brought a reduction of a locality approved final in 1868, in which a stipend in excess of the teinds as reported to be the value in the subvaluation of 1630 had been localled upon his lands. He sought to have the locality set aside as erroneous *ab initio*, on the ground that the teinds were valued by the subcommissioners in 1630, and that their report had been eventually approved by the Court of Teinds. The Court of Teinds *granted* decree of reduction, but the decree "to have effect only from and after the date of the decree of approbation, 16th July 1888, for the second half of the crop of 1888, and in all time coming." Lord Elibank's Trustees v. Hope, Jan. 23, 1891, p. 445.

Subvaluation—Summons of approbation—Decreet—Ambiguity—Construction—Prescription.

3. In a report in 1629 of a valuation by subcommissioners of lands and teinds in a parish, the lands of P. were reported to be of the value of forty bolls victual. In a note appended to the report, the lands of D. were declared to be "nocht valued becaus yai ar sett *decimis inclusis*." In 1797 an action of approbation and valuation was brought by A and B. The extract decreet in the action set forth that the action was brought by A as proprietor of the lands of P., and by B as "infeft" in part of the lands of D., "with pertinents . . . and which lands of D. were formerly part of the said lands of P."; that the report of the subcommissioners of 1629 had valued the lands of P.; that therefore that report ought to be approved "in so far as concerns the valuation of the pursuers' lands before specified"; that the pursuers appeared by their procurators, who produced the report of the subcommissioners, "and particularly the valuation of the pursuers' lands libelled, and appearance was made for the

TEINDS—*Continued.*

Officers of State"; that the Lords thereupon ratified, allowed, and approved the said report, in so far as concerned the "valuation of the pursuers' lands libelled" and interponed their decreet and authority thereto, and found and declared in terms thereof that the yearly avail of the stock and teind of the lands of P. were and should be in all time coming forty bolls victual, and decerned "conform to conclusions of the libel." More than forty years after the date of the decree the proprietor of the part of D. which belonged to B objected to be localled on for augmentation of stipend, maintaining that his part of D. had been valued under the above decree. Another proprietor lodged answers in which he maintained (1) that the decree of approbation, when fairly construed along with the report, which it expressly approved, did not value the lands of D.; or otherwise (2) that there was a latent ambiguity in the decree, which fell to be explained by documentary evidence. *Held* (1) that the decree valued the part of the lands of D. which belonged to B as having formed part of the lands of P. at the date of the subvaluation; and (2) that the objections stated to it were extrinsic objections which could not be maintained after the lapse of forty years. Speir v. Lord Willoughby de Eresby, Jan. 16, 1891, p. 407.

Procedure in locality—Res judicata.

4. An augmentation of stipend having been granted and modified a process of locality followed in which in 1850 an interim scheme was approved. To this scheme the Lord Advocate, as having right on behalf of the Crown to the bishops' teinds, lodged objections, in which he stated that the teinds of the lands of D. and certain other lands in the parish, the teinds of which were held on heritable rights, were unvalued. He objected to the scheme in so far as it laid no portion of the augmentation upon the teinds of these lands. The common agent lodged a note in which he admitted that the teinds of certain of the lands in question, including the lands of D., were unvalued, and stated what he believed to be their rental. In 1858 the Lord Advocate lodged a note stating that he was satisfied with the extent to which the common agent had given effect to his objections as regarded the rents stated for the lands which were let unvalued, including the lands of D., and he craved the Lord Ordinary to sustain the objections, and to remit to the clerk to rectify the locality, and to allocate the augmentation *primo loco* on the teinds of these lands. By interlocutor of 25th June 1858, the Lord Ordinary allowed the note to be received and seen, and by interlocutor of 9th July he remitted to the clerk to rectify the locality and to report. This interlocutor was not reclaimed against. The clerk reported a rectified scheme, but it was never approved final, and no further proceedings took place in the locality until after a new augmentation was granted in 1873. In 1890 the question was raised whether the teinds of the lands of D. were valued or unvalued. The party alleging that the teinds were not valued pleaded *res judicata* in respect of the Lord Ordinary's interlocutor of 9th July 1858. *Held* that the interlocutor of 9th July 1858 did not support the plea. Speir v. Lord Willoughby de Eresby, Jan. 16, 1891, p. 407.

TIME. See *Bankruptcy*, 6.

TITLE TO SUE. *Agent and Principal.*

1. When a person enters into a contract in his own name for an undisclosed principal, the latter, on disclosing himself as principal, has a title to sue upon the contract, but is subject to all pleas which the defender could have maintained against the agent if the latter had raised the action. Bennett v. Inveresk Paper Co., June 19, 1891, p. 975.

Jus tertii—Adjudication—Discharge—Statute 1621, *cap.* 6.

2. The debtor in an obligation for payment of an annuity has no title to plead, in answer to a demand for payment by a person who has adjudged the creditor's right, that the adjudger's right has been extinguished by payment

TITLE TO SUE—*Continued.*

of the debt on which the adjudication proceeded. Macleod's Trustees v. Murray, May, 21, 1891, p. 830.

Unincorporated society—Competency of action—Patrimonial interest.

3. The Renton Football Club, an unincorporated society, its office-bearers, and five persons described as members of the club, sued the Scottish Football Association, also an unincorporated society, its office-bearers, and the members of certain committees, for reduction of a minute of the defenders deciding that the pursuers' club be declared professional and expelled from the association. The pursuers averred that they had been illegally expelled from the association of which they were members; that as members they enjoyed several pecuniary advantages which they would lose by expulsion; and that they had been duly authorised at a meeting of the club to sue the action. The secretary of the association, several members of its general committee, and all the members of the "professional committee" appeared, and pleaded, *inter alia*, (1) that the pursuers had no title to sue, inasmuch as they did not represent and had no authority to use the name of the Renton Football Club; and (2) that the Scottish Football Association being an unincorporated society could only be sued by calling its individual members. It was admitted that the association had several thousand members. The Court *allowed* the pursuers a proof of their averment that they were duly authorised at a meeting of the club to sue the action, and *repelled* the second plea. Renton Football Club v. M'Dowall, March 13, 1891, p. 670.

Reduction—Proving of the tenor.

4. Where the heir-at-law and the next of kin of a person deceased brought an action for reduction of certain testamentary deeds executed by the deceased on the ground of facility and circumvention, and for declarator that the succession of the deceased was to be regulated by a prior testamentary deed under which they were residuary legatees, the pursuers did not produce the prior deed founded on, and the defenders alleged that it had been destroyed *animo revocandi*. The pursuers then added an averment that they were respectively heir-at-law and next of kin of the deceased. *Held* that having the alternative title of heirs *ab intestato* and disponees under the deed alleged to have been revoked, they had a title to sue a reduction of later deeds granted to their prejudice, and that the validity of these deeds fell to be decided in the first place. Gilchrist v. Morrison, Feb. 28, 1891, p. 599.

See *Bankruptcy*, 5—*Company*, 5—*Succession*, 11.

TRADE INCORPORATION. See *Burgh*, 9.

TRUST. *Administration—Expenses—Fee and Liferent.*

1. In a trust-settlement the testator directed his trustees "in the first place," "to pay all my just and lawful debts . . . and the expenses of every kind connected with the execution of the trust hereby created. . . . In the seventh place, I direct my trustees after fulfilling the foregoing purposes, to hold the residue of my estate for behoof of my said wife in liferent, . . . and . . . to pay to my said wife the free annual produce of the said residue as and when the same is received by my trustees." The testator then gave directions as to the disposal of the residue on his wife's death. *Held* that all expenses connected with the examination of investments from time to time and changes in them fell to be paid out of capital and not out of income. Smith v. Bennie, Oct. 30, 1890, p. 44.

Directions to trustees to manage estate, after it had vested in beneficiary, until beneficiary attained twenty-five years of age—Repugnancy.

2. A testator directed his trustees to hold and manage, "as absolute proprietors," certain heritable property for behoof of his second son until the latter attained the age of twenty-five, when they were to denude in his favour, declaring that the property should not vest in him till he attained the age of twenty-five, or married with the consent of the trustees after attaining the age of twenty-one. The testator also directed his trustees to the whole residue of his moveable estate in certain shares for his

TRUST—*Continued.*

children. The vesting-clause was in similar terms to the vesting-clause regarding the heritage, but there was no similar direction as to management. The trustees were, however, given an unlimited discretion as to the application of the annual interest of the shares of residue, and it was declared that on the sons' attaining the age of twenty-five, and the daughters attaining that age or being married, they were to be entitled absolutely to any accumulations of interest on their respective shares, and the trustees were directed to pay over the same to them accordingly. The son, after attaining the age of twenty-one, but before attaining the age of twenty-five, married, with the approval of the trustees. *Held* by a majority of seven Judges that the son's right to the heritage and to his share of the moveable estate having vested in him upon his marriage with the consent of the trustees, he became then entitled to call upon the trustees to denude in his favour. Miller's Trustees v. Miller, Dec. 9, 1890, p. 301.

Powers—Investments.

3. A truster gave a general power to his trustees to continue to hold the investments which he might have at the time of his death in any public companies, "and power to invest the funds . . . which shall devolve upon my daughter in heritage and preference stocks of railways in Scotland or England, and in the stock of Scotch banks." *Held* that it was competent for the trustees to hold the funds liferented by the daughter in the shape of shares in public trading companies, which were held by the testator at the time of his death, they being bound, however, to exercise their discretion from time to time as to the expediency of retaining them. Thomson's Trustees v. Henderson, Oct. 25, 1890, p. 24.

See *Judicial Factor*, 7.

Powers—Sale.

4. *Held* that a power given by a testator to his trustees to sell his heritable estate, with the exception of certain lands, implied a prohibition against selling the excepted lands. Whyte's Factor v. Whyte, Jan. 10, 1891, p. 376.

Adverse title made up by accepting trustee—Deathbed.

5. *Held* that a trustee under a settlement executed on deathbed did not commit a breach of trust in completing his own title as heir-at-law to the heritage conveyed, and in disregarding the deathbed conveyance in favour of a stranger. Thain v. Thain, July 18, 1891, p. 1196.

Jurisdiction—Forum non conveniens.

6. In an action by a legatee against two trustees who had taken out confirmation in Scotland under a Scotch trust-deed, the trustees pleaded no jurisdiction in respect that they were not resident in Scotland, and that the whole estate had been distributed twelve years before. The Lord Ordinary (Kyllachy) *repelled* the plea, holding that the jurisdiction once constituted against them by their obtaining confirmation, and acting as trustees under a Scottish trust, remained unaffected. M'Gennis v. Rooney, March 20, 1891, p. 817.

7. Jurisdiction of English Court to determine right of administration of English heritage belonging to a Scotsman. Hewit's Trustees v. Lawson, March 20, 1891, p. 793.

See *Discharge*, 2—*River—Road.*

VALUATION ACTS. *Valuation-roll—Sublease.*

1. Where subjects are sublet, the only rent which ought to appear in the Valuation-roll under the heading "Yearly rent or value" is the rent paid by the principal tenant to the owner. The occupier's column may, however, contain in addition to the name of the principal tenant that of the subtenant, with the rent paid by him and the extent of his occupation. Cowdenbeath Coal Co. v. Assessor for County of Fife, June 13, 1891, p. 948.

Lease—Agreement—Dwelling-houses in connection with colliery—Consideration other than rent.

2. During the currency of a mineral lease for thirty-one years, under which the rent payable by the tenants was a royalty on the output of coal, the

landlord and tenants entered into an agreement with a view to extend the mineral workings, under which the tenants were to erect certain additional miners' houses upon the lands belonging to the landlord, but then let to an agricultural tenant. The mineral tenants were to be entitled to repay themselves the cost of erection by retaining the royalties over and above a certain sum per annum, on condition of erecting an equal number and value of houses on ground belonging to themselves. The houses on the landlord's property were to be maintained and insured against fire by the tenants, who were also to settle the claims of the agricultural tenant for the land taken for the houses, and to relieve the landlord of certain assessments. At the termination of the lease the houses, so far as paid for out of the royalties, were to be left to the landlord, and *quoad ultra* he was to have the right to take them over at a valuation, and failing his doing so the tenants were to be entitled to remove the materials. Houses were erected on the landlord's lands under this agreement, and were in the occupation of miners, who paid a rent to the tenants. The assessor entered them at that rent as the property of the tenants. The Court *held* that the entry was wrong, being of opinion (1) that the agreement fell to be read as part of the lease; (2) that it contained no consideration other than the rent, with the exception of the sum paid for insurance; and therefore (3) that with the exception of the latter sum the subjects were covered by the royalty payable under the mineral lease. Cowdenbeath Coal Co. v. Assessor for County of Fife, June 13, 1891, p. 944.

Lease—Meliorations—Sum paid by incoming to outgoing tenants—Consideration other than rent.

3. The incoming tenant of a farm let to him for nineteen years at a rent of £500 paid to the outgoing tenants a sum of money for meliorations payable to them by the landlord under the expiring lease. His lease contained the stipulation that he should be entitled at its termination to repayment from the landlord of the sum so paid by him, or of such other sum not exceeding it, as the meliorations should then be valued at. *Held* that as the payment by the tenant relieved his landlord of an obligation which he would otherwise have had to meet, there was a consideration other than the rent, and that a sum equivalent to four per cent on it fell to be added to the rent contained in the lease. Duke of Fife v. Assessor for County of Elgin, June 13, 1891, p. 941.

Public-house—Goodwill—Consideration other than rent.

4. The proprietor and occupier of a public-house having died intestate leaving a son and daughter, both in minority, his law-agents acting generally in the interests of the heir and executor, accepted an offer of £660 for the goodwill of the business, shop-fittings, &c., made on condition of the offerer obtaining a transfer of the licence, and a five years' lease of the premises at £80 per annum. The rent of £80 was a full rent for the premises when used as a licensed public-house, the value of the premises without the licence being about £30. The value of the shop-fittings, &c., was £150. The £510 paid for goodwill had not been apportioned between the heir and the executor, and there was no evidence that any part of it belonged to the heir. *Held* that as it had not been proved that any part of the £510 belonged to the heir the latter sum could not be regarded as a consideration other than the rent stipulated for in the lease, and that therefore the premises fell to be valued at £80. M'Farlane and Dailly v. Assessor for Dundee, June 13, 1891, p. 939.

Cemetery—Yearly value.

5. *Held* that one-half of the net profits of a cemetery company was a reasonable sum to take as representing the annual value of the land belonging to the company and used as a cemetery. Aberdeen Cemetery Co. Limited, v. Assessor of Aberdeen, June 13, 1891, p. 936.

Bank buildings with dwelling-houses occupied by bank officials—Cumulo or separate valuation.

premises of a bank, including the banking-office and the dwelling-houses

VALUATION ACTS—*Continued.*

of two bank officials, were entered in the Valuation-roll as a *unum quid* at one *cumulo* valuation. The bank appealed, and maintained that the offices and dwelling-houses ought to be separately valued in order to satisfy the purposes of a local Act, which in authorising an assessment made a distinction between the assessment of dwelling-houses and offices. The houses formed part of the main bank buildings—one of them had internal communication with the office and the other had not. *Held* that the dwelling-house which had no internal communication with the business premises ought to be separately valued, and that the dwelling-house which had such communication ought to be valued along with the office as a *unum quid.* Bank of Scotland v. Assessor for Edinburgh, June 13, 1891, p. 936.

Buildings unlet and unfit for occupation.

7. A piece of ground in the neighbourhood of a large manufacturing town was let to the Crown for 94 years, and buildings thereon were occupied as military barracks. On the expiration of this lease the buildings reverted to the proprietor, and were unoccupied. They were entered in the roll at £305, the rent at which they were entered when occupied by the Crown. It was proved that they could not be let without considerable outlay being made to alter their condition. The Court reduced the valuation to £100 consented to by the proprietor. Earl of Home v. Assessor for Dundee, June 13, 1891, p. 934.

WRIT. *Authentication—Conveyancing Act*, 1874, *sec.* 39.

1. The testing-clause of a recorded disposition of heritage bore, *inter alia*, that the disposition had been subscribed by Hugh James Rollo (one of the granters) "before these witnesses, William Robertson, apprentice, and John Alexander James, clerk, both to me, the said Hugh James Rollo." The subscription of one of the witnesses to what bore to be Rollo's subscription was "William Roberton, witness." A proof, allowed in a petition under the 39th section of the Conveyancing Act, 1874, established that William Roberton, apprentice to Rollo, had attested Rollo's subscription by subscribing the words "William Roberton, witness," appearing on the disposition in question. *Held* that the discrepancy between "Robertson" and "Roberton" was an informality of execution within the meaning of the 39th section of the Act, that that section therefore applied, and, looking to the proof, that the petition fell to be granted. Richardson's Trustees, July 11, 1891, p. 1131.

Informality of execution—Proof—Onus—Conveyancing Act, 1874, *secs.* 38 *and* 39.

2. Where a person alleged that a deed, without a testing-clause, bearing to be signed by him and by attesting witnesses had not been signed by him, and it was proved that the witnesses had signed but had not seen the alleged granter sign or heard him acknowledge the subscription, and where the person founding on the deed did not prove that the granter had signed it, *held* that the deed could not receive effect.

Opinion (*per* Lord Young) that when a deed is irregularly executed by reason of the persons signing as witnesses not having seen the granter subscribe or heard him acknowledge the subscription, the deed will be effectual if it is proved that the granter signed it. Geddes v. Reid, July 16, 1891, p. 1186.

Pencil alterations.

3. A solicitor, on 5th February 1884, made a holograph will in favour of his parents should they survive him, and failing them in favour of his nephew. A year afterwards he married, executing a marriage-contract in which he settled part of his estate upon his wife and children. He died in 1889, leaving a widow and children. After his death the will was found in his repositories altered in pencil in favour of his wife and daughter. The alterations were in his handwriting, but were neither initialed nor signed, and had no date attached to them. *Held* (1) that the will as it originally stood became inoperative by reason of the *conditio si testator sine liberis*

WRIT—*Continued.*

decesserit, and (2) that the pencil alterations were to be regarded merely as converting the will into a draft for another will to be afterwards made. Munro's Executors v. Munro, Nov. 18, 1890, p. 122.

Holograph—Adoption of writing not holograph—Will partly printed, partly holograph.

4. A B, a domiciled Scotsman, resident in Shanghai, filled up, dated, and signed a printed form of a will drawn in English style, but left the annexed attestation schedule blank, there being no subscribing witnesses. The form contained blanks (1) for the name of the testator, (2) for the names of the legatees, and (3) for the name of an executor. In the first A B inserted his own name and designation, in the second the names of his two brothers, and the words "equally and jointly, if one deceased to the survivor only," and in the third the name of a friend. The words of bequest and the description of the subjects were in print. The whole document, with the manuscript insertions, read as a bequest by A B of his whole heritable and moveable property to his two brothers. The execution of the will was defective according to the law of England, the *lex loci*, but it was founded on as a valid will by the law of Scotland. *Held* (*diss.* Lord M'Laren) that the document could not receive effect as a holograph will. Macdonald v. Cuthbertson, Nov. 14, 1890, p. 101.

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